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# United States Circuit Court of Appeals

## FOR THE SECOND CIRCUIT

| | |
|---|---|
| THE UNITED STATES OF AMERICA,<br>Appellee,<br>against<br>SAMUEL BAYER, alias SAMUEL BOYARSKY, ELIAS BAYER, alias ELIAS BOYARSKY, and WALTER V. RADOVICH,<br>Defendants-Appellants. | C-120-468 |

### Statement by Appellants Bayer Under Rule 13.

The indictment herein is against the above named defendants for "Conspiracy to defraud the Government of the faithful services of an officer of the United States Army". An alleged violation of Title 18, Section 88, U. S. C.; was filed on July 12, 1945. On July 16, 1945, all defendants pleaded "Not Guilty". On September 26, 1945, defendant Radovich filed a demurrer to the indictment and a plea in bar (former conviction). On October 3, 1945, the demurrer was overruled and the plea in bar overruled.

The trial was begun on October 3, 1945, as to all defendants before Barksdale, D. J. The trial was concluded on October 23, 1945, with a verdict of guilty as to all defendants with a special plea for clemency.

Defendant Samuel Bayer was sentenced to two years confinement and a fine of $10,000. Defedant Elias Bayer was sentenced to 18 months confinement and fined $5,000. Defendant Walter V. Radovich was sentenced to confinement for one year and one day.

4 *Statement by Appellants Bayer Under Rule 13.*

On October 29, 1945, defendant Radovich filed his notice of appeal. On the same day defendants Samuel and Elias Bayer filed a notice of appeal. Stipulations and orders extending the time of defendants to file a bill of exceptions to January 8, 1946, were made and filed.

Defendant Radovich was released on $5,000 bail. Defendant Samuel Bayer and Elias Bayer were released on bail pending appeal by order of the Circuit Court of Appeals made on December 4, 1945.

The Government appeared by John F. X. McGohey, U. S. Attorney (Edward C. Wallace and Samuel Rudykoff, of
5 counsel).

Defendants Samuel Bayer and Elias Bayer appeared by Samuel Conrad Cohen (Joseph B. Keenan and Washington Irving Levy, of counsel). On November 9, 1945, Archibald Palmer filed a notice of appearance for said defendants Bayer and since this appeal was taken has been substituted as attorney of record for the defendant Samuel Bayer and further since this appeal was taken Max E. Sanders has been substituted as attorney of record for defendant Elias Bayer.

Defendant Radovich appeared by Roger Robb (Samuel T. Ansell, of counsel).

6 The time of defendants to serve and file a bill of exceptions, assignments of error and transcript of record was extended to January 8, 1946, was further extended to March 1, 1946, and was further extended to April 15, 1946.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,
Appellants.

**Statement by Appellant Walter V. Radovich Under Rule 13.**

This is a criminal case commenced by the filing of an indictment on the 12th day of July, 1945.

The indictment is in one count and charges the appellant and two co-defendants, Samuel Bayer and Elias Bayer, with conspiracy to defraud the United States, in violation of Title 18, Section 88, U. S. Code, in that the appellant Radovich, Samuel Bayer, Elias Bayer, and other persons to the grand jurors unknown, beginning on or about September 1, 1942, and continuing up to and including the date of the indictment, conspired to defraud the United States of the faithful services of Radovich, an officer of the United States Army.

There has been no change of parties.

The trial before Honorable Alfred D. Barksdale and a jury was commenced on October 2, 1945, and concluded on October 23, 1945. The jury found the appellant Radovich and the co-defendants guilty.

4b *Statement by Appellant Walter V. Radovich Under Rule 13.*

The defendant Samuel Bayer was sentenced to be imprisoned for two years and to pay a fine of $10,000. The defendant Elias Bayer was sentenced to be imprisoned for eighteen months and to pay a fine of $5,000. The appellant Radovich was sentenced to be imprisoned for one year and one day.

Under arraignment the appellant Radovich was released in the custody of the Army of the United States. Upon conviction and sentence the District Court denied the appellant Radovich's application to be released on bail pending this appeal, but continued bail pending application to this Court.

5b

Upon application to this Court an order was entered admitting the appellant Radovich to bail in the sum of $5,000, and on November 19, 1945, bond in that amount was filed for the appellant Radovich and he is now at liberty under such bail.

No question has been referred to a Commissioner, Master or Referee.

Sentence was imposed upon the appellant Radovich on October 24, 1945. Notice of appeal was filed on October 29, 1945.

6b

## Docket Entries.

Docket 120

CRIMINAL DOCKET

| | |
|---|---|
| THE UNITED STATES<br>vs.<br>SAMUEL BAYER, alias SAMUEL BOYARSKY, ELIAS BAYER, alias ELIAS BOYARSKY, and WALTER V. RADOVICH. | Violation of Title 18, Sec. 88, U. S. C.<br>Conspiracy to defraud the Gov't of the faithful services of an Officer of the United States Army. |

| PROCEEDING | |
|---|---|
| July 12, 1945 | Filed Indictment. |
| July 16, 1945 | Samuel Bayer Pleads Not Guilty. Bail Cont'd. |
| July 16, 1945 | Elias Bayer Pleads Not Guilty. Bail Cont'd. |
| July 16, 1945 | Walter V. Radovich Pleads Not Guilty. Custody of Army. |
| July 25, 1945 | Filed transcript of record of proceedings. (as to all Defts.). Knox, J. |
| Aug. 1, 1945 | Filed application, order & consent permitting deft. Samuel Bayer to leave the jurisdiction of this Court—Rifkind, J. |
| Aug. 6, 1945 | Filed transcripts of record of proceedings. 7/19/45 & 7/23/45. |
| Aug. 31, 1945 | Filed affidavit, motion and order permitting Roger Robb to try this action on behalf of deft. Walter V. Radovich—Mandelbaum, J. |
| Sept. 6, 1945 | Samuel Bayer—see 120/95 for bond filed. |

10 *Docket Entries.*

| | | |
|---|---|---|
| | Sept. 6, 1945 | Elias Bayer—see 120/96 for bond filed. |
| | Sept. 11, 1945 | Filed Notice of Appearance—Roger Robb Atty. for W. V. Radovich. |
| | Sept. 26, 1945 | Filed motion by defendant Radovich for postponement of trial until court-martial proceedings have been disposed of. |
| | Sept. 26, 1945 | Filed Demurrer to Indictment by defendant Radovich. |
| | Sept. 26, 1945 | Filed Plea in Bar (Former Conviction) by defendant Radovich. |
| 11 | Sept. 28, 1945 | Filed affidavit and order directing argument on plea in bar and demurrer be set for Oct. 2, 1945 or as soon thereafter as counsel can be heard—Barksdale, J. |
| | Oct. 3, 1945 | Filed order and affidavit—authorizing U. S. Atty to employ a physician to examine Alfred H. Jacobson to determine physical fitness as a witness—Barksdale, J. |
| | Oct. 3, 1945 | Memo endorsed on demurrer filed Sept. 26, 1945. Demurrer argued. Overruled—Barksdale, J. |
| | Oct. 3, 1945 | Memo endorsed on plea in bar filed Sept. 26, 1945. Plea in bar argued. Overruled—Barksdale, J. |
| 12 | | |
| | Oct. 3, 1945 | Filed demurrer to defts.' plea in bar Memo endorsed—Demurrer to plea in bar sustained—Barksdale, J. |
| | Oct. 3, 1945 | Memo endorsed—Motion for postponement of trial filed 9/26/45—Motion denied—Barksdale, J. |
| | Oct. 3, 1945 | Trial as to all defendants begun before Barksdale, J. |

| | | |
|---|---|---|
| Oct. 4, 1945 | Trial contd. | |
| Oct. 5, 1945 | Trial contd. | |
| Oct. 9, 1945 | Trial contd. | |
| Oct. 10, 1945 | Trial contd. | |
| Oct. 11, 1945 | Trial contd. | |
| Oct. 15, 1945 | Trial contd. | |
| Oct. 16, 1945 | Trial contd. | |
| Oct. 17, 1945 | Trial contd. | |
| Oct. 18, 1945 | Trial contd. | |
| Oct. 18, 1945 | Filed stip. re: absence of deft. Samuel Bayer during trial. | 14 |
| Oct. 22, 1945 | Trial contd. Summations by both sides made. | |
| Oct. 23, 1945 | Trial concluded—Verdict—All defts guilty with a special plea for clemency. | |
| Oct. 24, 1945 | Filed judgment #46897. Samuel Bayer—Two years at a place of confinement to be designated by the Attorney General of the United States and fined $10,000. Defendant not ordered to stand committed for non-payment of fine. Defendant to surrender Oct. 31, 1945. Bail continued. Barksdale, J. | |
| Oct. 24, 1945 | Filed judgment #46898. Elias Bayer—Eighteen months at a place of confinement to be designated by the Attorney General of the United States and fined $5,000. Defendant not ordered to stand committed for non-payment of fine. Defendant to surrender Oct. 31, 1945. Bail continued. Barksdale, J. | 15 |

16 *Docket Entries.*

| | | |
|---|---|---|
| | Oct. 24, 1945 | Filed judgment—Walter V. Radovich—One year and one day at a place of confinement to be designated by the Attorney General of the United States. To surrender 10/31/45. Bail continued. Barksdale, J. |
| | Oct. 24, 1945 | Issued commitment in triplicate as to all defendants. |
| | Oct. 29, 1945 | Filed Notice of Appeal and Grounds of Appeal of Walter V. Radovich (notice sent to Judge Barksdale). |
| | Oct. 29, 1945 | Filed Notice of Appeal and Grounds of |
| 17 | | Appeal of Samuel Bayer and Elias Bayer (notice sent to Judge Barksdale). |
| | Nov. 7, 1945 | Filed affidavit & Order for Writ of Habeas Corpus for Samuel Bayer for examination in supplementary proceedings—Issued writ —Returnable 11/14/45. |
| | Nov. 7, 1945 | Filed affidavit & Order for Writ of Habeas Corpus for Elias Bayer for examination in supplementary proceedings—Issued writ —Returnable 11/14/45. |
| | Nov. 9, 1945 | Filed Notice of Appearance. Archibald Palmer, Atty., of Counsel for Samuel & Elias Bayer. |
| 18 | Nov. 13, 1945 | Filed elections (2) of Defts. Samuel & Elias Bayer to begin service of sentence—dated 11/10/45. |
| | Nov. 14, 1945 | Elias & Samuel Bayer sworn in supplementary proceedings—Caffey, J. |
| | Nov. 14, 1945 | Filed supersedeas bonds (2) for Samuel & Elias Bayer in sum of $10,000 for Samuel Bayer & $5,000 for Elias Bayer dated 11/14/45. National Surety Corp. |

| | | |
|---|---|---|
| Nov. 19, 1945 | Filed stipulation extending time of Samuel & Elias Bayer to file bill of exceptions, etc., to and including 1/8/46—So ordered, Conger, J. | |
| Nov. 19, 1945 | Filed bond for Walter V. Radovich pending appeal for $5,000—Fed. & Deposit Co., Surety. | |
| Nov. 26, 1945 | Filed stipulation extending time of Walter V. Radovich to file bill of exceptions, etc., to and including 1/8/46. So ordered, Conger, J. | |
| Nov. 27, 1945 | Filed Commitment & entered return. Defendant Samuel Bayer delivered to the Fed. Inst., Danbury, Conn. 11/14/45. | 20 |
| Nov. 27, 1945 | Filed Commitment & entered return. Defendant Elias Bayer delivered to the Fed. Inst., Danbury, Conn. 11/14/45 | |
| Nov. 27, 1945 | Filed Writ of Habeas Corpus ad testificandum as to Elias Bayer. Memo Endorsed. Writ Dismissed 11/14/45. Caffey, J. | |
| Nov. 27, 1945 | Filed Writ of Habeas Corpus ad testificandum as to Samuel Bayer. Memo Endorsed. Writ Dismissed 11/14/45. Caffey, J. | |
| Dec. 4, 1945 | Filed true copy of order of C. C. A. granting bail in sum of $5,000 for each defendant—A. M. Bell, Clerk C. C. A. | 21 |

22

## Indictment.

IN THE

## DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

* * * * * * *

Southern District of New York, ss.: The Grand Jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that District, upon their oath present:

23 That heretofore, to wit, beginning on or about the 1st day of September, 1942, and continuing thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, SAMUEL BAYER, alias Samuel Boyarsky, ELIAS BAYER, alias Elias Boyarsky, and WALTER V. RADOVICH, the defendants herein, unlawfully, wilfully and knowingly did combine, confederate and agree together, and with each other, and with divers other persons whose names are to the Grand Jurors unknown, to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful,
24 disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

It was part of the conspiracy that the defendants Samuel Bayer, alias Samuel Boyarsky, and Elias Bayer, alias Elias Boyarsky, would during the period aforesaid make the acquaintance of various officers of the United States Army stationed at various United States Army Posts

including Mitchell Field, Long Island, New York; 39 Whitehall Street, New York, N. Y.; Middletown Air Depot, Middletown, Pennsylvania; Bradley Field, Connecticut; and Westover Field, Massachusetts.

It was further a part of said conspiracy that the defendants Samuel Bayer, alias Samuel Boyarsky, and Elias Bayer, alias Elias Boyarsky, would during the period aforesaid entertain and give various gifts to the aforesaid officers of the United States Army.

It was further a part of said conspiracy that the defendants Samuel Bayer, alias Samuel Boyarsky, and Elias Bayer, alias Elias Boyarsky, would during the period aforesaid give sums of money amounting to approximately 26
$7,000 to the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant Walter V. Radovich and to induce him, in violation of his lawful duty, to transfer private Martin Bayer, and private Melvin Usdan, both soldiers in the United States Army, from and to various units of the United States Army in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of continental United States.

It was further a part of said conspiracy that said defendants would conceal such transactions and acts, as aforesaid, and would do such other, further and different acts as they might deem necessary and advisable to prevent the disclosure of the existence of said conspiracy and would attempt to obtain the destruction and alteration of records, books and documents which might in any way evidence the existence of said conspiracy and would attempt to suppress and obtain the suppression of any and all information and evidence of the acts made and done in furtherance of said conspiracy. 27

## OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of April, 1943, the defendant ELI BAYER had a conversation with one Harold Busch at 84 Fifth Avenue, New York, N. Y.

2. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of July, 1943, the defendant SAMUEL
29 BAYER, alias Samuel Boyarsky, had a conversation in a taxicab with the defendant WALTER V. RADOVICH.

3. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of July, 1943, the defendant SAMUEL BAYER, alias Samuel Boyarsky, had a conversation with the defendant WALTER V. RADOVICH in an automobile in the vicinity of Rockefeller Center, New York City.

4. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of July, 1943, the defendant SAMUEL
30 BAYER, alias Samuel Boyarsky, had a conversation with the defendant WALTER V. RADOVICH at the Hotel St. Moritz, New York City.

5. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of August, 1943, the defendant SAMUEL BAYER had a telephone conversation with one Joseph Busch.

6. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of August, 1943, the defendant SAMUEL BAYER entered a taxicab outside the Hotel Governor Clinton, New York, N. Y.

7. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of August, 1943, the defendant SAMUEL BAYER made a telephone call to Albany, New York.

8. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of November, 1943, the defendant ELIAS BAYER, alias Elias Boyarsky, boarded a railroad train at the Pennsylvania Station, New York City, N. Y.; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 88, United States Code).

JOHN F. X. MCGOHEY,
United States Attorney.

34

## Endorsements on Indictment.

July 16, 1945 Samuel Bayer Pleads Not Guilty. Bail cont'd. Elias Bayer Pleads Not Guilty. Bail cont'd. Walter V. Radovich Pleads Not Guilty (Custody of Army). Knox, J.

Oct. 2, 1945 Trial of all defts. begun before Barksdale, J.

Oct. 3, 1945 Trial contd.

Oct. 4, 1945 Trial contd.

Oct. 5, 1945 Trial contd.

Oct. 9, 1945 Trial contd.

35 Oct. 10, 1945 Trial contd.

Oct. 11, 1945 Trial contd.

Oct. 15, 1945 Trial contd.

Oct. 16, 1945 Trial contd.

Oct. 17, 1945 Trial contd.

Oct. 18, 1945 Trial contd.

Oct. 22, 1945 Trial contd.

Oct. 23, 1945 Trial contd. & concluded—All defts. guilty. Special plea for clemency as to all defts.

Oct. 24, 1945 For sentences of all defts. see judgment filed. Barksdale, J.

36

**Plea in Bar (Former Conviction) of Defendant Walter V. Radovich.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE UNITED STATES<br>v.<br>SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH. | Criminal No. 120-468 |

Now comes Walter V. Radovich, one of the defendants herein, and pleads in bar to the indictment herein against him as follows:

1. On June 11, 1945, this defendant, then and now an officer of the United States Army, before a United States Army general court-martial having jurisdiction of the defendant and the offense charged, was arraigned upon charges preferred against him, pleaded not guilty, was tried, and on June 29, 1945, was convicted and sentenced by said general court-martial. A copy of said charges, findings, and sentence are herewith, Exhibit A.

2. Thereafter on July 12, 1945, a grand jury, duly empaneled in the District Court of the United States, Southern District of New York, returned in said court the indictment herein charging the defendant with the same offense as that for which he was tried, convicted and sentenced by said general court-martial.

40 *Plea in Bar of Defendant Radovich.*

WHEREFORE, defendant prays that the said indictment against Walter V. Radovich be dismissed.

ROGER ROBB,
Attorney for Defendant Radovich,
Address: c/o James A. Smyth,
Room 505,
150 Broadway,
New York, New York.

September 26, 1945.

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41 EXHIBIT "A"

"RECORD OF TRIAL OF RADOVICH, WALTER V., MAJOR, AIR CORPS, MITCHEL FIELD, NEW YORK, BY GENERAL COURT MARTIAL APPOINTED BY THE COMMANDING OFFICER, HEADQUARTERS FIRST AIR FORCE, MITCHEL FIELD, N. Y.—TRIED AT AIR BASE, MITCHEL FIELD, N. Y., 11, 27, 28, 29 JUNE 1945.

"ARRAIGNMENT

"The accused was then arraigned on the following charges and specifications—

"CHARGE I: Violation of the 95th Article of War. [Art. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—
42 Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. Title 10, U. S. C., § 1567.]

"SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States,

for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

"SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December, 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan 44
from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

"CHARGE II: Violation of the 96th Article of War. [Art. 96, GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the dis- 45
cretion of such court. Title 10, U. S. C. § 1568.]

"SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First

Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

"SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando
47 Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

"FINDINGS

"Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

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| Of Specification 1 of CHARGE I: | GUILTY |
| Of Specification 2 of CHARGE I: | GUILTY |
| Of CHARGE I | GUILTY |
| Of Specification 1 of CHARGE II: | GUILTY |
| Of Specification 2 of CHARGE II: | GUILTY |
| Of CHARGE II: | GUILTY |

"SENTENCE

"The court was closed, and upon secret written ballot two-thirds of the members present at the time the vote was taken concurring, sentenced the accused to be dismissed from the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years."

## POINTS AND AUTHORITIES

1. The trial of defendant Radovich under the indictment is barred by his general court-martial trial and conviction for the same offense. 50

*Grafton v. United States*, 206 U. S. 333.

2. The 95th and 96th Articles of War, Title 10, U. S. C. § 1567, 1568 (formerly the 61st and 62d Articles) are military common law articles; conduct which violates them must be specified but need not be, and usually is not, given a name; whether conduct does or does not violate the Articles, is determined by the court-martial in the light of Service custom and precedents.

3. According to military common law, conduct which in any manner defrauds, or tends to defraud, the Government of its rights, or which violates or neglects official duty, or prejudices military command and good order and discipline, including conspiracies, is cognizable under those articles. Except for the property and money fraud specified in Article 94 (10 U. S. C. § 1566), defrauding or conspiring to defraud the Government, whether the "fraud" or "conspiracy" be employed or not, is chargeable under Articles 95 and 96 and under those Articles only. 51

4. Both civil and military legal language have their peculiarities, and it may, in instances, be difficult to conform the offenses charged under the two. As Justice Harlan said, in the Grafton case,

> "It may be difficult at times to determine whether the offense for which an officer or soldier is being tried [in the civil court] is, in every substantial respect, the same offense for which he had been previously tried [by courtmartial]. We will not therefore attempt to formulate any rule by which every conceivable case must be solved."

But, as the court observed, the determination must be
53 made.

5. A fair comparison of the military charge and the civil charge shows that in both the charges the substance and the evidence to sustain them are the same.

(a) The military *charge* under the 95th Article is for conduct unbecoming an officer and gentleman and the *charge* under the 96th Article is for disorders and neglects to the prejudice of good order and military discipline, or for conduct of a nature to bring discredit on the service, or for a non-capital crime or offense, there being no particularization. The *specification* under each military *charge* is, in substance, that Radovich wrongfully and unlawfully received and accepted from Samuel Bayer $7000
54 for the purpose of effecting the transfer of two privates to unalerted organizations (that is, to organizations in continental United States). The term fraud or conspiracy is not used. But all frauds and conspiracies against the United States—except those which have to do with money and property and are specifically denounced by the 94th Article (10 U. S. C. § 1566)—are chargeable under these military common-law articles; and so is every violation of duty.

(b) The indictment charges Radovich, together with Samuel Bayer and Elias Bayer, with conspiracy to defraud the Government of his honest and faithful service, the indictment alleging that a part, which was indeed the essence of the conspiracy, was that the Bayers would give (and Radovich would receive and accept) the $7000, with intent to induce Radovich, in violation of his duty, to transfer the two privates so that they would not be sent out of continental United States.

6. For Radovich to accept and receive the money from Bayer for the purpose specified necessarily required agreement and concurrence between them of action and purpose. Since the substantive offense contains, as a necessary and essential ingredient, such agreement and concurrence between the same parties there can be no indictable conspiracy to commit the offense either at common law or under the Federal statute. *Gebardi* v. *U. S.*, 287 U. S. 112, 122, citing *U. S.* v. *Katz*, 271 U. S. 354, 355; *Norris* v. *U. S.*, 34 F. (2d) 839, 841; *U. S.* v. *Dietrich*, 126 Fed. 664, 667. See also *U. S.* v. *N. Y. C. & H. R.R. Co.*, 146 Fed. 298; *U. S.* v. *Sager*, 49 F. (2d) 725. If, under an unartful military specification, a conspiracy had been specified as a substantive offense along with the substantive offense that was pleaded, it would have been charged under the same common-law articles and no other; and if the proof had fallen short of showing the consummated act of accepting and receiving the money, but had shown the agreement to accept and receive the money, then under age-old military practice the specification would have been amended by the court-martial to conform to the proof and a conviction for the conspiracy under the charge as it stood would have followed.

7. Evidence to sustain the military charges and specifications would be sufficient to sustain the indictment and

58 *Plea in Bar of Defendant Radovich.*

*e converso.* Divested of only a little verbal dressing, the military charges and the indictment set up the same offense provable by the same evidence.

8. Protection against double jeopardy ought not to be sacrificed to refined verbal differences.

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**Demurrer of Government to Plea in Bar.**

UNITED STATES DISTRICT COURT,

59 SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| UNITED STATES OF AMERICA<br>v.<br>SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,<br>Defendants. | DEMURRER<br>C 120-468 |

Now comes John F. X. McGohey, United States Attorney for the Southern District of New York, and demurs to the plea in bar to the indictment interposed herein by the defendant, Walter V. Radovich, on the grounds (1) That it does not state facts sufficient to constitute a plea in bar,
60 and (2) that the plea in bar is not well taken under the law as made and provided herein.

WHEREFORE, the said John F. X. McGohey, United States Attorney for the Southern District of New York, prays

that this demurrer be sustained and the said plea in bar be stricken as insufficient.

Dated: New York, N. Y., September 28, 1945.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
Office and P. O. Address:
United States Court House,
Foley Square,
New York 7, N. Y.

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(*Endorsement*)

Oct 3-1945

Demurrer to plea in bar sustained.

A. D. BARKSDALE,
*Judge.*

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64

## Demurrer to Indictment of Defendant Walter V. Radovich.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE UNITED STATES<br>v.<br>SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH. | Criminal No. 120-468 |

65 Defendant Walter V. Radovich, one of the above-named defendants, demurs to the indictment herein on the following grounds:

1. Said indictment is vague and uncertain, and does not set forth the nature of the right, including the services, judgment, and duty of this defendant, of which it is alleged the United States was defrauded.

2. Said indictment charges no offense against the United States: the offense attempted to be charged being one in which agreement, with concert of action and purpose, is an essential element, the charge of conspiracy will not lie.

66 WHEREFORE, defendant prays judgment dismissing the indictment.

ROGER ROBB,
Attorney for Defendant Radovich,
Address: c/o James A. Smyth,
Room 505,
150 Broadway,
New York, New York.

September 26, 1945.

67

**Testimony.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>vs.<br>SAMUEL BAYER, alias Samuel Bayarsky, ELIAS BAYER, alias Elias Bayarsky, and WALTER V. RADOVICH. | C. 120-468. |

Before: HON. ALFRED D. BARKSDALE, *D. J.*, and a Jury. 68

New York, October 2, 1945,
11 A. M.

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APPEARANCES:

JOHN F. X. MCGOHEY, Esq., United States Attorney, for the Government (JOHN F. X. MCGOHEY, Esq., SAMUEL RUDYKOFF, Esq., and EDWARD C. WALLACE, Esq., of counsel).

SAMUEL CONRAD COHEN, Esq., attorney for Samuel Bayer and Elias Bayer (JOSEPH B. KEENAN, Esq., and WASHINGTON IRVING LEVY, Esq., of counsel). 69

SAMUEL T. ANSELL, Esq., attorney for Walter V. Radovich (SAMUEL T. ANSELL, Esq., and ROGER ROBB, Esq., of counsel).

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Mr. McGohey: There are some motions to be decided, if your Honor please, a plea in bar, a demurrer to the

indictment, a motion for continuation, all filed on behalf of the defendant Radovich. They appeared on the calendar this morning and Judge Leamy, in Room 318, referred all those up here to your Honor.

Mr. Keenan: In addition to that I filed a motion orally in the procedure room, in 318, before Judge Leamy, for adjournment for reasons set forth in the affidavit that I was to hand to the Court, and the Judge likewise referred that to your Honor for decision.

The Court: Let me make this inquiry. If I am to first hear the motions would it not be better to hear them in the absence of the respective panel of jurors, which is
71 the panel in the court, Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: I think it would be better to have the panel retire. Let the jurors return to their room for a moment.

(Panel of jurors retired from the room.)

The Court: You may proceed.

Mr. Ansell: If your Honor please, on behalf of the defendant Radovich, we have filed here a motion for a continuance. I am quite aware that there are motions and motions for a continuance, and I am quite aware that many of them, doubtless for one reason and another, are without merit. In this case I regard this motion as something more than a mere motion for continuance. There is something more than the mere time element involved. There is something more than the convenience of counsel or
72 client. Out of my conscience, out of such sense of justice as I have, this motion is to me, and was made as such, a plea, a prayer to your Honor, for common, ordinary fairness and justice.

I say that because this officer has already been tried, convicted and sentenced by court-martial. This is a case, if your Honor please, clearly to a current jurisdiction. Whether, as I shall subsequently contend, a plea of former jeopardy by reason of this court-martial lie or not, the

Government of the United States chose its forum with the full knowledge of the civil authorities in this case, the United States Attorney.

The court-martial proceeded, there was no indictment against this defendant until within probably ten or twelve days after the court-martial had concluded its actual trial.

In order that there may be no questions as to the full freedom and liberty that the learned United States Attorney had to proceed immediately upon this officer's confinement and arrest, I wish to say that this officer as early as May, June and July, 1944, the command of warfare which he had been engaged in in Burma having been concluded by reason of the oncoming monsoon, came home to 74
this country from Burma, a long trip, over the route from there to Miami and thence to the Pacific Coast, hospitalized along the way as a result of his service.

After he had had a month's sick leave on the Pacific Coast he was ordered to report to General Hunter, the Commanding General of Mitchel Field, in Long Island, when here. He came and reported at Mitchel Field on August 9, 1944. He was immediately placed in confinement in a ward in a hospital that had been specially designed and prepared for the reception of the violently insane and the subduing of them.

While in that hospital not only was he subjected to every possible military indignity and humiliation, but he was investigated, interviewed, questioned by the military authorities. He was likewise questioned and interviewed 75
by the agents of the Federal Bureau of Investigation, operating, I assume, out of the office of the District Attorney here, or at least in co-operation with it.

After this defendant was released from this, what is commonly known as the "nut ward", he was still kept in arrest and restricted within limits of that post command. It developed later at the court-martial that charges had been sworn to and preferred against this officer. They

were not served on him; he knew nothing about them until just before the trial, when these charges were served upon him.

So it was that he was put in confinement and arrest at Mitchel Field, August 9, 1944. He was not tried by court-martial until June, 1945, something like nine or ten months thereafter.

During all this time he was questioned upon many occasions by the military authorities, who were staff officers of General Hunter, and during this time also he was questioned upon occasion, I think a minimum of four, in the office of the United States Attorney here by one of the
77 assistants of the United States Attorney. He was also from time to time, I don't know how many times, but several, likewise questioned by agents, I think they are called field agents, of the F. B. I., in or near the United States Attorney's office.

There was no indictment of Radovich. Such a trial, conviction and sentence as this has to be referred to Washington, to the office of the Judge Advocate General, and maybe on up to the Secretary and the President, and, of course, the sentence cannot become effective until it is confirmed by the President.

The Court: You are referring now to trial by court-martial?

Mr. Ansell: Exactly, sir.

The Court: All right.

78 Mr. Ansell: Having been tried by court-martial, under the statute, the Articles of War, as your Honor knows—that is the technical military name for them, it is also the statutory name—the Articles of War being those rules and regulations which Congress, by the Constitution, is authorized to make for the government and discipline of the Army of the United States, under those articles the proceedings in this case have to go to the Judge Advocate General and on up.

The trial having ended June 29th, it is to be assumed that by reason of the familiarity of the Commanding General and his Staff Command Judge Advocate, that those proceedings were rather expeditiously—in any event such is the requirement of the statute—referred to Washington. So far as we are concerned, Radovich, and Radovich's counsel, that has been the last of that proceeding. We have heard nothing officially, we have heard nothing except what has appeared in the public press. It is true and frank for me to say to your Honor that no lawyer could have done aught but expect that almost immediately the responsible authorities of the War Department would quash those proceedings because of the gross and glaring 80
errors committed by that court-martial, which indeed can properly be characterized as a farce.

The statute requires that any officer exercising court-martial jurisdiction shall keep a man in arrest no longer than eight days and if longer he must report to superior authority. The statute, Articles of War, also require that any officer who does not expeditiously dispose of court-martial charges and proceedings, and take all the action required by the Articles of War, shall himself be subject to court-martial.

There can be no actual doubt but that the proceedings of this Court, this court-martial, conviction and sentence have all been disapproved. Immediately after, as I have said, this indictment was brought.

Now, if your Honor please, I have here and shall file, 81
or shall present and argue at the proper time, a plea of former jeopardy. But after General Hunter had forwarded these proceedings to Washington certain things have taken place, strange administration, at least strange to me, with some familiarity of such matters.

Major Radovich was released from the confinement which ensued upon his conviction, and then he was ordered for duty to Bolling Field, just outside of Washington. From

there he was after some little time, I think not long, ordered from Bolling Field to Andrews Field, somewhere over in Maryland, near Marlboro, ordered for duty to each of those places; arrived there, no duty, no quarters, no anything, just that. And then the last order was an order from the military authorities, the Air Forces of the United States, ordering Radovich to report to the United States Attorney for the Southern District of New York for temporary duty, to report here not later than 10.30 this morning.

So, whether the distinguished United States Attorney knew it or not, by military fiat he became my client's com-
83 manding officer; my client—I could never get in touch with him, and every effort I made to contact my client has been impeded from beginning to end. That is highly suggestive to me of the arbitrariness lurking and which has lurked all along, actuating the military authorities in this case.

If we take that order as it stands, he is to report, and I told him to report, to the United States Attorney for his orders for duty, as silly as that may be. According to the order he is not in contact with me, his counsel; he is taking the orders of the United States Attorney. I don't know whether the United States Attorney upon the terms of that order could not advise him when to appear, how to appear, how to defend, what he should testify to; I really don't know what the intention of the military authorities might be as to whether my client Radovich was to sit
84 with me or whether he was to sit in the corner with Mr. McGohey.

The Court: I think the Court has some slight control over that.

Mr. Ansell: I was going to remark, your Honor, of course, having been an army officer I take no pleasure in criticizing military administration, but it is my duty to do so in this, and it has been in other cases.

It was somewhat, perhaps likely through my effort, that we got an amendment of the Articles of War in time to prevent General Hunter or any other officer from doing just what he did in this case, which was done in so many cases in the last war, when men lay in military guardhouses and jails and military prisons until they almost rotted. That is not American, that is not our army. That is the result of the terrible mixup that comes when we have to create large armies upon the spur of the moment. So there was written the injunction in these articles that if an officer did not expeditiously bring a man to trial he himself was subject to court-martial, and at all stages of the proceeding if he himself did not do his best to bring the conclusion of the trial to an expeditious conclusion he was court-martialed.

Now, what has happened to these proceedings? My client is the football, as I see it, in this case. They both had an opportunity to proceed with Radovich and run with him. They investigated, they did everything they wanted to do; General Hunter's staff officers ordered him to report to the United States Attorney and be interviewed by him throughout this nine or ten months, and finally, after nine months, General Hunter for some reason or other got ready and court-martialed him. And then he threw the ball to Mr. McGohey, and Mr. McGohey apparently has the ball and Mr. McGohey is running with the ball, or doing his best to do so now.

My client—batted backwards and forward between the military and the civil jurisdiction, and ordered around like a flea—Mitchel Field, Bolling Field, Andrews Field, the United States Attorney's office. It has been difficult to catch up with him. And I say to your Honor that I have been so impeded in keeping or getting and keeping in contact with him I have not been able to do my duty effectively as his counsel.

Is it fair, right, just, that after the United States had had an opportunity for ten long months to indict this officer, and they had indicted the other co-defendants now mentioned here long before, and having permitted the military authorities to go forward with the court-martial, and the court-martial proceedings not having been concluded, and they are pending yet so far as we know, with the statutory injunction upon General Hunter that he shall bring all of these matters to the most expeditious conclusion, with the statutory injunction that if these proceedings were referred back to him, having been reversed by the War Department, that he had only two things to do—either
89 proceed to retry him or to dismiss the charges. He does neither. He says nothing to us. He does not advise Radovich of a thing, or me. They lie there. And Mr. McGohey now takes the bill, after all of this waiting, and while the military proceedings are still pending, and we are here in response to answer that indictment.

Can it be said reasonably—I am almost certain it cannot be, I am almost certain it cannot be said legally—that when the United States exercised its jurisdiction over this army officer before court-martial, that they can just make him sport of the big winds and say: "You will be tried there, and before you have heard from that, before it has been disposed of, you can also be tried before the civil court"?

Speaking specifically, your Honor, we know it is rather difficult to sustain a plea of former jeopardy, and it is
90 actually probably more difficult as between the civil forum and the military forum than otherwise, and yet Justice Harlan in Graffman v. United States said it has to be done because they are both courts of the same sovereign.

Can it be said that I can make my plea here of former jeopardy, which I shall make and which from my limited knowledge of the law is sound, that I can make that plea here or should make it before the court-martial jurisdic-

tion has been exhausted and the case there finally disposed of? Shall the answer—we say the answer, "any court", to the one that first took jurisdiction before it has exhausted its jurisdiction, and we have the method whereby it has been exhausted—the opinion by the Judge Advocate General, the War Department, and what General Hunter has to do next? Am I not entitled to that in justice to this man here? Am I not entitled to have this trial continued, not for my reason, not for anybody's reason, but the reason of justice to Radovich, that he may come here, and he is willing to come here; we are willing to be retried before the court-martial—whether we will or will not be, but we are; we are willing to be retried here. Our objection is, 92
your Honor, that we cannot fairly defend here at this time in matters of the utmost importance to this defendant.

I think I have said all that I want, and I want to thank your Honor.

The Court: Let me inquire from Mr. Keenan; what is your position on the matter of continuance?

Mr. Keenan: Your Honor, the reasons are set forth in the affidavit that I intended to file in the procedure room, and was referred to—may I have this handed to the Court. Your Honor, the affidavit may be better understood. I think I can state very succinctly what our position is. This cause, while it is entitled a conspiracy charge in the essence, of conspiring to defraud the United States Government, I think that it was meant to state, out of the impartial 93
services and judgment of an officer of the United States, although the indictment says, "the right to it"—we come to that at a different time. But that is the essence of it. And the essence of the complaint is founded, as we all know, the Government and ourselves, on a claim that an effort was made to delay the departure of one Martin Bayer, a son of Samuel Bayer, one of the defendants, and a nephew of Elias Bayer, and other the son of a widowed sister of Mr. Bayer, to delay their departure for combat

areas. I say that because that was the subject matter of three other indictments that have been lodged and are now to be dismissed pursuant to the statement of the United States Attorney a few moments ago in another court. And the charge is interfering with the ordinary processes or the judgment of Major Radovich, then Captain Radovich, who was the commanding officer, as alleged, of Martin Bayer, a nineteen-year-old boy.

Now, the arrest occurred some time in the month of December, 1944, and I was retained about that time, within a day or two before it. And I happened to be quite ill in a hospital in Washington at the time. In any event,
95 within a very short time, I think a matter of days—we have never been able to get the exact time from the army—Martin Bayer, the subject matter, the essence of this, the favored of the alleged conspiracy, was shipped overseas to the Pacific area where he has been all the time. He is over in Burma now and has been practically all the time since the arrest. We have never had an opportunity because of the war to interview Martin Bayer. We have certain information which has been adduced from such investigations as I have been able to make that causes me to believe and make an affidavit thereto, that there was information given to the defendant Samuel Bayer of physical deficiencies and illness of his boy, and that even at the time that he was—he enlisted, because he did enlist in the United States Army, this Martin Bayer, that he had some
96 difficulties in passing the examination, all of which were related to his father and which caused him undue anxiety and zealousness of the father which led to some of the events which I don't care to go into at this time, but which are the basis of the complaint.

Now, I must state this, that there was a considerable delay, so felt by the United States Attorney—I have to get the facts. It was around December when the arrest occurred, December, 1944; and at that time I was retained

and I conferred with the United States Attorney and told him that I felt he should have the presence of these two defendants and they should tell their story to him under oath for whatever it would amount to in determining whether he should proceed further, whether it would be an offense; and I brought the both of them and they were extensively interrogated before the learned assistant, Mr. Wallace, in Mr. McGohey's presence.

Thereafter, about the 28th or 29th of March, 1945, an indictment or a series of them were returned. Two substantive indictments charged bribery of a United States officer, dividing up sums, $1950 I think, and $5,000, and a third conspiracy on the part of Samuel Bayer, Elias Bayer, 98
and one Greenblatt, who was supposed as alleged to have passed the money. Those indictments, your Honor, are to be dismissed by the agreement of the United States Attorney, we having stated that we would move to elect which one to proceed on, and he decided to dismiss them. But I am giving your Honor the background so that you will know what this affidavit has to do with it.

We ask for a continuance. I asked for a continuance of one week for arraignment. I happened to be in the south at the time. And the arraignment took place about the 1st, 10th or 12th of April, the first two weeks of April, 1945. At that time, because of other engagements that I had and thought of considerable importance, I sought some delay, unsuccessfully, and the case was set for the 99
18th of June, 1945, for trial. At that time, if I remember correctly, there were no judges available during the summer period here in this court on several occasions to try the case and it had to be put over for such reason. In addition thereto, this court-martial proceeding came out of the blue as far as we were concerned, and on the 18th of June, a few days before the 18th of June when this case was to go forward, we were informed by Mr. McGohey, United States Attorney, that he did not desire to proceed

because of this court-martial, of which General Ansell has spoken. Thereafter the case was set by Judge——

The Court: You mean that he said Mr. McGohey did not desire to proceed at that time?

Mr. Keenan: That is right. Oh, at that time. I had not meant to say anything different. At that time.

The Court: Of course, your clients are not involved directly in the court-martial proceeding at all; they are not subject to military law.

Mr. Keenan: I know, your Honor, answering that question, they are not involved in a sense.

The Court: I don't know that it is at all material.

101 Mr. Keenan: But they may be involved in a sense. I don't like it very well that Major Radovich is sent down here subject to the orders of the United States Attorney in a case where my clients are co-defendants. However, that is something I think may come up at a later time.

To answer your Honor's question, there is no military jurisdiction, thank God, in this country, over any civilians, including my two defendants.

On the 18th of June we were not able to go ahead because of the court-martial, and then afterwards there was some slight delay because there were not any judges present from that time on.

The Court: The court-martial proceeding, the actual trial, was concluded when?

Mr. Keenan: July 7th. In any event it was understood
102 between Judge Healey we were ready to go ahead, Samuel Bayer here and Elias Bayer, and I was ready—I happened to be ill at the time and taking some cure, and my colleague, Mr. Levy, stated in open court that I was ready and was willing to proceed. Then, however, Major Radovich sought some delay of thirty days on his arraignment because this new indictment came in against Major Radovich. This was the fourth indictment against two defendants out of the same facts and circumstances.

Then General Ansell, as probably brought out, sought a delay to September, 1945, because of a commitment he had. And at that time I told Mr. McGohey that I had an engagement out in St. Louis on some important matters, and this case was set for October 2nd. So I suspect it is entirely possible that Mr. McGohey will feel that there is more or less of an implied understanding on our part that we were going forward with this case, because I know that he is very desirous from his statement in court to dispose of it.

And I have to make this statement because there is a difference between comity and between counsel for the United States Attorney, for whom I have great respect, and civil relations, and the duty of a lawyer in properly defending the interests of his client. And I cannot escape the statement of the conscientious duty that I owe, that I cannot proceed properly in the defense of Samuel and Elias Bayer without the presence in this courtroom of Martin Bayer, whom I call the Hamlet of this tragedy.

The Court: He is the soldier?

Mr. Keenan: He is the soldier, and he is over in Burma.

The Court: What about the other soldier, his cousin?

Mr. Keenan: His cousin I am not so much interested in; I don't know much about that. But, in any event, Samuel Bayer has three sons and this is the only one that I know to be concerned at all with any controversy in the court. This boy is over in Burma, where he is now suffering from rashes, or we think the jungle fever. Our information is not too clear upon that, but he has been ill.

During the time that we were very earnestly because of professional engagements seeking some delay, we learned of the emphasis that the learned District Attorney placed upon an early trial of this case, where he made the statement that he believes that this was of sufficient importance to raise it to the dignity of a trial for treason, and the fact that it should proceed immediately during the summer periods because there were flyers present who were needed

to subdue the Japs in the Pacific. And my client instructed me, as I have stated in this affidavit, during the pendency of the Japanese war, I mean the actual warfare, not to seek any delay; he would rather take his conseqences, whatever they may be. Because I have stated in the affidavit, while the war with Japan was on, if we made an effort to delay, even to delay trial to get Martin Bayer back, since the efforts of this alleged conspiracy was keeping him out of combat service, and since he was then in a combat area, it might be contended against my client that he was renewing this attempt to save his boy by bringing him back. In any event, that is the way he felt. So that
107 while the war was on I was forbidden by my client to seek what I thought was necessary delay for the return of this boy for his testimony. And I think I may be subject to misunderstanding by the learned District Attorney, of what might be considered a change of position on that, because I have never asserted it before, and this is the first time I have come in court since we are all happy to note the end of the actual warfare, at least we hope it is.

So that I am now, your Honor, making this application on behalf of the two Bayers only, they are all that I represent, asking for a continuance until such time as Martin Bayer can come back to this country, relieved of his duties on the other side of the water. We don't think it ought to be very long, because he is ill, and we think that with other members of the Army he will be returned to this
108 country. And now, and we say this with great respect and with no desire to—well, with great respect and in all seriousness, if the learned District Attorney feels that these flyers and all these men were necessary to properly defend our country and subdue our enemies, we think that danger, of course, is over for some time to come.

The Court: Mr. McGohey.

Mr. McGohey: If your Honor please, Mr. Ansell argued strongly to your Honor that the actions which he charges

to the United States Army impeded him, and I think at one time, if I am correct, he said prevented him from even getting in touch with his client I think if your Honor will look at the papers filed by the defendant Radovich you will find that at least some time General Ansell was able to communicate with him because the defendant Radovich signed and verified the papers which appear before your Honor, or at least some of them.

With respect to anything that the United States Army has done with respect to the defendant Radovich, of course, I do not suppose it is necessary for me to urge upon your Honor that I do not have to answer for that, that is something entirely outside of my control. 110

The fact, your Honor, as set forth in an affidavit which I have filed in this court, show that this indictment which is now moved for trial was returned by the grand jury of this district on July 12th of this year.

The Court: That is an affidavit in opposition to the motion for continuance?

Mr. McGohey: Yes. The affidavit which I filed in opposition to the motion for continuance, yes, your Honor.

The Court: I haven't it.

Mr. Ansell: We haven't it either, your Honor.

Mr. McGohey: No, I am incorrect in that, your Honor. This is the affidavit which I filed with this Court in support of an application for an order directing the argument to be held today on the plea in bar filed by the defendant Radovich, the demurrer filed by the defendant Radovich 111 to the indictment, and the motion for continuance. In other words, when the plea in bar, and the demurrer and the motion were filed with me, or served upon me rather, they contained no notice of argument, nor was any date asked for argument, and in order to bring them on today I secured from the Court an order directing that they be brought on.

But, in any event, I am quoting from what the record in this Court shows, your Honor. This indictment was returned by the grand jury of this district on the 12th of July of this year, and the defendant Radovich pleaded not guilty July 16, 1945.

And on the same day, it being a new indictment, the defendants Bayer, Elias Bayer and Samuel Bayer also pleaded not guilty.

Now, at that time on that day the defendant Radovich was represented by an attorney of this bar, and he filed a plea of not guilty. The Government was anxious to move the case speedily for trial, but at the request of the defend-
113 ant Radovich, who pleaded that he did not have regular counsel at that time, the case was set down until July 23rd. Now, prior to the adjourned date, and specifically on June 20, 1945, Mr. Ansell, with whom Mr. Robb—who is the attorney of record in this case, is associated I understand in Washington—sent a telegram to Judge Healey, the District Judge for Massachusetts, who was here assigned and conducting the court in Room 318, and I have a photostatic copy of that telegram here, and then he followed that up also with a letter to Judge Healey, and in that Mr. Ansell stated that he had appeared for the defendant Radovich as his counsel in the court-martial proceeding recently held at Mitchel Field and that by reason of his representation of Radovich he believed himself to be more familiar with the facts and the law of Radovich's case than any counsel who
114 might be assigned by the Court.

Your Honor will recall that I stated at the time that Mr. Minton, a member of the bar of this Court, appeared for him, stated that he had not been retained by Radovich, and there was a discussion before Judge Healey as to whether or not Radovich was a person to whom counsel ought to be assigned. And the matter was laid over for that purpose. And then in the meantime came these letters and documents from Mr. Ansell. I beg your pardon, your

Honor—General Ansell. He further stated that he would be willing to represent Radovich in the trial in this court if he could get an adjournment at least until September 3, 1945, which he stated was the earliest date which he could, consistent with his then current commitments, be available to try the case.

Now, on the call of the calendar on July 23rd, this matter was fully discussed before Judge Healey and Judge Healey stated to me that he would accept the representations of General Ansell and Radovich and he would put the case over until September 4th, which he did.

Now, when we come to September 4th, the attorneys for the defendants Bayer, Mr. Keenan particularly, conferred 116
with me and stated—called, rather, to my attention that September 7th was one of the Jewish high holy days, that thereafter there was a period of holidays or holy days leading up to the very high holy day which occurs on September 17th, and he pointed out to me that all likelihood was that if the trial was started on the 4th or 5th of September, it could not be concluded before the 7th and probably not before the 17th, and he felt that it would be really indecent to require two men of the Jewish faith to be on trial in a criminal court during their holy days. That was a consideration which appealed to me, and I agreed with him. And I then inquired if we could not go on immediately after that. Mr. Keenan represented to me that he had a long-standing commitment to be out in the Middle
West for a period of approximately, I think it was, from 117
about September 10th until September 25th, on business for a regular client of his. And I could understand that. And accepting his word, the trial was put over until today, your Honor.

Now, if I may address myself first to this application by Mr. Keenan.

The Court: Let me interpolate a question. How long is it contemplated that the actual trial of this case would require?

Mr. McGohey: I would think, your Honor, that if the trial is started today we would certainly be finished by Thursday or Friday of next week.

The Court: You mean the whole trial or the Government's case?

Mr. McGohey: No, the whole trial, your Honor, I don't think it should take more than that time. Of course, your Honor realizes that anybody making a guess in advance of a trial is only making a guess. But my judgment is that it ought to be concluded in that time.

This is the very first time since I first met Mr. Keenan in connection with this case last December that I have
119 heard any suggestion that Martin Bayer, the son of Samuel Bayer, would have possibly anything to say or any testimony that he might give which would be relevant and material in any way to the issues in this case. Martin Bayer's name has been discussed and mentioned frequently in our conversations, but never with the suggestion that he was necessary or a desirable witness in this case.

Now, I will accept Mr. Keenan's representation that neither he nor his clients desired to make any application for the return of Martin Bayer while the war in the Pacific was still going on. But the war in the Pacific ended on the 15th of August and I had conferences with Mr. Keenan subsequent to the 15th of August, particularly just preceding this September 3rd, and not even at that time was there any suggestion that Martin was a necessary or
120 a desirable witness. I don't understand that there is any statement made in this affidavit, in the short time I have had to read it, nor did I hear any statement made this morning that any application has been made to the proper authorities for the return of this young man.

If I understand Mr. Keenan's argument, it is this, that some time in the normal processes of bringing our troops back from the Pacific, Martin Bayer will come to this country and that if, as and when he gets here, that then he will be

available. On that basis I don't know how long this case might be adjourned. I think that that, your Honor, is pretty indefinite, in view of the failure to show any application or any effort whatsoever to bring the young man back here.

Now, with respect to General Ansell's argument. Most of it, of course, your Honor, was a criticism of the army. I don't know what argument was made by General Ansell that goes to the question of why this case should not be brought in this jurisdiction. General Ansell has not argued his plea in bar on the ground of double jeopardy.

The Court: If I understand the gist of his contention on his motion for continuance, it is not that he is entitled 122
to continuance as a matter of right, but he is addressing himself to the discretion of the Court upon the theory that it would be unfair to his client to force him to trial here today prior to the time that the court-martial trial has been concluded and he informed of the result. I would like to hear you on that.

Mr. McGohey: I think, your Honor, that it later came out in General Ansell's presentation that while he may not have received any official certificate or notice of any kind from the army, there is no doubt that what has happened with respect to Radovich's court-martial is this: that the decision and sentence of the Court has been reviewed by the Judge Advocate General and that the Judge Advocate General has in effect set aside the conviction for errors of law committed by the law officer of the court or by the 123
court. I may be inaccurate in stating that because I am not sufficiently familiar with the technicalities of court-martial procedure, but I have read the decision.

The Court: Read it where?

Mr. McGohey: Sir?

The Court: Where did you read it?

Mr. McGohey: I got a copy of it from the army, your Honor. I have it in my office.

The Court: Has the defendant been apprised of that?

Mr. McGohey: I don't know, your Honor. I don't know.

Mr. Ansell: No, your Honor, we have heard nothing.

The Court: I so understood.

Mr. McGohey: I make no claim to that. But I did understand General Ansell to say that there can be no real doubt that on review the conviction has been reversed.

The Court: There was some far from laudatory comment which he had upon the conduct of the court-martial.

Mr. McGohey: Your Honor, I shan't make any comment on that. I wasn't there, and whatever was done was done, and it requires no defense from me. I have no part of it,
125 I was no part of it. And while I am about that, your Honor, may I just digress for a minute to say I was informed this morning in the courtroom downstairs by the defendant Radovich that he had an order from the United States Army to report to me for duty, and I informed the Major that I was not an officer of the United States Army nor did I have any duty for him to perform. I would like to explain how I think that came about. During the war, your Honor, it was necessary for some system to be worked out whereby prosecutors, whether a Federal Government prosecutor or county prosecutor or State prosecutor, could have available men who were needed as witnesses but who were then in the military or naval service. Now, in order not to have process servers running about the country and going to local commanders or to local stations and sub-
126 poenaing men to appear in court at times when that might conflict with their military duty, a system was worked out by the Attorney General and the War and Navy Departments whereby if any governmental official wanted for any purpose the appearance and the presence of a member of any of the services, he was to communicate that fact to the Department of Justice and from that point on arrangements would be made with the services to have the men available if their availability did not too seriously conflict

with military duties. I assume it was in pursuance to carrying out that arrangement that this order was issued. But again, your Honor, that is nothing with which I have any concern.

So let us get down to this matter of appeal to your Honor.

The Court: As a practical matter, what is he doing, that is, Radovich?

Mr. McGohey: He is here, your Honor.

The Court: Is he in any kind of custody?

Mr. McGohey: That I don't know, your Honor.

The Court: Well, you know whether he is in yours?

Mr. McGohey: He is not in mine. Definitely he is not in my custody. I saw him sitting—I don't know whether 128
he is in the courtroom. Yes, there he is (indicating). I saw him sitting down.

The Court: So far as you know he is under no kind of arrest?

Mr. McGohey: Not as far as I know, your Honor, no. And certainly he is under no arrest that I have anything to do with, if he is, or confinement of any kind.

The Court: All right.

Mr. McGohey: Now, General Ansell says that he does not know what is going to happen here, and I will take his word for it. I don't know either. But I then raise the question, your Honor, how long must this case be continued? The crime here, as I think we will be able to show if we get into the argument of the plea in bar and the demurrer, the crime here is a separate and distinct crime. To be 129
sure, the evidence that the Government proposes to adduce before a jury here is the same, certainly the same kind, and in many instances the same witnesses that were used at the court-martial at Mitchel Field, and they will be if Radovich is tried again. The crime is distinct, the jurisdiction is distinct. I don't know when the army is going to move the case for trial. I don't know whether they are

going to acquit him, I don't know whether they are going to file new charges. I don't know anything about it at all. But I have what I claim, and I think I can sustain to be a valid indictment, that was returned by the grand jury of this district. I think that the continuances that have been had on the representation of counsel that they would be ready to go to trial justifies me in pressing for the trial of this case at this time. I urge your Honor in the exercise of your discretion on this motion to exercise it against the plea for both defendants and to direct that the trial proceed.

The Court: Let me hear from you. Do you wish to be
131 further heard from, gentlemen?

Mr. Ansell: No, I can't hear in this room, your Honor. I couldn't hear your Honor in this room.

The Court: I asked if you wish to be further heard from on your motion for continuance.

Mr. Ansell: Just for a moment, please, your Honor.

The Court: Would you mind addressing yourself to this: Leaving out the question of how this defendant, your client, has been treated by military authorities, tell me, sir, in what respect will his cause be prejudiced by a prompt trial of his case here today upon this indictment?

Mr. Ansell: Well, your Honor, it seems to me to be impossible for me or any other lawyer to know anything about the reasons—we can speculate—for reversing the court-martial proceeding. Supposing the proceedings were
132 reversed because there was a lack of jurisdiction in the convening authority, or the jurisdiction of the court-martial became divested during the trial? That would pose as a question: we would not be able in such a case to plead, perhaps, that he had already been put in jeopardy by a court of competent jurisdiction. Again, suppose it were for mild error during the trial, could the District Attorney, whom I am glad to say has shown me great courtesy, and I think we are going to get along splendidly, Mr. McGohey—

Mr. McGohey: I hope so, General. It will be my first experience getting along well with a General!

Mr. Ansell: Could the District Attorney or any other lawyer know the law of that case as laid down by the Judge Advocate General of the army in reversing the opinion? Would he know whether he was to be tried again or not, or ought to be tried, or acquitted? If he were acquitted we would certainly have one situation with respect to this plea that I would like to know about. If he were retried, ordered retried, we would certainly have a different situation.

Mr. McGohey has seen the opinion, so he stated or intimated. Your Honor, why haven't we seen it? Who is more 134
concerned in the trial of that case and the reasons for the disapproval, if it were disapproved, than the accused himself? Does he amount to naught in this case? Can I advise my client to prepare for another trial before that court? Can I advise him as to how we are to meet the indictment in this Court, utterly ignorant of what has transpired since his conviction was announced? It seems to me that I am just required to risk this man's liberty here by stabbing in the dark. I can't do that.

Now, Mr. McGohey said that he has had absolutely nothing to do with what the military authorities did, and I shall not refer to any criticism of them, though they ought to be criticized and will be ultimately, that he has had nothing to do with it. Therein Mr. McGohey differs from
the official report made by the Staff Command Judge Advo- 135
cate to General Hunter and repeated by General Hunter that this man was held there all that nine months at the specific request of the United States Attorney here.

This is the statement, Mr. McGohey. Now, you and General Hunter may quarrel with this if you want to, I know nothing about it; I know that you and General Hunter in all truth had a very close working arrangement, and here is what General Hunter's Staff Command Judge Advo-

cate said about why they kept this man in durance vile over all this time, the delay—it was high time that it be apologized for—in referring them, the court-martial charges, for trial, was the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused. That is in my motion, Mr. McGohey.

Now, Mr. McGohey says that I committed myself to try this case on September 2nd or 4th, after a local attorney had come here and entered a plea. It was arranged by us. Maybe paid for by us. He had to have somebody.
137 Mr. McGohey was pressing for trial. I am not quarreling with him. But we did not commit ourselves that we were going forward on September 4th. Radovich had to have somebody here because Mr. McGohey said he was going to press for trial.

Now, at that time we had supposed, and that was a reasonable supposition, that the military jurisdiction would have been exhausted, it would have determined what it was going to do and I could come here then and represent Radovich. Now, that is the extent of the commitment, your Honor. That is all there is to it, that we thought it would be disposed of. And the papers carried, as I remember it, somewhere about mid-August or probably a little before, the statement that the whole thing had been busted. I thought that we would be notified almost immediately.
138 We have never been notified. Mr. McGohey has. He has got a copy of the opinion.

I am sorry to take up so much time, your Honor, in this matter, but it is a matter which I feel intensely about.

Mr. McGohey: Your Honor, may I be heard on just one or two things?

The Court: Just a minute. Let me ask General Ansell something before I forget it. You stated awhile ago that this defendant might be prejudiced in the consideration

of his plea of former jeopardy by reason of the fact that not knowing what the action on the court-martial trial was, it might turn out that they had been divested of jurisdiction at some time earlier than the instance of jeopardy so to speak.

Mr. Ansell: Might have been.

The Court: But doesn't your plea allege to the contrary, doesn't your plea allege that your client has been put in jeopardy there, and wouldn't the Court have to consider that as true on a determination?

Mr. Ansell: I think your Honor is right about that. I took the report that I received, that there was error, error in the proceeding, and proceeded on that theory. But 140
that does not alter the fact, your Honor, that General Hunter has got to do one of two things, and under the Articles of War is himself subject to court-martial for any delay in the matter, and that is to retry Radovich right away—the language of the statute says that—or dismiss. I certainly think we are entitled to know, your Honor. I myself have read all the law that I could. The man here who is more familiar with criminal practice than I would know about it.

The Court: We have not got to that. But one point I wanted to ask——

Mr. Ansell: I think I ought to say this, your Honor. I did not stress it in my argument. But I have felt impeded and I have been impeded ever since this trial. I 141
am not going to criticize. But there is no communication between counsel and Radovich except through third parties. And Radovich is ordered to A, to B, to C, to D. I have no notice of it. And I can't get notice except through considerable delay. Whatever anybody else may think about it, I think the right to the assistance of counsel is one of the most sacred rights, as we all do, and I don't think that Radovich has had that. That is a different matter. But we have been practically impeded by all of

these military orders which in my opinion ought never to have been made.

The Court: Did you ask to say something, Mr. McGohey?

Mr. McGohey: Yes, sir.

The Court: I think I had better hear him, Mr. Keenan, because he might want to reply to what he says.

Mr. McCohey: I am quoting from the telegram which was sent to Judge Healey, and a copy sent to me, dated July 20, 1945, signed Samuel T. Ansell, a telegram sent from Washington.

Mr. Ansell: Would you read it all, Mr. McCohey?

Mr. McGohey: Yes, I shall.

143 "Your Honor: I address you in this unusual way, because the case is unusual, the situation is unusual, and this is the only way I can address you. I was Major Radovich's attorney before a court-martial which on June 29 convicted him and sentenced him to dismissal and three years' imprisonment; that case is now pending before the Board of Review in the office of the Judge Advocate General. A week or more later the United States Attorney proceeded to have Radovich indicted for what seems to be in fact, if not in law, the same offense as that of which the court-martial convicted him. The United States Attorney insisted upon almost immediate arraignment and I am advised that he now insists upon putting him on trial next Monday. Major Radovich has no money, his military confinement adds to his difficulty of obtaining enough to em-
144 ploy effective counsel, and he is without counsel. I was once an officer of the Regular Army and I admire Radovich for his exceptional gallantry against the enemy. I will defend him if it is made possible for me to do so, and I will do so without compensation. I must leave Sunday to attend a difficult court-martial trial in Texas in which I was retained in January. It will probably consume three weeks. I am a member of the bar here but not New York, but I will gladly represent Radovich if admitted there

for the purpose, and if the trial can be postponed until September 3, the earliest date that I can absolutely commit myself to. Radovich's present co-defendants were indicted months ago without Radovich. I see no earthly reason for rushing Radovich to trial and I believe that the reason given by the United States Attorney as related to me by Radovich, namely, necessity of sending certain military witnesses overseas, is untrue and that the United States Attorney is being imposed upon. I know that military commanders at Mitchel Field have, for an entire year, abused their powers over Radovich and subjected him to unlawful and cruel treatment. I have preferred a formal written complaint against them to the President, who is 146
absent. It seems clear to me that these same military commanders are pressuring the United States Attorney as a part of their campaign of crucifying Radovich. Radovich is entitled to justice, money or no money. He is entitled to a fair trial, including a reasonable time for counsel to prepare the case. I say that I will defend him not later than September 3. I urge your Honor to grant me that much time. I am sending a copy of this air mail to Mr. McGohey. I respectfully request you to pardon this method of addressing you."

Now, your Honor, I would like to repeat that sentence: "I say that I will defend him not later than September 3." I think, and thought then, that that was a commitment to be ready to go to trial on that day. But we didn't go to trial. That is a month ago, your Honor. And up to this 147
moment I have heard nothing from General Ansell nor from Mr. Robb, nor from anybody on Radovich's behalf, that any application would be made. I had heard nothing from the defendants Bayer or their attorneys until this morning. I assumed that I had firm commitments from counsel for all defendants to go to trial today, and I have here all of the Government's witnesses, some of whom have come from long distances.

The General read from a statement which I understand was made at the court-martial by Colonel Harmeling——

Mr. Robb: It is his report to the War Department.

Mr. McGohey: That the trial, court-martial trial, of the defendant Radovich was delayed at my request. That is substantially right. I don't deny that to your Honor. I did ask the army to delay trial of this man until the Government's investigations of the civil crimes were completed. When I say I had nothing to do with Radovich's punishment nor with Radovich's movement from camp to camp, that is what I am addressing myself to. In other words, nothing that I have done or nothing that anybody
149 in the civil side of the Government under my jurisdiction has done has been done for the purpose, nor, as far as I can find out, with the effect of, impeding or hampering Radovich in the preparation of his trial. And certainly General Ansell, I am sure, will not claim that I did any of those things.

The Court: All right, gentlemen.

Mr. Keenan: Your Honor, very briefly I want to refer to dates so that there will be no confusion on a matter of making firm commitments to try the cause and changing the position for no reason whatsoever except delay or any other reason.

The cause was set for September 2nd, not by my doing, but by an application that was made in some proceeding—
150 a telegram that was referred to just before by Mr. McGohey. I didn't wait until the 2nd of September to have an adjournment. I cannot at this moment state what day in August it was that I had.

Mr. McGohey: It was in August.

Mr. Keenan: But it was in August.

Mr. McGohey: Oh, yes.

Mr. Keenan: I do know that I happened to be in New York on the 15th of August, those days when we had considerable delay finding out whether the war with Japan or

the hostilities had ceased, and I don't know the exact day of V-J Day, but I know I was here and there was a great deal of excitement, and I think it was around that time or very shortly thereafter that I had this discussion with Mr. McGohey. I have attempted to make it clear that as long as the war was on I was under peremptory instructions from my client to seek no delay by bringing this boy or attempting to bring him home.

And to say that we have made no effort to get him back since then, if the learned District Attorney had encountered the same difficulties I had in getting any information from the United States Army at Washington or any place else as to these transfers alone, he would understand why I would not be optimistic enough to attempt to get the United States Army to send this man back home under such circumstances for testimony in a civil case. So that, to make it clear, up until after the hostilities, I couldn't ask for the return of this boy. My client would rather take whatever punishment the law permitted rather than subject the nephew and son to further publicity, such as I set forth in my affidavit, I regret to say, was even released from the official branches of the Government and appeared in Time Magazine and other instrumentalities of dissemination of information throughout the United States. So that up until the end of the Japanese hostilities I wanted the boys home, but I would not, as my client requested and demanded of me, ask for a continuance until after the war was over, and that is not so long ago, your Honor. I have had other things in the meantime. This is the first opportunity I have had. And since I knew, and I can state, that there was going to be an application for a continuance, I feel that I ought in representing my client, make this application, who have been the recipients of no soft treatment by the Government, your Honor. Following the analogy of General Ansell, that his client has been used as a football and passed from one jurisdiction to another.

my clients have been used as the same football, but they have been kicked from one indictment to another.

The Court: I shall pass on this motion for a continuance before considering anything else, don't you think?

Mr. Ansell: I think that would be correct, your Honor.

The Court: Well, would you let me have all of the documents which have any bearing on this matter? What about that affidavit?

Mr. Ansell: There was one observation, your Honor—you have been so patient—but so far as Radovich is concerned all that has to be done is for General Hunter to act, let us know where we are, just give me a reasonable time
155 to study the opinion that sent that back; if Hunter says he is to be retried, I assume that Mr. McGohey would know that it would be practically impossible to be here. If he is not to be retried, we will know that. So I am not asking for any indefinite extension, and my request is caused by the delay of General Hunter to take action on this case and which the Articles of War require him to have taken long ago.

The Court: Would you mind answering me a little further: from a practical standpoint, how would the publication of the final action on the court-martial affect your trial of this case here today?

Mr. Ansell: Physically, I presume it would not.

The Court: I did not say physically. I said practically, sir.

156 Mr. Ansell: Well, I haven't the grounds for the reversal. I think I ought to have that, your Honor, because that determines whether he is going to be tried right away again by Hunter within eight days.

The Court: How would that affect you here? General Hunter certainly can't take this defendant nor you out of this court until this court is finished with him.

Mr. Ansell: I know, your Honor, but it occurs to me that here upon a plea of double jeopardy, for instance—

that is the real plea here—I certainly ought to have the entire court-martial proceedings upon which I base that plea. It is now pending in the Court of Appeals, the War Department, so far as I know. I can't tell.

The Court: I don't quite follow you, sir, as to how the proceedings in the court-martial, that is, the details of the court-martial, and the reason for the reversal could affect the validity of your plea of double jeopardy here.

Mr. Ansell: If it were reversed for mere error, that would be one situation. If they directed him to acquit, I think that would be another situation. And, in addition, your Honor, and with the utmost frankness, I say to you it would not surprise me in the least. These military reversals and remands have this characteristic: you can add 158
to those charges whatever the authorities want to add.

The Court: Yes, but you couldn't make what they add a basis for a plea here; you could only plead what has taken place.

Mr. Ansell: Of course not, sir. But it seems to me, without being able to answer your Honor specifically, and I wish I could, because I am not here just taking up time, I want to see where we are at with respect to this military jurisdiction. If General Hunter acts today—did I understand the United States Attorney to say that he was advised as to General Hunter's action on this case or the Judge Advocate General, Mr. McGohey?

Mr. McGohey: The Judge Advocate General.

Mr. Ansell: If I can get the action of the military au- 159
thorities in my hands today and give me a reasonable time to orient myself, I am perfectly willing to be here and stand trial, your Honor.

The Court: Will you be more specific in what you mean by the action of the military authorities?

Mr. Ansell: I don't know whether this was sent back by the Judge Advocate General to General Hunter under

that article of war or not. I do not know whether it was reported to the Secretary of War and who took the action. They are two different cases. I think it is rather involved. We all fought it out before Congress, and I am not sure that the article is at all simple, but the Judge Advocate General can send it back with instructions to General Hunter and General Hunter can do two things, as I understand the statute, either order a retrial or take such other action, and the statute in that particular place says as he deems fit. The Secretary of War's action seems to go through different channels, but I do not see that the result differs.

161 Now, when it gets back to General Hunter, of course, the statute requires his Staff Command Judge Advocate shall be called in and advised, and the statute requires that we be given a copy of that also, and that we be given a copy of all papers.

You know, your Honor's questions, of course it must be obvious, are a bit embarrasing because I can't answer them specifically. But when a statute says that I am entitled to that opinion, that I am entitled to the Staff Command Judge Advocate's opinion, that I am entitled to be advised of the action that General Hunter takes, there is some reason for all that.

The Court: I think you have made it very clear to me. I am going to take a recess now, gentlemen, until 2 o'clock.

162 (Recess until 2 P. M.)

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AFTERNOON SESSION.

The Court: Are you ready, gentlemen?

I have for decision, gentlemen, this: Motion for continuance, separate motions. I will first pass on the motion of the defendant Radovich.

Radovich's counsel, General Ansell, makes a number of assertions as to the treatment, which he criticizes severely, of this defendant by the military authorities. The question for me to determine is whether such treatment and the present status of the court-martial proceeding in any way prejudices the rights of this defendant as to his defense in the action pending here. I cannot find that they do. In other words, I cannot see how the defendant's right to make his defense to this charge is prejudiced by the situation which existed as to the court-martial. I have examined the plea of former jeopardy and the plea avers that this defendant has been convicted by a court-martial. In passing on the plea, in considering it at this time, I have 164
to take that, of course, as true, and I do not see how on the plea the defendant could put himself in a stronger position for consideration of the question of law presented. So I am going to overrrule the motion for continuance on the part of the defendant Radovich.

Also I am going to overrule the motion for continuance made by the defendants Bayer. Their motion is based upon an affidavit made by their counsel to the effect generally that Martin Bayer, the son of one of the defendants, should be here as a witness. I have examined the affidavit and although there are general statements that his presence and testimony are both desired and necessary, I cannot find any specific allegations or assertions of any testimony which he might give which seem to be material to the issue here involved. So I am going to overrule that 165
motion for continuance. Exceptions may be noted as to my rulings in both instances.

Now, what do you want to take up, gentlemen?

Mr. Ansell: I assume, if your Honor please, that we might proceed, ought to proceed, to the plea in bar.

The Court: All right. Now, let me see; the plea in bar applies, of course, only to your client.

Mr. Ansell: That is quite right.

The Court: How about the demurrer? Have all defendants filed demurrers?

Mr. Ansell: We filed a demurrer for Radovich. I don't know whether the other defendant has or not.

The Court: I believe you stated, Mr. Keenan, that you had made or desired to make some verbal motion or motions.

(Mr. Keenan spoke to Mr. McGohey out of the hearing of the reporter.)

Mr. Ansell: I am advised that the United States Attorney filed a demurrer to defendant Radovich's plea in bar, Mr. McGohey?

167 Mr. McGohey: Yes. That is a formal demurrer.

Mr. Ansell: A formal demurrer.

Mr. McGohey: Yes. And there is no question about the service?

Mr. Robb: No, we don't question it; we just didn't happen to get it.

Mr. Ansell: I find myself questioning whether, we having filed a plea, your Honor, and the United States having demurred generally to that plea, the proper procedure is not for Mr. McGohey to proceed.

The Court: Which way do you prefer it, sir? I don't think it will make a great deal of difference, because I am going to hear both of you first. I say which way do you prefer? I am going to hear both of you fully.

Mr. Ansell: I do not know that it makes any difference,
168 and I would just as leave proceed now as at any other time.

The Court: I am inclined to think that you are pulling the laboring oar. Go ahead.

Mr. Ansell: I think that is probably true of the demurrer.

The Court: I would think that his demurrer simply relieves you of any necessity of sustaining your allegation by proof.

Mr. Ansell: I suppose that is right. Off the record.

(Discussion off the record.)

Mr. Ansell: You know, your Honor, inasmuch as Mr. McGohey has briefed his demurrer, I am wondering if it would not be probably fairer to me if Mr. McGohey proceeded. I just told your Honor that I was perfectly willing to proceed.

The Court: Have you a brief which you wish to file?

Mr. Ansell: I have some points and authority appended to my brief—Mr. McGohey has actually briefed his demurrer; I haven't seen it, though; but don't you think that you ought to proceed, Mr. McGohey?

Mr. McGohey: Your Honor, I agree with your Honor that it does not make a great deal of difference who goes 170
first on the plea in bar and the demurrer filed to the indictment.

The Court: Do I understand that your brief is just now being filed and these gentlemen have had no previous copy of it?

Mr. McGohey: That is correct. The memorandum of points or legal references upon which I assume they are going to rely were appended to their papers which contain the plea and the demurrer.

The Court: And of which you have seen a copy?

Mr. McGohey: Of which I have seen a copy, and I have a brief in opposition to that which I have just this minute handed to General Ansell.

The Court: Then, under those circumstances, I will 171
ask you to proceed.

Mr. McGohey: I shall, your Honor.

Your Honor, the indictment here was filed on July 12, 1945, and it charges a conspiracy to defraud the Government of the right to the honest services of certain army officials. One of the alleged aims and objects of the conspiracy was to prevent privates Martin Bayer and Melvin Usdan, each of whom is related to the defendant Samuel Bayer, Martin Bayer being his son and Melvin Usdan

being his nephew, from being sent out of the Continental United States. On July 16th, 1945, the defendants pleaded not guilty to that indictment. On September 27th this year, and it was last Thursday, the Government received by mail from the defendant Radovich, or, rather, from his counsel, the following papers:

A plea in bar and a demurrer to the indictment. Now, the Government has in turn filed a demurrer to the plea in bar and the two demurrers, the defendants' demurrer to the indictment and the Government's demurrer to the plea, of course, both operate as admissions for the purpose of this argument of the facts alleged in the plea
173 in bar as well as the facts alleged in the indictment. So the sole issue on the argument of the appeal here is the legal sufficiency of the indictment and the legal sufficiency of the plea in bar..

The Court: Are you about to proceed both as to the question raised by the plea in bar and the demurrer to the indictment?

Mr. McGohey: Yes, your Honor.

The Court: Very well.

Mr. McGohey: I think that will probably be the easiest way, to let me complete my argument at one time.

The Court: That is all right.

Mr. McGohey: Now the facts with respect to this case, your Honor, briefly are these, that on June 11, 1945, the
174 defendant Radovich, an officer in the United States Army, a major, was arraigned before a United States Army court-martial for two offenses, to wit, one, conduct unbecoming an officer and a gentleman, under the 95th Article of War; and, two, a charge under the 96th Article of War, and the 96th Article of War provides, and I am quoting:

> "Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring dis-

credit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

Now, the charges that were filed against the defendant Radovich in the military establishment and by which he was charged before the court-martial represented identical conduct in each charge. The first charge is that:

"Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 176
1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2,000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York."

That is the first charge.

The second charge is that:

"Major Walter V. Radovich (then Captain), Air 177
Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas

movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement."

On June 29, 1945, the defendant Radovich was convicted and sentenced for both offenses by the general court-martial.

Now, on the 12th of July, 1945, the grand jury in this district returned the indictment which is before us here, and that indictment charges the three defendants, Samuel Bayer, Elias Bayer and Major Radovich, with conspiracy under Title 18 of the United States Code, Section 88, with a conspiracy to defraud the United States.

179 The Court: Under the general conspiracy.

Mr. McGohey: Under the general conspiracy statute. (Continuing): "To defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich, an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud."

The indictment alleges the following, among others, as
180 the aims and purposes of the conspirators in the conspiracy charged in the indictment:

1. To make the acquaintances of various officers of the United States Army;

2. To make gifts to said officers;

3. To give sums aggregating $7,000 to the defendant, that is, the defendant Radovich, in order to induce him to

detach Privates Bayer and Usdan from units about to be sent out of the Continental United States.

A fourth aim is to conceal these transactions and conduct.

And a fifth aim charged in the indictment, fifth aim of the conspiracy as charged is to mutilate, alter and destroy evidence of the conspiracy and its purposes as contained in records, books and documents.

Now, eight distinct overt acts within this jurisdiction are alleged in the indictment.

Now, the defendant files a plea in bar and invokes thereby the Fifth Amendment of the Constitution of the United States which so far as material here provides that "• • • 182
nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb • • •"

And the defendant argues that the offenses charged against him before the court-martial and the offenses charged in the indictment at bar are identical. He also argues that the offense charged in the indictment is a conspiracy to accept and receive from Bayer the sum of $7,000, and that that conspiracy, as he alleges, it is pleaded, such a conspiracy is not indictable because the substantive offenses charged against the defendant before the court-martial, namely, the actual receipt of $2,000 on one occasion and $5,000 on another, those offenses, says he, were impossible of commission without the cooperative action which is charged in the indictment. 183

So that the Government argues, and will argue here, that the defendant's plea in bar and demurrer are precluded, first of all, by the defendant's plea of not guilty which was entered on the 16th of July; second, the indictment is legally sufficient, the Government contends; and, third, we contend that there is no identity between the offenses here charged and the offenses charged before the court-martial.

Now, as to the first point, that the defendant's plea in bar and the demurrer are precluded by the plea of not guilty

filed last July, I will take the liberty, although I don't think it is necessary, your Honor, to refer to Section 564 of Title 18 which provides:

> "• • • And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue and shall, without further form of ceremony, be tried by a jury."

That is the provision of the Code with which your Honor is of course familiar.

We claim that is a clear mandate in the statute and that it means that no plea shall intervene the plea of not guilty
185 and the jury trial, but that the issues raised by the plea of not guilty shall be tried immediately. Pleas and dilatory tactics in the forms of filing pleas or demurrers on the day a case is set for trial have been condemned repeatedly in the courts, and the cases in this district in support of that are cited there in my brief, so I need not refer to them.

Now, coming to the legal sufficiency of the indictment. The demurrer filed here says, first, that the indictment is vague and uncertain and does not set forth the nature of the right, including the services, judgment, and duty of this defendant, meaning Radovich, of which it is alleged the United States was defrauded.

Secondly, it is claimed that the indictment charges no offense against the United States, and that the offense
186 attempted to be charged being one in which agreement, with concert of action and purpose is an essential element, the charge of conspiracy will not lie.

Now I would like to address myself to the first claim that the indictment is vague and uncertain. We contend that the indictment is quite definite and quite certain and precise as to the right of which the United States was defrauded and the services and judgment of the defendant encompassed thereby.

The indictment alleges the right of the United States to be as follows:

> "* * * * right to the conscientious, faithful, disinterested and unbiased service and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud."

The service and judgment of the defendant to which the 188
Government was entitled are clearly defined as follows in the indictment:

> "* * * * the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant Walter V. Radovich and to induce him, in violation of his lawful duty, to transfer Private Martin Bayer and Private Melvin Usand, both soldiers of the United States Army, in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of Continental 189
> United States."

Now, I submit, your Honor, that that clearly defines first of all the right that the Government had and the duty which the officer had. Precisely the same kind of indictment, almost in identical words, was the indictment that was filed against the defendant Manton in this district some years ago. That indictment, its legal sufficiency was

attacked by a demurrer, and that indictment was sustained at the trial here. And in our Circuit Court in this district, and certiorari was denied on attempt to appeal that to the Supreme Court on the sufficiency of that indictment.

Now with respect to this double jeopardy or the identity of the offenses charged in the court-martial and the offense charged in this indictment. The Fifth Amendment proscribes double jeopardy in respect of the same offense.

The Court: Let me interrupt you before you get off that subject. Was the offense a crime upon which a trial was had in the Manton case conspiracy?

Mr. McGohey: Yes, sir. The charge was: The defend-
191 ants were charged with conspiracy to deprive the United States Government out of the honest conscientious service of Judge Manton of the Circuit Court. And the right alleged was the Government's right to his unbiased, unprejudiced services as a judge of the Court.

The Court: You of course cite that in the brief?

Mr. McGohey: Yes, that is cited in the memorandum.

The Fifth Amendment proscribes double jeopardy in respect of the same offense. There certainly is no constitutional limitation in respect to the repetition of the same evidence in support of different offenses. And I have cited cases in support of that proposition. The test rather is whether the required proof as to each offense is identical. And I have cited cases in my memorandum for that proposition of law.

192 Now it is clear that the same transaction may give rise to several offenses, for instance, possession and sale of the same liquor will support two offenses. The offense of unlawfully breaking into a post office with intent to steal and the offense of stealing may be predicated on the same act. The offense of conspiracy and a substantive offense can be, and indeed usually are, grounded on identical transactions. And the cases supporting those propositions, although they are fully familiar to your Honor, I am sure, are cited in this memorandum.

The mere fact that the evidence required to support one offense is or may be closely connected with and even similar to the evidence required in support of another offense, is immaterial with respect to this question of double jeopardy.

Now this indictment charges the offense of conspiracy to defraud the United States of its right to the honest services and judgment of officers of the United States Army. In proof of that charge the Government may adduce, among other proof, evidence of bribery or extortion involving the defendant Radovich. The fact that the defendant has been convicted before a court-martial of what is tantamount to the offense of bribery is not, however, in any sense in our judgment a bar to the indictment here. This indictment 194
does not charge the defendant Radovich or anybody else with the offense of bribery, and the defendant is not subject to punishment for bribery on conviction for the offense of conspiracy. It is certainly not necessary to establish a criminal act in support of the offense of conspiracy. If the overt acts are not criminal, the offense of conspiracy could nevertheless be completed and indictable.

Now, an acquittal in respect of a conspiracy of course does not preclude an indictment for bribery, and by the same token a conviction for bribery would not preclude a conviction for conspiracy. The two, the substantive crime and the conspiracy to convict the crime are certainly distinct, and that is well settled law.

Now in this case eight overt acts are alleged, none of
which constitutes bribery and any one of which would be 195
legally sufficient to complete the offense charged after the unlawful conspiracy had been established.

The offense which we charge, the offense of conspiracy, requires proof of agreement among the defendants to defraud the United States of the honest services and judgment of this defendant Radovich. The offenses with which the defendant Radovich was charged before the court-martial required no proof of such agreement. The concert

required to establish the bribery is not the same concert required to establish the agreement here charged. The authority for that is again found in that Manton case which I have cited to your Honor, because precisely this same argument was made in the Manton case. When you come down to examine the Manton case you will find it was argued that what you had here was in effect a conspiracy to bribe a United States judge, and that was argued at length. The Circuit Court with respect to it said:

> "The indictment * * * charges a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to
197 be a way of consummating the conspiracy * * *. The long argument upon the point consequently falls for lack of foundation to give it support."

Precisely the same argument that is being made here was made in an attack upon the indictment in the Manton case, and the sufficiency of the indictment was sustained.

The defendant further argues as if one of the objects of this conspiracy, namely bribery or extortion, is the conspiracy charged in the indictment, and clearly that is not the fact. Bribery is not charged here. Conspiracy to defraud the Government of the honest, faithful, conscientious service of this officer is all that is charged in this indictment.

198 Now the defendant's chief reliance is on a case in the United States Supreme Court, back in 206 U. S., the case of Grafton v. United States. General Ansell quoted that to your Honor this morning and he relies on it in his papers. Now, a mere statement of the facts in the Grafton case will immediately show the difference between that case and this one.

The Court: I had an opportunity to glance at it quite hurriedly during lunch hour.

Mr. McGohey: Then your Honor is familiar with it.

The Court: Superficially.

Mr. McGohey: The facts are these: A soldier on duty some place in the Philippines back in the early part of the century shot either one or two persons, I am not sure which, and killed them.

The Court: I do remember the facts.

Mr. McGohey: He was tried, as your Honor knows, before the court-martial for the crime of murder and he was acquitted by the court-martial, and immediately, or shortly after, he was indicted in the civil jurisdiction for a crime called assassination by terms in their statute, but clearly the things were precisely the same; assassination was the killing of the human being, the murder for which he was charged in the court-martial was the killing of a human being. There was no difference whatever between the crimes charged. 200

The Court: There was a difference between the crimes. Homicide was an essential element of each.

Mr. McGohey: When I say "crimes" I don't mean the technical language of the statute. I mean that what the man was charged with in each instance was the killing of a human being. And the court of competent jurisdiction, the military tribunal, heard the evidence and returned a verdict of not guilty. And then it was sought to have any other tribunal possibly find a verdict of guilt for the same offense on precisely the same evidence.

Now the reading of the Grafton case clearly distinguishes it from this case here. It is true that the evidence that will be submitted here will be largely the same kind of evidence as was submitted at the court-martial, but, as I have said before, and as the cases which I have cited to your Honor really hold, the mere similarity or even identity of evidence does not at all affect the nature of the crime and does not make the crimes the same. So that the position of the Government, if your Honor please, is that there is 201

no double jeopardy in this case, and, secondly, that the indictment as an indictment is a good and sufficient indictment under the authority of the cases that I have cited.

Mr. Ansell: If your Honor pleases, as I followed the district attorney's argument I thought his first point was that we were too late in filing our plea of former jeopardy after we had pleaded not guilty. I have a distinct tendency to refer to the United States Attorney's argument upon any such point, because he must be and is so familiar with questions that arise in the course of criminal trials. But in this particular case a plea of double jeopardy I assume, without knowing, they do not frequently appear. I don't
203 know that it is at all helpful to your Honor, indeed I think it is not helpful and resolves itself into nothing but an expression of professional opinion based upon recollection of cases, for me to say that my view of the seasonableness of the submission of the plea of double jeopardy is that it can come in at any time.

The Court: Suppose we do not take up any more of your time on that question, sir, because there has been lack of diligence in the filing of these pleas; if after submission to a jury I became convinced that there should be a plea I would bring him in and consider it and if I became convinced that an indictment was not sufficient, I would pass upon the question at any time during the trial.

Mr. Ansell: Mr. McGohey has run together the argument in opposition to the plea of double jeopardy and I
204 have some difficulty in extracting that argument and assigning one part of it to one thing and one part to another, but I have followed his points and his purposes. First, as to the Grafton case. I have not said, your Honor, that the Grafton point is in point upon the very question raised here. I resort to the Grafton case to establish first that there can be double jeopardy as between the trial before a court-martial and a civil criminal court.

The Court: It certainly holds that.

Mr. Ansell:—It certainly does. The case is enlightening I should say perhaps for information. The Government of the United States has gone along from the time it came into existence until 1906 trying men for the same offense, but one being under the military code and one being under the civil code, that is, a criminal code of the United States; that, inasmuch as the same actions violated the military code and the civil code, using that term as indicated, there was no double jeopardy because Congress had said in effect that the same act would violate two different statutes. And, as strange as it may seem, that had gone along from 1789, I think, or shortly thereafter, until 1906, when Justice Harlan wrote that opinion for the Supreme Court. And 206
we saw, the Army saw at least—I contributed something to the Grafton case for Grafton—the Army saw nothing unjust in that because the Army erected itself into a different world, a different system of law and jurisprudence from that which governs us all.

If your Honor please, I suppose that every system of law has its own peculiar terminology, it has its own technical terms that requires some knowledge to become initiated in it. Now, as Mr. Justice Harlan pointed out in that case, as your Honor will find near the conclusion, because that was stressed in the argument for the War Department, the War Department said that it is almost impossible in many instances, in any event, to compare the allegation or specification of the military charge and specifications to the civil charge and specifications, because of the idiosyncrasies in 207
language of the two systems. It was pointed out in the brief, in the law edition, at any rate the briefs are pointed out, and it is true, said the Department of Justice and the War Department, that conduct unbecoming an officer and gentleman—what is it? It is common law of the military—whatever a court-martial says constitutes conduct unbecoming an officer and a gentleman that does constitute conduct unbecoming an officer and a gentleman, because

they proceed in accordance with the precedents and customs of the service that constitute the common law of conduct unbecoming an officer and a gentleman.

They said also that the 95th Article of War—your Honor will observe that in the time of the Grafton decision the corresponding articles were numbered 61, for conduct unbecoming an officer and gentleman; 62 for what is shortly called conduct to the prejudice of good order and military discipline. But Justice Harlan pointed out—as a matter of fact, I think he went through the Civil War and knew something about it, probably, more than most of them had knowledge, and he gathered from his own knowl-
209 edge and the briefs of counsel in the matter that the old 62, now the 95th, Article of War is a great hodge-podge; it specifies in the charge "conduct to the prejudice of good order and military discipline," whatever that may be, "offenses of a civil nature not capital"; and there you look to the penal code, and even to the penal code of the several states, if it be such a matter that a court-martial can say that that does reflect discredit upon the officers of the Army of the United States.

The textbooks and digests in the military establishments mean rather more than textbooks in our civil practice. The textbooks are all to this effect and so are the digests and so are the customs of the service from the beginning, that any violation by an officer of the Army of
210 the penal code of the United States is also conduct to the prejudice of good order and military discipline or an offense less than capital against this military code.

Now whether the specification, the military specification, charges bribery or not, technically, it charges, if it does charge bribery, an offense against the penal code of the United States, and that is in violation of that article. If it charges conduct in the nature of bribery, it also is conduct unbecoming an officer or a gentleman or an offense

But the textbooks and the digests and all the years of service in the military establishments show that any fraud against the United States committed by a member of the Army subject to military law, any fraud against this Government, is chargeable and convictable under the 96th Article of War. You do not have to use the term, your Honor, "fraud," you do not have to use the word "bribery," you do not have to say that he did something in violation of a section of the penal code. It is common law generally if this Court finds that this officer soldier did anything which you would ordinarily call fraud, that is, the accomplishment of an evil purpose by trickery or evil design or so forth, that violates this section. It makes no 212
difference what language you use. And even if it should be found by the court-martial that Radovich did not actually receive this bribe but nevertheless did conspire to receive the bribe, though fell short of receiving it, then it is a time-honored method, approved by the Army from the beginning and by the civil court—they have taken notice of that fact—you just strike out the actual consummated offense alleged, and if the evidence proves that an attempt was proved or that a conspiracy to do that thing was proved—just change the two words—it is done daily in the Army of the United States—you would be caught anyway, if, whatever the evidence shows, in the judgment of the court-martial, with its military precedents, it constitutes a violation of this common law article.

I do not know whether I follow the district attorney's 213
test. When we come to double jeopardy everybody talks test, test, test, until my head gets to ringing with "test". We are attempting to determine identical offenses. I assume offenses that are substantially identical; I assume that we are not going to strain this great constitutional guarantee and protection through such a fine sifter that we will neglect the substance of the matter.

Now look at the Grafton case. The United States Attorney, through inadvertence of course, when he said that the court-martial tried this soldier for murder. It being a time of peace, the war and insurrection being over, he could not have been tried for murder. In times of peace the military authorities cannot try a man for murder. What he was tried for was a degree of homicide which the court found to have been included within the crime of assassination which we commonly call murder, not exactly the murder at common law. It is Spanish law, your Honor, and we have done our best to conform of course the Spanish code to our own system of law, really, with great
215 success, I think. Homicide is really a will to do all of this, as we say, with malice aforethought. The court-martial was perfectly willing that the civil authorities should try this man. They knew they couldn't try him for murder. But the civil authorities at that time made no motion to try him. Therefore, the court-martial tried him. It was a case of shooting and killing these two people. He said in the line of his duty he killed them. He was tried by the court-martial for what he could be tried for, that is, something less than murder. And he was tried later by the civil court for something greater than what he was tried for, although the terms were not as accurate as ours are. We know that homicide is a lesser offense than murder. There, it is not quite so plain
216 under the Spanish code and never has been. But our court-martial charged him clearly with the unlawful taking of a human life. Of that he was acquitted. And the civil court came along and thereafter tried him of murder, as we would call it at common law, and they did it on the theory that they were following these two separate jurisdictions, one military and the other civil. And Justice Harlan said no and the Court said no, and it has been adhered to ever since.

Now in this case—in this case, your Honor—the charge is cryptically a violation of the 96th Article of War, that means a common law military. If "fraud" had been written in there it would have been fraud against the United States in violation of the 96th Article of War. If bribery, technically bribery under the penal code had been charged, it then could have been written, "Bribery as denounced by a certain section of the penal code in violation of the 96th Article of War." If conspiracy had been charged, or if the evidence had proved conspiracy but fallen short of proving the actual receipt of the bribe as the result of the agreement, that also would have fallen under the 96th Article of War. 218

Now that specification charges that Radovich received a certain sum of money from one of these co-defendants for the purpose of effecting the transfer, engineering the transfer of these men from a danger spot to a soft spot, if I may use that language. Now, it did not seem to me that the United States Attorney really touched upon a point I had hoped that I made in my points on authority. It is this: If we charge a man with the actual receipt of a bribe for this purpose, if we charge Radovich, as we did, with the receipt of this money for the purpose of effecting the transfer of these men from a dangerous to a soft spot, whether you call it bribery or not it makes no difference, it is the receipt of money from John Smith to Radovich for the specified purpose, and it all connotes 219 and necessarily connotes, a concert of action, an agreement between John Smith and Radovich, with the same thought, to the same purpose, the same end. Now the cases are almost legion to the effect that if the Government charges an accused, a defendant, with an offense that necessarily involves this agreement, this concert of action, this unity of thought, this same evil purpose agreed upon, they have charged all that can be charged,

and they can't come along and say, specification 2 or some other count in the civil side, charging you with having received from John Smith $1,000 for this unlawful purpose, understood by all; you can't come along then and say, specification 2 or count 2, you conspired to do that. Because whatever the language the Court used, they used a concourse of action, this sameness of thought that it had to be—that I can't receive money from John Smith to do this, to say that these men are transferred thus and so without having conspired with John Smith to have received that money for that purpose; and when I charge the receipt of money for that purpose I have also charged
221 him with a conspiracy. I have cited the cases in my brief.

I think, your Honor, getting rid of all the learning, the Latin terms used and quoted by the Supreme Court of the United States in at least two instances, converse and so forth, getting rid of that and getting down to brass tacks it seems to me that the reason why you can't charge—indeed it is said by the Court; I won't say "by the Court"—that the reason why you can't charge this completed act which necessarily involves this unity of action, understanding and purpose, is that the legislature has said, has fixed a punishment for that act and you can't string it out by calling it by a different name and give it some other punishment. Or if we want to pursue the common law concept, and as I read the books, this very thing is civil law rather
222 than common law perhaps, adopted by us, it is: Wherever you charge a man with having received a bribe from John Smith for an evil purpose to defraud the Government you have likewise charged him with the lesser included offense of the conspiracy, and you can't charge him separately and independently with both.

With all due respect to Mr. McGohey I would like to address myself for a moment to Manton case, the judge of the Court of Appeals here.

The Court: Let me interrupt you for a moment. It is now 3 o'clock, gentlemen, and I see very little likelihood of my hearing you as fully as I want to and read these cases and going into a further trial this afternoon, so it is my disposition to excuse the jury until tomorrow morning.

Mr. McGohey: That would be agreeable to the Government, your Honor.

The Court: No matter how I may rule I don't want to do it hastily, I want time to consider.

So will you notify the docket commissioner that he may excuse this jury until tomorrow morning as far as this case is concerned.

Mr. Ansell: Your Honor, we have some military witnesses here. I don't like to be responsible for keeping them here, and there is no reason why they shouldn't go home now. 224

The Court: All right. As far as the Court is concerned I see no point in any witnesses being advised to stay. There is no possible question of fact which may arise on these motions.

Mr. Ansell: I was wondering this, Judge. I don't want to interfere with the procedure—they are about an hour and a quarter, I understand from here, and I wonder if we might have sort of an understanding that they need not come, that they may stay in their offices, until we see, or think we see, about what time we will need them, and we could then telephone them. 225

The Court: Are they defendant witnesses?

Mr. Ansell: They may be. They are ours. Certainly the s I see here are ours. They may also be the Government's. I don't know.

Mr. McGohey: No, they are not. Are you referring to Colonel Harmeling and Colonel Miller?

Mr. Ansell: Yes.

Mr. McGohey: The Government has not called those gentlemen as witnesses.

Mr Ansell: They are mine, then, sir.

The Court: I have no disposition at all to put these gentlemen to any inconvenience, but I have no inclination at all to have the Court and jury wait while some witness is called. If you can guarantee you can get them here by the time they will be needed, I have no objection.

Mr. Ansell: I think your Honor is quite right about that, and I think it will be an imposition if I promise to get them here and I couldn't get them here. So I think I will have them here, because there may be need for them, and there we would tie up the procedure of this court.

The Court: Suppose we take a very short recess right
227 here. Let us take a ten-minute recess here. Recess until 3.15.

(Short recess.)

Mr. Ansell: I was about to say, your Honor, with respect to the Manton case, the argument or contention was made there quite as Mr McGohey said. But there all that was involved was, as I understand it, a simple matter of pleading. Judge Manton was charged really at great length, cases that were coming before him, page after page after page in the indictment, with a conspiracy to defraud the United States by various and divers means, page after page of that also; and the contention was made in behalf of Judge Manton that there was duplicitous pleading there, that he was charged in one specification, one paragraph really, of the indictment with both defrauding the
228 Government of his honest judicial services and, too, said the contention, also with bribery. The Supreme Court in that case said this: No, the Judge is charged with defrauding the United States by having all these cases before him, or probably would have them all before him, and that the method, bribery, was only auxiliary to it, was a mere incident that is not charged with the bribery as a substantive offense.

The Court: Isn't that somewhat analogous to your situation here?

Mr. Ansell: No, your Honor, because here we have two substantive charges, and I say that even the——

The Court: You mean in the court-martial?

Mr. Ansell: In the court-martial proceeding and this proceeding you have two substantive charges. You don't say that this bribery charged here is alleged as a mere auxiliary as, says the Supreme Court, it might be said in a conspiracy to murder, you might say, by means of a shotgun. I say in this case, your Honor, we have got in the court-martial a charge of defrauding the Government of the United States under 62, 96th Article of War, that 230
that includes—that very specification includes the conspiracy, the very conspiracy that is alleged here. The prime means that is alleged in Mr. McGohey's bill of indictment was, it was a part of this conspiracy, it was the part of the conspiracy, it was the gist of it, that this bribe should be given and received. That is set up as an independent charge; nothing auxiliary about it.

I have said, or tried to say, that you can't charge bribery and conspiracy to give or receive a bribe, and if you look at the 96th Article of War you can't charge fraud of the United States Government, using that term, without charging it under the 96th Article of War. The only specific charge of fraud against the Government of the United States upon the part of anybody in the military service is 231
found in the 94th Article of War, an old Civil War article which had to do with defrauding the Government of money, property, not such things as we are talking about here—influence, judgment, duty and so forth. The only conspiracy to defraud that is specifically set out by the article of war is also the 94th; defrauding the Government of the United States of money, material, false claims and so forth for money, a conspiracy, thus to defraud the Government of the United States under the 94th. All other

frauds, all these frauds, defrauding the Government of the benefits, the judgment, duty, services of its officers through trickery, bribery, or whatnot, are chargeable under the 96th Article. And I say that Major Radovich was charged with fraud against the Government of the United States.

The Court: But don't you have to go a little further? Was he not charged with a specific fraud in that he did receive a bribe?

Mr. Ansell: Let us take that specific fraud in that he did receive a bribe. Probably your Honor was ahead of me in thought. I think you were. Charge of fraud, a vio-
233 lation of the 96th Article of War, in that he did accept a bribe for the purpose of engineering the transfer of these boys from a danger spot to a soft spot.

The Court: But the specification does not go that far—yes, it does.

Mr. Ansell: Yes.

The Court: I will just ask one question to save myself some trouble. Are the specifications, the two specifications, under each charge identical?

Mr. Ansell: Yes, your Honor, because in order—do you follow it, sir?

The Court: Yes.

Mr. Ansell: I was getting rid of a little and only a little verbal differences, that this officer was charged with committing a fraud against the United States by receiving a
234 bribe to engineer the transfer of these soldiers to a soft spot. What was the fraud against the United States? What is a fraud against the United States as set out in the bill of indictment? Why do we get captivated by mere words? The fraud against the United States was the deprivation of the United States of the duty, loyalty and so forth, good conduct of Radovich, because, forsooth, he accepted a bribe that seduced him away from his duty to

the United States. And in the court martial, I say under the 96th Article of War, we say fraud, defrauded the United States—that is the charge, specification, a peculiarity of their language, in that he did receive a bribe for the purpose of engineering these men's transfer. That was the fraud against the United States. There is nothing else here.

I wish that we could divest ourselves of the mere difference in language between civil and military indictments. I wish we could so divest ourselves that we would get right down to the bone and marrow of this thing. Now I say that in the military charge if we said fraud were specification 1, in that he did receive a bribe for the purpose of transferring these men, that they could not have pleaded then—of course they could, but a lawyer would have stricken it down—in that he did conspire to receive the bribe, the second specification being necessarily included in the first. Now if the military charge can't say that, if our law says that you can't charge a man with the receiving of a bribe, which necessarily involves a conspiracy, that you can't put in specification 2, in that he did conspire to receive the bribe, then most assuredly you can't put in specification 2 over on the civil side of the docket, because specification 2, the conspiracy to receive the bribe, is wrapped up in specification 1. And I have cited cases for that, your Honor.

Your Honor is wonderfully patient. The subject is of great interest to me.

The Court: It is of great interest to me.

Mr. Ansell: Naturally we talk these things over, all lawyers do in offices; and it was one of the most interesting things to me to chase down the history of the law wherefore we could not charge a man with bribery, receiving a bribe I mean and conspiracy to receive a bribe, because the second was involved in the first. And the Supreme Court went to great length and great learning in discussing that question with a great deal of references to it. But I am con-

vinced that is the law. And I am convinced myself, your Honor, which means nothing, except that I have the courage of my conviction, that when Mr. McGohey indicted Radovich for fraud in that he did receive this bribe for this purpose——

The Court: That is not just the way he does.

Mr. Ansell: Fraud against the United States.

The Court: He indicted him for conspiring to defraud.

Mr. Ansell: I say, if he had done that—I am taking the hypothesis—if he had charged this fraud against the United States, charged that Radovich accepted the bribe, having done that he could not then charge separately and inde-
239 pendently fraud against the United States in that Radovich conspired to defraud the United States by accepting this bribe, though he never got it.

I hope your Honor follows it. Whether your Honor and I see eye to eye on it isn't the point. I am trying to make my point stand up.

The Court: I am very much interested in what you have to say, sir.

Mr. Ansell: It is not the Manton case at all.

The Court: It certainly has some analogy.

Mr. Ansell: Oh, certainly it does, sir. It has a kinship.

The Court: Looking at the case stripped of verbiage, the gist of the offense which Judge Manton was accused of committing was accepting bribes, wasn't it?

240 Mr. Ansell: What was that, sir?

The Court: I say, stripped of a lot of verbiage, is it not fair to say that the gist of the offense which Judge Manton was accused of was accepting bribes?

Mr. Ansell: A conspiracy to accept a bribe.

The Court: That is not what he was indicted for.

Mr. Ansell: That is what he was. I say, suppose your Honor, that the indictment had been acceptance of the

bribe, the question is, could he also have been indicted for conspiracy to accept the bribe?

The Court: The Circuit Court seems to have answered that question by saying that he was not indicted for accepting a bribe——

Mr. Ansell: Quite right.

The Court (continuing): —he was indicted for conspiracy to deprive the United States of his honest services, and the means was the acceptance of the bribe—the incidents.

Mr. Ansell: That was the auxiliary.

Now, in this case Radovich was indicted, I say, for fraud against the United States for accepting a bribe. The only 242
fraud against the United States was the transfer of these men and seducing the officers to make that possible. I think, your Honor—I don't know where we are going to come out, but I think I can say this, that the evidence to sustain the court-martial charge would also sustain the indictment if that was the test conversely.

The Court: A man convicted for removing and concealing distilled spirits did not do but one thing, but he was convicted and punished both for removing and for concealing.

Mr. Ansell: That was in the days I imagine of prohibition.

The Court: No, sir. This was afterwards.

Mr. Ansell: Well, unquestionably the Legislature can put in verbiage and that verbiage and that word, they 243
may be different offenses, but that is not the situation here.

The Court: That is my problem.

Mr. Ansell: We have the cases, even in the days of the prohibition era, not speaking of it I hope with disrespect, but, all the same, they were strange decisions. The seller and the purchaser of liquor in those days, the statute

said, "sell and buy", but the Court said it was not the intention of the Legislature to make the purchaser amenable. But in this case we do not get into all of that, your Honor, in my opinion. There are certain offenses, they are few, but they are all pointed out. I guess in the field of fornication and adultery, the author seemed to comment upon that, two people have to be engaged in the same act, and they have to agree because you cannot be indicted, the guilty parties cannot be indicted, for the evil conduct and for conspiracy to commit that evil conduct. Now, some people on the outside might have considered that this should take place but not with the two people in whom the concert
245 of action was necessary.

The same way with bribery. If you are indicted for the receipt of the bribe you cannot be indicted for conspiring to receive that bribe. My associate says he doesn't think—of course, we have said this so much, your Honor, it is nothing new—that the Manton case is in point in the matter of double jeopardy. I think your Honor will see that when you analyze it. I can't help you. I say it is not in point. I thank your Honor very much.

The Court: Do you wish to be heard, Mr. Keenan?

Mr. Keenan: I don't care to be heard, sir, at this time.

The Court: Do you wish to be heard?

Mr. McGohey: No, I have nothing further to offer.

The Court: All right, sir. Would it not be convenient for you gentlemen of counsel to be here at 10 o'clock to-
246 morrow morning?

Mr. Ansell: We will be here at ten.

The Court: The regular hour for the convening of this court is 10.30, but I would like to have you here at ten so that I may rule upon the questions which have been submitted in time, if I should rule adversely to the defendants, to go ahead with the jury trial at 10.30.

All right. Is there anything else for this afternoon?

Mr. McGohey: No, your Honor.

The Court: All right, then, this Court will take a recess until 10 o'clock tomorrow morning.

(Adjourned to Wednesday, October 3, 1945, at 10 o'clock A. M.)

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New York, October 3, 1945,
10 o'clock A. M.

TRIAL RESUMED.

The Court: Are you ready to proceed, gentlemen?

Gentlemen of counsel, I have for decision this morning 248
two questions: First, the question raised by the demurrer to the indictment, the second, the question raised by the plea of former jeopardy or autrefois convict filed by defendant Radovich, and the Government's demurrer thereto.

As to the demurrer to the indictment, I overrule the demurrer, as it seems to me that the indictment clearly sets out an offense under Title 18, Section 88 of the United States Code Annotated, which is commonly referred to as the conspiracy statute, and that the allegations of the indictment are sufficient and definite.

As to the plea of former jeopardy, filed by defendant Radovich, he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offense as alleged in the indictment here, and that 249
by virtue of the constitutional provision against double jeopardy, this prosecution must be dismissed. The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one, and therefore the constitutional provision against double jeopardy does not apply.

The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against

double jeopardy applies to prosecutions in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in the indictment here is substantially the same as the offense for which he was tried by a court-martial. Simply stated, the record of conviction by the court-martial shows that defendant Radovich was convicted of accepting bribes from his two co-defendants here, for the purpose of effecting transfers of certain soldiers. By his counsel, he asserts that the offense charged against him in the indictment here is that of conspiring to accept such bribes which was by necessary
251 implication included in the offense of which the court-martial convicted him.

It is well settled, as a general rule, that the substantive offense of violating a statute or defrauding the United States, and conspiring so to do, are separate and distinct crimes, and convictions may be had on both offenses. However, defendant urges that the crime of accepting a bribe necessarily implies a concert of action, which amounts to conspiracy between the giver of the bribe and the acceptor thereof, and, further, that inasmuch as the indictment here is essentially an indictment for conspiracy to accept a bribe, the offense here charged is substantially the same as the offense for which defendant was tried by a court-martial. I find it unnecessary to decide whether or not a prosecution for accepting a bribe precludes further prose-
252 cution for conspiracy to accept a bribe, because I am satisfied that the offense charged in the indictment here is not the offense of conspiring to accept a bribe. The offense here charged is that of conspiring to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased judgment of an officer of the United States Army free from corruption, partiality and so forth, and more particularly "its right to the conscientious, faithful, disinterested, unbiased services and judgment of the

defendant Walter V. Radovich as an officer of the United States Army free from corruption" and so forth.

It is true that the matter of the bribe is involved in the conspiracy charge, but the indictment does not charge the giving or receiving of bribes as a substantive offense, nor does it charge a conspiracy to give or accept bribes. Of the indictment here, it seems to me that it may be fairly said, as was said of the indictment in the Manton case, 107 Fed. (2d) 834, at page 839:

> "It charges a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to 254
> effect a conspiracy to murder, is purely ancillary to the substantive offense."

It is therefore my conclusion to sustain the Government's demurrer to the plea of former double jeopardy filed by defendant Radovich.

Mr. Ansell: I assume we may have an exception to that, sir?

The Court: Exception may be noted.

Now are you ready to proceed with the trial, gentlemen?

Mr. McGohey: The Government is ready.

The Court: Let me make an inquiry. I find that in every jurisdiction which I sit the method of impaneling a jury differs. In my own jurisdiction I do all of the interrogating of jurors on the voir dire. I know in Washington the 255
practice is different; the practice is usually different here—counsel do the interrogation. Is that not correct?

Mr. McGohey: Not as a rule, I think, your Honor, except that some of the judges allow counsel a little more leeway than others. Some of our judges here insist on doing all the examining and insist that any questions which counsel wish to put to the jurors be put through the Court. Other judges, however, leave them perfectly free to examine.

The Court: Since you mention it, in this court I have done it both ways. What is the desire of you gentlemen of counsel first?

Mr. McGohey: My own view, your Honor, is that the Court should question the jurors and if the Court's questions do not cover such subjects as counsel feel need to be covered, then counsel might supplement that questioning with their own.

The Court: What is your thought?

Mr. Ansell: We agree with that. There was one question, and of course we do not care who would ask it, but it seems to us that the Court might well ask it if it would—
257 we wanted to suggest to your Honor one question on the voir dire. That is the only question that we can see now.

The Court: What is that?

Mr. Ansell: And that question is, in effect, phrased as your Honor may deem best, whether or not if it develops in this trial that the defendant Radovich has already been tried by court-martial and convicted for an offense growing out of the same transaction as this, whether that fact would so prejudice them that they could not fairly try this case. It seems to me it is almost necessary that somewhere along the line of this case that fact will come out on cross-examination or otherwise. We feel that in substance that question ought to be asked.

The Court: Well, I think it inevitable that there is going to be some reference to the court-martial trial; certain wit-
258 nesses will be asked if they did not make conflicting statements. It was my thought that it definitely should not come to the jurors' knowledge that there had been a conviction of anyone, and if I ask the question as you suggest it I will tell them that in the first instance. It seems to me it would be to the prejudice of your client.

Mr. Ansell: I have an idea that your Honor is probably correct about that.

The Court: I would not at all object to stating to them that it is going to appear in evidence in all likelihood that the defendant Radovich has been tried by a court-martial, that the result of that trial is immaterial and should not in any way be considered by them, and ask them if the fact that there has been such a trial would in any way influence their verdict. I think that is fair.

Mr. Ansell: We think that is correct, your Honor.

The Court: How about you, Mr. Keenan?

Mr. Keenan: I am going to object on behalf of my defendant to any reference on the part of anyone in this case to any court-martial. The court-martial of Radovich I think has nothing to do with the issues involved with my 260
defendants and might well be prejudicial to their defense. It is with great respect I make that statement. That is my belief.

The Court: Your position is quite interesting, and I have to weigh it with respect to the request made by counsel for Radovich.

In view of Mr. Keenan's objection, what have you to say, gentlemen?

Mr. Ansell: Your Honor, I regret to be in the position I am. I do not seem to be able to hear anything.

The Court: I sympathize with you, sir. I have quite much the same difficulty.

Mr. Ansell: I thought your Honor was addressing counsel for Radovich.

The Court: I was. I asked this question: Mr. Keenan, 261
counsel for the Bayers, co-defendants, said he objects to any reference by the Court to any court-martial proceeding against any defendant as he thinks it would be prejudicial to his clients.

Mr. Ansell: I do not know that I am obliged to comment on that, your Honor. It does seem to me that it is inevitable in this trial that reference must be made to the fact that there was a court-martial. Some of the witnesses appearing here will be——

Mr. Keenan: I would state to your Honor, if I may be permitted, that in the event that were it found to be essential to the protection of the legitimate interests of the defendant Radovich, we would ask for a severance so that our clients could be tried separately where they would not be subjected to that disadvantage with the jury. In the event that any such ruling is made I would most respectfully make that motion for a severance at that time because of this request of counsel, which I am bound to say, I must recognize as having merit from the standpoint of Radovich and his counsel, but which from our own viewpoint it seems to me would be mischievous and would be sub-
263 versive to a just determination in the minds of the jury and would be prejudicial to us, the defendants Bayer.

Mr. Ansell: This has taken something of an unexpected turn to us, your Honor, as things frequently do in the course of a trial, but we have no objection to any severance that might take place.

The Court: Do I correctly assume that the Government opposes a severance?

Mr. McGohey: Yes, your Honor, the Government does oppose a severance.

The Court: I don't know specifically whether a motion has been made for a severance, but——

Mr. Keenan: I am making that, your Honor, at this time in view of the situation that has arisen by virtue of the request for certain inquiries made of the jury which,
264 if made, I believe would be prejudicial to the rights of the defendants Bayer in this case.

The Court: So far it is only a request which I have not complied with, and at this time certainly I will overrule a motion for a severance.

Mr. Keenan: May I ask your Honor if I may have an exception to that ruling, and it may be renewed at a later period of time?

The Court: Yes.

I think I am going to do it this way, gentlemen. I shall not tell the jury on their interrogation on the voir dire that there has been any proceeding by court-martial or any other proceeding, but I think I shall ask them that if it should appear that there has been any other legal proceeding concerning any defendant would they be influenced by such other legal action. At the same time I shall tell them that it should not. Now, if after I have said what I am going to say you have further motions, I will of course entertain them.

Is the jury ready?

Mr. Keenan: Your Honor, before the jury is called in and in the interest of saving time, I would like to object 266
to the introduction of any evidence and to ask this cause be dismissed on the ground that in view of the statement that this indictment does not consist or comprise the offense of conspiring to accept a bribe, we believe, the defendants Bayer, that a cause of action is not stated, that the indictment is invalid and therefore, at least for the protection of the record, we would like to urge at this time that the taking of evidence be not—there be no further proceeding and the indictment be dismissed because it does not state an offense.

The Court: All right. Motions will be overruled.

Mr. Keenan: To which we have an exception?

The Court: Yes, you have an exception.

Now, give me just a little bit more information——

Mr. Ansell: If your Honor please, I have conferred with 267
my associate here and we are perfectly satisfied with your Honor's thought, the first thought, that you would ask the jurors on the voir dire with respect to the court-martial, omitting, however, all reference to the conviction. Your second thought, your Honor, we think is too narrow and we ask your Honor to revert to the first thought and if he feels that he ought not to do so that he give us an exception to that. Whatever the practice may be here, your

Honor, I don't know, but we think that that question ought to be asked by your Honor, I mean the first question, omitting the conviction.

The Court: I hardly see how you can except to what I have said until I have said it.

Mr. Ansell: That is probably true.

The Court: If when I have interrogated the jury you then wish to except, I will grant you an exception.

Mr. Ansell: Yes.

The Court: But I would like for you to state now specifically what you do wish me to ask the jurors with reference to the court-martial.

269 Mr. Ansell: If the reporter could read back what your Honor said and what I said——

The Court: I have what I said pretty well in mind. I don't know about what you said.

Mr. Ansell: I said in substance, or I intended to say this——

The Court: If I may interrupt, what I want to know now is specifically what you wish me to ask the jury.

Mr. Ansell: I would like your Honor to ask the jurors if it should appear in the course of this trial that the defendant Radovich had been court-martialled for an offense growing out of the same transaction, out of which this indictment—the same or similar transaction, if that fact would create a prejudice in their minds against Radovich so that they could not fairly try the defendant Radovich
270 in this case on the evidence.

The Court: All right, sir, I think I understand you. Now, if what I say does not satisfy you then I will give you an opportunity to except.

Now will you give me a little information before they come in: Where do the defendants Bayer reside? I don't mean the street address, but I mean so that I can identify them for the jury.

Mr. Keenan: They live in Lawrence, I believe, Long Island.

The Court: Both of them?

Mr. Keenan: Samuel Bayer lives in Lawrence, Long Island, and Elias Bayer lives in New York City, on 86th Street.

The Court: West 86th Street, New York. Where is the residence of the defendant Radovich?

Mr. Ansell: Radovich's home is in California, Los Angeles. As your Honor knows, a man acquires no domicile in the Army. He is now stationed for duty or temporary duty at Andrews Field, some 10 or 12 miles outside of Washington, and I think near Marlboro, Maryland. 272

The Court: All right, sir, thank you.

All right, let them come in.

(Oct. 3, 1945.)

(The entire panel of jurors was sworn.)

(Twelve jurors placed in the box.)

The Court: The case which you are now—some of you will be—called upon to try is the case of the United States against Samuel Bayer, Elias Bayer and Walter V. Radovich.

Samuel Bayer resides at Lawrence, Long Island; Elias Bayer at West 86th Street, New York City, and the defendant Radovich has his home in Los Angeles, California. He is presently in the United States Army, a Major in the United States Army, and stationed at Andrews Field, 273 near Washington.

Counsel in the case for the Government are Mr. John F. X. McGohey, Mr. Edward C. Wallace, Mr. Samuel Rudykoff; for the defendant Samuel and Elias Bayer, Mr. Joseph B. Keenan and Mr. Washington I. Levy, and for the defendant Radovich, General Samuel T. Ansell and Mr. Richard Robb.

Are any of you in any way by blood or marriage related or connected to any of those persons, defendants or counsel? (No response.)

Have any of you any relations in the office of the United States Attorney here in New York? I take it that none of you are employed by the United States Government. All right.

Now the offense which is here charged and which you will be called upon to try is that of conspiracy, that is, the Government charges that these three defendants conspired to defraud the United States of the honest and conscientious service of an officer of the United States, the defend-
275 ant Radovich.

Now, has any of you formed or expressed an opinion as to the guilt or innocence of any of these defendants as to the offense charged? Do any of you know any reason whatsoever which would prevent your giving the Government and these defendants a fair trial on this charge?

Now I shall tell you very briefly—in more detail later—that it is your sworn duty to try and determine this case upon the evidence and the law which you hear in this courtroom. It is possible, however, that during the course of this trial you may hear some reference to some other legal proceeding involving the defendant Radovich, growing out of some of the transactions about which you will hear evidence. Now can you fairly give this defendant Radovich and all the defendants a fair and impartial trial, irrespec-
276 tive and disregarding anything which you may hear about any other legal proceedings elsewhere? Do any of you feel any doubt about that?

Are there any further questions, gentlemen? (To clerk:) All right, hand the list to counsel.

I think at this point I would like to have counsel come up to the bench.

(The following proceedings were had at the bench, out of the hearing of the jury.)

The Court: I think probably, gentlemen, if there is to be an exception to what I have said, I should hear and consider it now, before I require you to exercise your challenges. Have you anything to say, Mr. Keenan?

Mr. Keenan: No, I haven't any exception.

The Court: Have you?

Mr. Ansell: I think not. I wonder if you would object to asking the jury whether they have read anything about this case in the papers—we would like to know—or who have not, for the purpose of exercising a peremptory objection.

Mr. Robb: Or any magazines.

The Court: I have no objection to asking that. 278

Mr. Keenan: At any time.

Mr. Wallace: Shouldn't it be, have they formed any opinion as a result?

The Court: That may follow.

Mr. Keenan: But I have no exception.

(The following took place before the jury:)

The Court: It has been suggested, ladies and gentlemen, that I ask you one further question. Have any of you, so far as you presently can recall, read anything in the newspapers or magazines or weeklies, news weeklies, with reference to this case?

(Two jurors so indicate.)

The Court: You two gentlemen have. Well, let me ask you further, has what you have read, created any impression in your mind as to the guilt or innocence of any of 279 these defendants which would make it improper for you to undertake to give a fair and impartial trial?

Do you feel that any impression has been created on you, or that you could give a fair and impartial trial? All right, sir.

A Juror: I also have read—just the headlines, because I am not interested in those things in the paper; so, I mean, I know something about it but it hasn't made any impression on me at all because I never read those.

The Court: Your answer would be the same then.

The Juror: I never read any through.

The Court: All right, sir. By the way, I have omitted something, gentlemen, and that is the question of whether or not we should have alternate jurors.

Mr. McGohey: I think we should.

The Court: I believe that comes up with selecting the jury.

Mr. McGohey: After you select the first twelve, yes, sir.

The Court: It certainly could do no harm.

(Jurors 6 and 7 excused by the defendants.)

(Two new talesmen were seated in the box.)

281 The Court: Now, sir and madam, you paid careful attention, no doubt to the questions which I asked the other jurors who were in the box. Would the answers which you give to those questions be in any way different from the answers the other gentlemen made? Have you read in the newspapers or news weeklies any reference to this trial? Have you, sir?

A Juror: I don't think so, sir.

(Juror No. 6 excused by the Government and replaced by a new talesman.)

The Court: You have no doubt paid close attention to the questions?

The Juror: Yes, sir.

The Court: Would the answers which you would make to the questions which I have propounded be in any way
282 different from the answers of the other jurors in the box? Have you read any accounts relating to this charge in the newspapers or magazines?

The Juror: No, sir.

The Court: All right.

Mr. McGohey: My associate, Mr. Wallace, I think, has previously in one of his trials here had as a juror one of the jurors who has recently been selected. I think that is

juror No. 7. And I am sure that Mrs. Sloan was answering accurately when she said she did not know anybody.

The Court: I did not ask her that. I asked if she were in any wise related or connected with anyone.

Mr. McGohey: I thought you had asked whether she knew, whether the jurors knew any of us, your Honor.

The Court: I haven't asked that.

Mr. McGohey: I wanted to make that disclosure on behalf of the Government, your Honor.

The Court: Would that fact in any way influence your decision in this case?

Very properly, that would be announced in court.

Mr. McGohey: Yes. The Government makes no objection to the lady, but I just wanted to make that disclosure. 284

The Court: I understand.

(Jurors 1 and 12 excused by the defendants, and were replaced by new talesmen.)

The Court: You have heard the questions and answers which have previously been asked and given. Would your answers to the questions which I have asked be in any way different from the answers of the other jurors?

Juror No. 1: Well, I have a son in the F.B.I.

The Court: You have a son in the F.B.I.?

Juror No. 1: Yes, sir.

Juror No. 12: I have read about this matter quite a bit, and I have a very definite opinion on it.

The Court: You have an opinion, have you, which would require evidence to remove? 285

Juror No. 12: Well, very considerable.

The Court: I didn't hear that.

Juror No. 12: Very considerable.

The Court: I think I had better excuse you. The Court will excuse you.

Now you say, madam, that you have a—what is the relative?

Juror No. 1: He is a special agent with the Federal Bureau of Investigation.

The Court: Is he your brother?

Juror No. 1: My son.

The Court: Would that fact influence you in your determination of this case?

Juror No. 1: No, I don't think it would.

The Court: Would it incline you at all to give more credence to the evidence offered by the Government?

Juror No. 1: Wel, I don't know. I think I would rather be excused.

The Court: She said she would rather be excused. Do you feel that your relationship—your son—would incline
287 you to give more credence to what the Government witnesses say?

Juror No. 1: I think it would.

The Court: I think I will excuse you. Call two more.

(Jurors 1 and 12 excused and replaced by two new talesmen.)

The Court: Now, gentlemen, you have listened carefully to what has taken place, I assume. Would your answers to the questions which I have propounded be different in any way from the answers of the jurors who were in the box? And you, sir, have either of you read anything in the newspapers or news magazines about this occurrence? Have you, sir?

A Juror: Not as I remember, your Honor.

288 The Court: All right. Hand the list to counsel.

(Juror No. 10 excused by the Government and replaced by a new talesman.)

The Court: Madam, as to the questions which I have propounded, would your answers be different from those of the jurors who were in the jurybox? Have you read anything about this? All right.

(Jurors 2 and 9 excused by the defendants and replaced by new talesmen.)

The Court: Ladies, you have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have either of you read anything in the newspapers or magazines about this occurrence? All right.

(Juror No. 8 excused by the Government and replaced by a new talesman.)

The Court: You have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have you read anything in the newspapers or news magazines about this occurrence? 290

A Juror: I heard mention of it yesterday.

The Court: Would what you have read cause you to have any conviction as to the guilt or innocence of these defendants?

The Juror: No, sir.

The Court: All right.

(Jurors Nos. 5 and 8 excused by the defendants and replaced by new talesmen.)

The Court: You have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have you read anything in the newspapers or news magazines about this occurrence? All right. 291

(Juror No. 10 excused by the Government and replaced by a new talesman.)

The Court: You have heard the questions which I have asked and the answers which the jurors have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jury box?

Have you read anything in the newspapers or news magazines about this occurrence? All right.

(Juror No. 4 excused by the defendants and replaced by a new talesman.)

The Court: You have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to those questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have you read anything in the newspapers or news magazines about this occurrence? All right.

(A juror excused by the Government and replaced by a new talesman.)

293 Mr. McGohey: That completes the Government's challenges. It completes both sides now.

The Court: Do I understand correctly, gentlemen, this is the jury?

Mr. McGohey: That is correct, your Honor.

The Court: Though as to the matter of alternate jurors, we have exhausted our panel, I still think it probably would be worth while to take the time to impanel all the jury even though I have to interrogate them.

Mr. McGohey: Yes, I agree with that, your Honor.

The Court: All right. (To clerk:) Get some up.

Mr. McGohey: I suggest, your Honor, that your Honor hasn't asked this witness about possible prejudice.

The Court: I beg your pardon. I overlooked it. As to the questions I have asked the other jurors, and the an-
294 swers which they have given, would your answers to those questions be any different?

The Witness: No, they would be the same.

The Court: Have you read anything about the——

The Juror: No, sir.

The Court: All right, sir.

(Conference at bench between court and counsel.)

The Court: Now I shall tell you very briefly—in more detail later—that it is your sworn duty to try and deter-

mine this case on the evidence and the law which you hear here in this courtroom. It is possible, however, that during the course of this trial you may hear some reference to some other legal proceeding involving the defendant Radovich growing out of some of the same transactions about which you will hear evidence here. Now, can you fairly give this defendant Radovich and all the defendants a fair and impartial trial, irrespective and disregarding anything which you may hear about any other legal proceedings elsewhere?

The Juror: Yes, sir.

The Court: Do you feel any doubt about that at all?

The Juror: No, sir. 296

The Court: Have you read anything about this case?

The Juror: No, sir.

The Court: All right, sir. Now that completes the jury panel. On the matter of alternates, call two alternates.

(The jury was duly sworn.)

(Two alternate jurors were placed in the box.)

Mr. McGohey: I would like to know, if your Honor please, whether the defendants consider the alternate satisfactory or whether we are going to have——

The Court: You are entitled to two challenges.

Mr. McGohey: Two for the defense and one for the Government.

The Court: Do you care to exercise your challenge?

Mr. Keenan: We are satisfied with the jury as it is now, your Honor. 297

Mr. Robb: Defendant Radovich is also satisfied.

Mr. McGohey: The Government is satisfied, your Honor.

The Court: All right. Are you ready to proceed? Have the defendants pleaded?

The Clerk: Yes.

The Court: All defendants have been arraigned and pleaded, and are here?

The Clerk: Yes.

Mr. McGohey: I suggest, your Honor, that we might take a recess and let the jury go to the jury room.

The Court: First, lest I forget it, we have not sworn the alternate jurors.

(Two alternate jurors sworn.)

The Court: Ladies and gentlemen, you are about to try this case now, and I want to charge you and admonish you to bear it in mind; do not discuss the case now nor undertake to discuss it during the trial. You should hear all the evidence and the charge of the Court upon the law applicable to the case before you undertake to decide it. So do not discuss it and undertake to arrive at any conclusion
299 until you have heard it all. Then, more particularly, do not discuss it nor permit anyone else to discuss it with you during the course of the trial. Then the matter of newspapers. I do not know whether there will be any mention of this case in the newspapers or not, but if there is, I charge you not to read the accounts. You should not read the newspaper accounts of this trial, if there are any. I do not know whether there will be any or not, but if there are any such, then I will charge you not to read them, and if you should inadvertently see a headline or begin to read, I charge you particularly that you should disregard anything you see in a newspaper or in any other publication or which anyone might inadvertently tell you about. It is your sworn duty to try this case upon the evidence which you hear in this room, and the law as I shall give it to you
300 after you have heard the evidence. I go into this detail now so that you may bear it in mind whenever we adjourn from day to day or hour to hour.

The court will now take a ten-minute recess.

(Short recess.)

The Court: Are you ready, sir?

Mr. McGohey: May it please the Court, I should like to ask at this time the Court to direct that all witnesses be excluded from the courtroom.

The Court: All right.

Mr. McGohey: Pardon me, your Honor. With respect to that, there is an agent of the Federal Bureau of Investigation who was in charge of this investigation.

The Court: You are entitled to one person.

Mr. McGohey: And I would like to have him here with me. Mr. Flynn.

The Court: All right. Call him.

Mr. Robb: We expect that we may have to call Mr. Wallace as a witness.

The Court: Who?

Mr. Robb: Mr. Wallace, the Assistant United States Attorney, as a witness. 302

The Court: Do you wish to exclude him?

Mr. Robb: I think if we are going to have one person, he ought to have either Mr. Wallace or Mr. Flynn.

The Court: No, I don't think so. I think he is entitled to one Government representative in addition to counsel. Mr. Wallace is of counsel, is he not?

Mr. Robb: Yes, but I would like to have it understood that we do expect to call Mr. Wallace.

The Court: You may call him if you wish, but I am not going to exclude him. Who is the person you wish?

Mr. McGohey: Mr. Flynn.

The Court: All right. All other persons who are witnesses in the case will please retire. Mr. Clerk, show them where they may go.

Mr. Ansell: May we approach the bench? 303

The Court: Yes, sir.

(Conference at the bench between Court and counsel.)

October 3, 1945.

THE GOVERNMENT'S OPENING.

Mr. McGohey: May it please the Court, General Ansell, Mr. Keenan, Mr. Cohen, Mr. Levy, Mr. Foreman, Ladies and Gentlemen of the Jury:

Now on behalf of the Government I am about to outline to you what this case is about, and what the Government charges the defendants have done in connection with this indictment.

Before I say anything at all, either about the indictment or about any of the facts in the case, I would like strongly
305 and as seriously as I can to impress upon you one thing. Nothing that I say to you in this opening is evidence; it proves nothing. The evidence in this case will come to you from the witnesses on the stand here and from such documents as are permitted in evidence and disclosed to you. That will be the evidence. So the mere fact that I say anything to you, I don't want you to feel that that is testimony. And, by the same token, when the defendants' attorneys address you, if they do, the same rule will apply.

Mr. Keenan: I object to the jury being lectured by the United States Attorney. I think that is for the Court.

The Court: Objection overruled, sir.

Mr. Keenan: Exception.

The Court: Go ahead.

Mr. McGohey: Nothing that I say to you I want you
306 to take in the form of evidence. Now, likewise, this case starts with an indictment voted by the grand jury of this court. This indictment charges that the three defendants in this case, Samuel Bayer, Elias Bayer and Walter Radovich, conspired to defraud the Government of the United States out of its right to the conscientious service of Walter Radovich as an officer of the United States Army.

Now that charge is not evidence; it is merely a charge which the Government will have to prove beyond a reasonable doubt, beyond your reasonable doubt.

The indictment charges, as I said, that the conspiracy was to deprive the Government out of its right to the faithful, conscientious, disinterested and unbiased services and judgment of officers of the United States Army, and, particularly, the service and judgment of Walter Radovich, free from corruption, partiality, improper influence, bias, dishonesty, and fraud.

The indictment further charges that it was a part of the conspiracy that the defendants Samuel Bayer and Elias Bayer would make the acquaintances of various officers 308
of the United States Army, stationed at various Army posts, including the Army post at Mitchel Field, in Long Island, and other fields which are mentioned in the indictment.

And it charges that the defendants Samuel and Elias Bayer would, during the period of the indictment, make gifts of money and other valuable things to these officers, and particularly to the defendant Radovich. And the indictment further charges that it was a part of the conspiracy that during its continuance the two Bayers, Samuel and Elias, would give sums of money aggregating approximately $7,000, to the defendant Radovich, then an officer of the United States Army, with the intent to influence the action of the said Walter V. Radovich and to induce him in violation of his lawful duty, to transfer 309
two privates in the United States Army, one Martin Bayer, who was the son of Samuel Bayer, and the nephew of Elias Bayer, and another soldier named Melvin Usdan, who was the nephew of Samuel Bayer; transfer them from and to various units in the United States Army for the purpose and in order that these two soldiers, Martin Bayer and Melvin Usdan, might not be attached to a unit

of the United States Army which was about to be sent out of the continental United States for service overseas.

And it is further charged as a part of the conspiracy that the defendants would conceal their various transactions and that they would cause the destruction and the alteration of various books and records which contained evidence of their transactions, the changes and the obliterations and the destruction being done for the purpose of hiding these various transactions. That is substantially what the charge is.

Now the Government will prove that some time in the early part of the year 1943, the defendant Elias Bayer
311 made the acquaintance of an officer named Colonel Vidal, who was then stationed at Mitchel Field, and other officers. That Colonel Vidal and another officer by the name of Roeser he first met at the Cocacabana night club here in New York, that he had conversations with them that evening and learned that they were stationed at Mitchel Field, where the two soldiers Martin Bayer and Melvin Usdan were then stationed, and at the same time he informed these two officers that he was in the textile business and that he might be in a position to assist them in securing uniforms at cost, or at less than the retail price. And thereafter this acquaintance ripened into a friendship, perhaps not a friendship, a deep friendship, but an acquaintance or a friendship that was just more than a casual thing; they saw each other frequently from time to time; and these
312 officers and other officers at Mitchel Field who thereafter became acquainted with Elias Bayer were entertained from time to time by Elias Bayer at night clubs, at theatres, and sporting events of various kinds. And then after Elias had made these acquaintances he introduced at least some of these officers to his brother Samuel Bayer, and among the officers whom he introduced to his brother Samuel was the defendant Walter Radovich, now a Major in the United States Air Corps, and at that time a Captain.

Captain Radovich at the time was in command of the Headquarters Squadron of the First Fighter Command at Mitchel Field. And the two boys, the two young soldiers, Martin Bayer and Melvin Usdan, were then serving as clerks in the office of the Headquarters at Mitchel Field, that is, Base Headquarters. That was a different headquarters from the headquarters to which Major Radovich was attached.

Now in addition to these officers, the defendant Samuel Bayer also became acquainted with another officer in the United States Army, a medical officer, a Major Morris H. Saffron. He had made Major Saffron's acquaintance some time in 1942 or early 1943, through an introduction from 314
another relative of Sam Bayer's, a man by the name of Busch, one of three brothers who conduct a uniform company known as the I. Buss Uniform Company.

Now shortly after the Bayers, Elias and Samuel, became acquainted with these various officers at Mitchel Field, including Major Radovich, arrangements were made through the intercession of the Bayers with Major Radovich and other of the officers to have these two boys, Martin Bayer and Melvin Usdan, transferred from the headquarters of the base to the headquarters of the First Fighter Command, the headquarters squadron of which Major Radovich was the commander, and that transfer was effected, and so the boys came to the very organization of which Major Radovich was the commanding officer.

And then some time in the summer of 1943, the boys 315
being in the headquarters of the First Fighter Command, the defendant Samuel Bayer wanted to have his son and his nephew, Martin Bayer and Melvin Usdan, transferred out of this First Fighter Command and into the medical detachment at the base hospital at Mitchel Field, and he spoke to Major Radovich about that and Major Radovich agreed to make—to approve the request for the transfer if the boys made the request, or if a request was made

for their transfer, whether it came from the boys or anybody else. And the request was made for their transfer to the medical hospital, but it didn't go through right away, but after it had been made and before it had gone through, Samuel Bayer and Elias Bayer came down to Mitchel Field and they talked to a couple of officers there and asked them why wasn't it going through, and they came back a second time to find out why it wasn't going through. And the reason they were very anxious to have it go through was that they had promised Major Radovich that if he effected the transfer of the boys out of the Fighter Command into the medical detachment, Sam Bayer
317 had promised that he would pay him $2500. Well, eventually the transfer went through. And thereafter on three different occasions Samuel Bayer did make payments in cash to Major Radovich. He paid him cash; at one time in a taxicab, at another time in a car in front—not in a car but in the lobby I think it was of Radio City or along in front of one of the buildings in front of Radio City, and then a third time he made a payment of cash to him in the lobby of the St. Moritz Hotel, and the total of those payments in cash aggregated $1950 which Samuel Bayer paid in cash to Major Radovich for the purpose of effecting the transfer of these boys from the First Fighter Command Headquarters to the medical detachment at Mitchel Field.

Now I said to you that Sam Bayer, from the time that
318 the transfer was first proposed, between that time and the time that it actually went through, he came down to call on officers at Mitchel Field to ask their assistance in getting that through or to find out why it hadn't gone through; and the testimony will show that Sam Bayer urged at that time and pleaded at that time to have that order go through, because, as he said, he didn't want his boys to be out in any outfit which would be operating outside of the continental United States; he wanted them kept

here in this country and he wanted them if possible kept right at that hospital at Mitchel Field. Well, the transfer did go through, but a very few days after, as a matter of fact about five days after, orders were issued transferring these boys out of the hospital unit at Mitchel Field, and transferring them to units of airborne engineers; one boy was transferred to Westover Field in Massachusetts and the other boy was transferred to Bradley Field, in Connecticut, both units of the airborne engineers.

Now as soon as that happened, the defendant Samuel Bayer immediately began to call up all of the officers whom he could contact at Mitchel Field and to plead with them please to get his boys out of these outfits which were 320
going overseas and which, in his opinion—any outfit which in his opinion were very dangerous, and he wanted to get them out of there just as soon as he could. He spoke to various officers about that, and the officers whom he spoke to both personally and in conversations, in telephone conversations, will testify to those conversations right from this stand. And one of the men he spoke to was Major Radovich, a co-defendant in this case, Radovich, the man to whom he had previously paid $1950 to effect the transfer of the boys from the First Fighter Command into the medical unit. As a matter of fact, one of the very first he got in touch with was Radovich, and wanted to find out what happened, what fell through, why are the boys being changed, "I thought they were in the medical department, now they are being shipped out to the engineers. 321
Why?"

The various officers that he contacted told him that in their opinion there wasn't anything that could be done about it, the boys were transferred from the field into these units; the thing for Sam to do was to let them alone. But he pleaded with Radovich and continued to plead with Radovich—"isn't there something you can do to get my boys out of this airborne engineers? They are going to be flying, they

are going to be paratroopers, they are going to be in great danger. I want them out of there." Radovich told them there wasn't anything he could do about it, to leave them alone. But he continued to plead with Radovich to get them out, and finally he offered Radovich $5,000 for each boy whose transfer he would effect out of the airborne engineers into some outfit that would be safe, some outfit that wasn't going to go overseas.

Now bear in mind that at all times during the conspiracy, and at all times during the period which I am discussing with you, these young men were classified as clerks, they were clerks in the base headquarters, they were
323 clerks when they were with the First Fighter Command, they were clerks when they were in the medical detachment at the hospital, they were medical clerks when they were transferred to the airborne engineers. At no time were they combat soldiers in the sense that they had to fight with guns. They were clerical men and so classified, and the orders, the United States Army orders, transferring them from place to place, will clearly show that classification.

Well, the offer was made to Radovich. Now in the meantime Radovich had become associated—he had left the First Fighter Command at Mitchel Field and he had become a member of a group working with Colonel Philip Cochran in organizing what subsequently became the First Air Com-
324 mando Unit, a unit that subsequently went to Burma. That Air Commando Unit was something to which Cochran had been assigned to organize specially. He was given a free hand in picking personnel for that unit. He was given by the War Department and by the Commanding Officer of the Air Forces the highest priority for the selection of personnel, so high that the ordinary channels of transferring either enlisted personnel or commissioned personnel in the Army were cut short, they were streamlined and simplified, so that if Colonel Cochran or anybody

authorized by him wished to have a man transferred from any unit in the United States to the Air Commando Group, all that officer had to do was to contact a certain office in Washington, give the name of the man he wanted transferred, his serial number and so on, and the place of his location, and immediately telegraphic instructions would be issued out of Washington to the Commanding Officer of the man who was wanted to be transferred, and forthwith orders would be issued by the local commander, immediately transferring that man out of his unit and over to the First Air Commando Group.

Now, of course, at that time, in the fall of 1943, the organization of this First Commando Group was a secret of 326
the highest order. As a matter of fact, the Air Commando Group was not so designated; it was designated in the Army records as Project CA, and then some number which we will get in the course of the evidence. But that is how they regarded it. And they had this special arrangement set up in the Army Air Forces so that, immediately, personnel could be gotten into that outfit.

Now, after the pleading by Sam Bayer and the offer of the payments of the $5,000 for each boy, Radovich consulted with an officer at Mitchel Field familiar with personnel matters, to inquire whether or not, first, this officer thought it would be possible to effect the transfer of Martin Bayer and Melvin Usdan out of the airborne engineers, and into some other outfit, and the officer advised Bayer 327
that he did not believe that could be done because the airborne engineers, being an alerted outfit, destined shortly to go overseas, you couldn't transfer a man out of that kind of organization into an organization that was destined to stay at home, because in 1943 most of the troops were being processed for overseas service. And then later Radovich asked him whether or not he thought a transfer from the airborne engineers to the air commando group would be approved, and he was informed that that prob-

ably would be approved, because of this very high priority which the Government had placed on the air commando group. And then Radovich said, "Well, if I get them into the air commando group and we are overstaffed, we don't need them, could I get them into something else, could I get them into, for instance, the Air Transport Command?" And this fellow said, well, he thought probably they could. But the immediate thing was to get them out of Westover Field and Bradley Field, the airborne engineers.

So then Radovich, exercising this power that he had, or his authority that he had to get men transferred, went to Washington, and he went to the clerk that had the
329 charge of issuing these special orders, and he asked that clerk to issue orders for Martin Bayer and Melvin Usdan, then stationed with the airborne engineers, transferring them from the airborne engineers to the First Air Commando Group at Goldsboro, North Carolina, and immediately—the record will show it—that very same day the orders were issued, and the men were transferred to the Air Commando Group.

Now the Air Commando Group was organized on a basis of pure voluntary enlistment. A man could apply to become a member of the Air Commandos, he might be accepted or he might not. If he asked to come in and was received, and after he found out the character of the mission he asked to be relieved of his assignment there, he was allowed to go back to his organization immediately. In
330 other words, nobody was wanted in that group who did not want to be there, and, furthermore, nobody was wanted in that group who, in the opinion of the commander and his associates, was not the type of man who would be able to stand the kind of work that that group was going to do.

Now when Bayer and Usdan, the two privates, arrived at Goldsboro, they reported to an officer there named Colonel Boebel. Colonel Boebel had known those two men from Mitchel Field because he had been at Mitchel Field.

As a matter of fact the base headquarters where these boys had been originally. And he recognized them and asked them what they were doing there, and they told him that Major Radovich had arranged their transfer. And then, later on, these boys were assigned to quarters, and shortly thereafter Colonel Boebel saw Major Radovich and he said to him, "I see those two boys Bayer and Usdan are here." And Radovich said to him, "Well, that is all right, don't be concerned about it, they are going to be out of here very shortly. I am going to have them transferred out of here." And the records will show that two days after they arrived at the Air Commando Group, within two days Radovich by telephone from Goldsboro, again communicated with 332
this clerk in the office of the Air Force Commander in Washington, and requested that she then issue orders transferring the two boys, Martin Bayer and Melvin Usdan, out of the Air Commando Group and to a field at Wilmington, Delaware, where they would then be in the air transport service.

Those orders were issued and the boys were changed to Wilmington, Delaware.

Now you will remember that I stated that Samuel Bayer had offered and agreed to pay Major Radovich $5,000 if Radovich would effect the transfer of these two boys, that is, $5,000 for each boy, a total of $10,000.

After it was all arranged, Radovich communicated to Sam Bayer that the deal was set, the orders were through, and that his part of the bargain had been completed. And 333
then Samuel Bayer sent his brother Elias Bayer and another relative down to Goldsboro, North Carolina, and he gave them $5,000 in cash which was in an envelope, and they arranged with Radovich to meet at the railroad station in Goldsboro on a certain night, some time around midnight, when the train from New York would get down there, and when the train arrived these two men got off. Radovich came around the back of the station. Elias Bayer,

who had seen him many times, recognized him, and he handed him the envelope with the $5,000 and, in addition, he handed him three bottles of whiskey, but before he did he asked him "Are you sure everything is all right?" and when Radovich assured him that it was, he gave him the envelope with the $5,000 and he gave him the three bottles of whiskey, and Radovich went off in his car, and then Elias Bayer and his companion went off somewhere else.

That, ladies and gentlemen, is the outline of what the Government intends to prove in this case. Again I ask you not to take my word for anything I have said here, not to take anything that I have said as evidence, but please
335 keep your minds fully open, hear the witnesses and take the evidence from the witnesses. Thank you very much.

October 3, 1945, P. M.

AFTERNOON SESSION.

The Court: Before we start, gentlemen of counsel and ladies and gentlemen of the jury, there is a slight delay in convening here after lunch. It has been suggested to me that I ought to give just a little longer recess for lunch on account of the difficulty of getting lunch down in this section, which I think I shall do. But I want to make the very definite request not only of the members of the jury but of counsel and all interested parties, be on time for all
336 sessions of the court. If any one of us is late, that delays and prevents the functioning of the court for the time. I shall certainly endeavor to be on time and expect everyone else to be. All right, you may proceed.

Mr. McGohey: I propose now to offer some certified copies of official records of the War Department, certified under the seal of the War Department, and perhaps we could save time if I could submit them to counsel for the defendants.

The Court: All right.

Mr. McGohey: If your Honor please, I offer in evidence this certified copy, certified under the seal of the War Department of the United States, of the oath taken by the defendant Walter V. Radovich as a Second Lieutenant in the Air Corps.

The Court: Is there objection, gentlemen?

(No response.)

(Marked Government's Exhibit 1.)

Mr. McGohey: May I read that at this time to the jury?

The Court: So much as you think is material.

Mr. McGohey: Yes. (Reads Government's Exhibit 1.) 338

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ROBERT B. TRAVIS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Colonel Travis, you are an officer of the United States Army, are you not? A. That is right, sir.

Q. And your rank is Lieutenant Colonel? A. That is right, sir.

Q. To what branch of the service are you assigned? A. To the air corps.

Q. What is your present duty? A. I am the Adjutant General in the A1, personnel officer, Headquarters of the First Fighter Command, Mitchel Field. 339

Q. Will you keep your voice up so that the last juror in the box can hear you. In your duty as adjutant, is it part of your duties to be in charge of records of your command? A. That is one of my responsibilities, yes, sir.

Q. I show you this paper and ask you if that is a paper kept in the regular course of business in your office in your command? A. It is, sir.

Q. In your charge? A. That is right.

Mr. McGohey: I offer so much of this paper as is enclosed in paragraph 2 and paragraph 4 on this page headed "Special Order No. 231", dated August 19, 1943.

The Court: Any objection?

Mr. Keenan: I don't know what it is.

Mr. McGohey: I think it has not yet been shown, your Honor. I am offering it in evidence.

341 Mr. Keenan: You are offering what in evidence?

Mr. McGohey: I am offering paragraphs 2 and 4 of that order.

Mr. Keenan: We object to it, your Honor.

The Court: On what ground?

Mr. Keenan: On the ground that it has not been shown to be material to any——

The Court: I treat your objection as a motion to strike out, subject to its materiality, and admit the document. Received.

Mr. Keenan: Your Honor, may I at this time make objection to a method of proceeding generally with proof in this case of a conspiracy by introducing evidence that has no materiality with reference to any

342 evidence offered at the moment. I say that to your Honor because of an unfortunate experience I have had with the succession of bits of evidence being offered and being connected up at another time. That has received some comment from the Circuit Court of Appeals recently.

The Court: Would you expect it to be all offered simultaneously?

Mr. Keenan: I would expect it to be offered when its materiality is admissible.

The Court: Objection overruled.
Mr. Keenan: Exception.
The Court: Proceed.

(Paragraphs 2 and 4 received in evidence as Government's Exhibit 2.)

Mr. McGohey: If your Honor please, may I read from the exhibit?
The Court: Yes.
Mr. McGohey: This paper which has just been introduced is headed "Special Order No. 231", and then "Restricted", and then "Extract", and then over here, "Headquarters First Fighter Command, Mitchel Field, New York, 19 August 1943." 344
Mr. Keenan: What is the date, please?
Mr. McGohey: 19 August, 1943.
Paragraph 2 reads: "Reld. Fr."

Q. Colonel, can you tell us, does that "Reld. Fr." mean "relieved from"? A. Relieved from, that is correct.
Q. This last paragraph is "Transferred to"? A. Transferred to.

Mr. McGohey: Under the heading, "Name, grade, serial number," is the name Melvin Usdan, private, and then in parenthesis the numeral 501, and then down below that the numeral 12219208.

345

Q. Can you tell us, Colonel, what the number 501 in parenthesis on that order means? A. That is a code number for the man's military occupational specialty. Each man has one of those, and that number 501 indicates that that soldier was a clerk, administrative or general, or technical; that he is a clerk.
Q. Will you keep your voice up, please. A. I will endeavor to.

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Q. Under the heading "Relieved from" is this: "HQ and HQ SDN." Does that mean Headquarters and Headquarters Squadron, Colonel? A. That is right.

Mr. McGohey: Then following, "First Fighter Command, Mitchel Field, New York," under "Transferred to" appears "Det. Medical Department, Army Air Base, Mitchel Field, New York." Then in parenthesis it has "Auth:" I assume that means "authority", does it, Colonel? A. That is correct.

Mr. McGohey: The authority: 12th endorsement, 201-Usdan, Melvin (Enl.).

347 Q. I assume that stands for enlisted man. A. "Enl." stands for enlisted man.

Q. In parenthesis. "Hq. AF, EDC & First AF." What does that stand for? A. That is Headquarters Air Forces, Eastern Defense Command and First Air Force.

Q. 17——

Mr. Keenan: Just a moment. I would like to follow that. You are going very fast. He understands them and you do, but I don't.

Mr. Ansell: I would like Mr. McGohey to caution again- -I suppose you will have to keep on cautioning the witness, that is your usual experience, to lift his voice. When I was a cadet in military academy fifty-
348 odd years ago, we had an order "To boom voice", and the Army used to understand that to mean that they were not up to key.

The Court: Go ahead and speak out so these gentlemen can hear you, Colonel.

Q. Just keep your voice up, Colonel, as loud as you can.

Mr. McGohey: If I may continue here: Authority 12th endorsement, 201-Usdan, Melvin, enlisted, Head-

quarters Air Forces, Eastern Defense Command and First Air Force, 17 August 1943, on "ltr"—what does that mean? A. Letter.

Mr. McGohey: Melvin Usdan.

Q. Does that mean a letter of Melvin Usdan? A. A letter originated by Melvin Usdan.

Q. A letter written by him? A. That is right, sir.

Q. 20 July 1943. A. If that date is not in parenthesis, that is the date that he wrote the letter.

Q. "Subject: Request for transfer." A. That is the subject of the letter he wrote.

Q. Now then, Colonel, am I correct in understanding that 350
that legend which I have just read means that the authority for this order of transfer is the twelfth endorsement which appears on a letter of Melvin Usdan, dated July 20, 1943, in which Melvin Usdan requested a transfer from the headquarters and headquarters squadron of the First Fighter Command at Mitchel Field to the medical department of the air base at Mitchel Field? A. That is correct, sir.

Mr. McGohey: Now we also introduced in evidence paragraph 4 of this order which I will read, and I don't mean to go through the various headings, you will understand what they are as I go along. And this is: Martin Bayer, under name, grade and so on, it is Martin Bayer, Pfc. (501) and then that large 351
number 12219010——

Q. That large number in each instance is the enlisted man's Army serial number, is that correct? A. That is correct, sir.

Mr. McGohey: Relieved from: Headquarters and Headquarters Squadron First Fighter Command, Mitchel Field, New York, transferred to the medical

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department Army Air Base, Mitchel Field. And then the legend again, Authority: 12th endorsement 201, Bayer, Martin, enlisted, Headquarters Air Forces, Eastern Defense Command, and First Air Force, 17 August 1943, on letter Martin Bayer, 20 July 1943, subject: Request for transfer.

Q. And that legend means that the authority for that order was the 12th endorsement on the letter of Martin Bayer dated July 20, 1943, in which Martin Bayer requested the transfer? A. That is correct, sir.

353 Mr. Keenan: Your Honor, I will ask to have that last answer stricken out as containing obviously hearsay, because they are now quoting what Martin Bayer did and what he applied for. The best evidence would be his own letter or his own testimony, and unfortunately we can't have that because, as your Honor knows, he is over in the Burma area of the battlefields.

The Court: Objection overruled.

Mr. Keenan: Exception.

Mr. McGohey: If your Honor please, I offer now a certified copy, certified under the seal of the War Department of the United States, paragraph 32 of Special Order No. 325 of the Headquarters Army Air Base, Westover Field, Massachusetts, dated November 22, 1943.

354 (Marked Government's Exhibit 3.)

Q. Colonel, as part of your duties, are you required to know the various code numbers used by the Army to designate various types of service classifications? A. I am required to know that.

Q. Do you know them? A. Most of them. I don't know them all, sir; there are too many of them.

Q. I show you Government's Exhibit 3, which is paragraph 32 of this paper, and I call your attention to the fact that in front of the name Melvin Usdan, in parenthesis, are the figures 055, and the same figures appear in parenthesis before the name Martin Bayer, and I ask you if you can tell me what that figure 055 stands for? A. That 055 indicates that each of these soldiers was a clerk, non-typist.

Mr. McGohey: May I read the exhibit. This is headed T/5th Gr.——

Q. That stands for Technician, 5th Grade, does it, Colonel? A. That is correct.

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Mr. McGohey: (055) Melvin Usdan, then the serial number, Medical Detachment, 881st AB Engr. Avn Bn.

Q. Do you know what that means? A. Will you repeat that last designation, sir?

Q. Suppose you look at it. A. That is 881st Air Base Engineers Aviation Battalion.

Q. Is that Air Base or Airborne? A. I am not positive, sir; possibly it is airborne.

Mr. McGohey: Then under that Pfc, meaning private, first class (055) Martin Bayer, Serial No., Medical Detachment, 882nd AB Engineering Aviation Battalion, are transferred under present grade to Project No. CA-281, and WP at the proper time——

357

Q. What does that WP mean? A. "Will proceed."

Q. Those are abbreviations? A. Yes, sir.

Mr. McGohey: —the proper time, by rail, from Westover Field, Massachusetts, to Goldsboro, North Carolina, reporting not later than 25 November 1943

to the CO Overseas Replacement Depot No. 3 thereat, for further overseas assignment, semi-tropical climate, on per ch of sta.

The Witness: Permanent change of station.

Mr. McGohey: It being impractical for the Government to furnish cooking facilities for rations, meals for two men for six meals a/r——

Q. That means "at the rate," does it; a/r? A. At the rate of, yes, sir.

Mr. McGohey: At the rate of one dollar per meal will be furnished on meal tickets under the provisions
359 of AR 302215. I assume that AR is Army Regulations?

The Witness: That is correct.

Mr. McGohey: Dependents are not atzd——

Q. I assume that is the abbreviation for "authorized"? A. Yes.

Mr. McGohey: Dependents are not authorized to accompany or join him.

Q. Meaning that the parents or dependents are not authorized to accompany or join these men on this journey? A. That is correct.

360 Q. From Westover Field to go to Goldsboro. The QMC will furnish the necessary T Authority. That is, I assume, traveling authority? A. That is right.

Mr. McGohey: AR 615-200, meaning authority under Army Regulations, 615-200, dated 15 Mar., 1943, and TWX AF PMP 3888 from the CG AAF, Washington, D. C., 22 November, 1943.

Q. Now will you tell us what that means, Colonel, from there "Authority"? A. Authority AR 615-200, 15 March 1943, that date is the publication of the Army Regulation. That particular regulation governs the transfer of all enlisted men. They are transferred under that particular authority. The TWX AF PMP 3888, is from the Headquarters, Army Air Forces, that is, the TWX AF PMP 3888 is the identification of that particular message.

Q. Does the TWX mean telegram? A. The same thing. It is a message transmitted by teletype.

Q. By teletype? A. That is right, sir.

Q. That means a message by teletype from the Commanding General Army Air Forces at Washington on the 362
22nd of November, 1943? A. That is correct, sir.

Q. That was the authority for this transfer? A. Yes, sir.

Mr. McGohey: I offer in evidence certified copy, certified under seal of the War Department of paragraph 38 of Special Order No. 333 from the Headquarters Technical School, Army Air Forces, Technical Training Command, Seymour Johnson Field, North Carolina, dated November 29, 1943.

(Marked Government's Exhibit 4.)

Mr. McGohey: This is headed Special Order No. 333, Headquarters Technical Training School, Army Air Forces, Technical Training Command, Seymour 363
Johnson Field, North Carolina, 29 November, 1943: The following EM——.

Q. That again would mean enlisted men, would it not? A. Yes, sir.

Mr. McGohey: Are relieved from Atchd——.

Q. From being attached, would that mean? A. Yes.

Mr. McGohey: 715th Training Group this station, are transferred at and WP Second Ferrying Group—

Q. What does that "WP" mean? A. "Will proceed."

Mr. McGohey: Will proceed to the Second Ferrying Group, Second Ferrying Division, Air Transport Command, Newcastle Army Air Base, Wilmington, Delaware, and then the following is Del rptg——

Q. What does that abbreviation mean, Colonel? A.
365 Wilmington, Delaware, reporting—rptg.

Mr. McGohey: Then the rptg is reporting to the Commanding Officer thereat for assignment and duty. EM—enlisted men—relieved from assignment to Project CA-281.

The Witness: That is correct, sir.

Mr. McGohey: And then follows the name of the two men. T/5.

Q. That means technician, fifth grade? A. Correct.

Mr. McGohey: (055 Melvin Usdan) and then NMI.

The Witness: That means no middle initial.

Mr. McGohey: And a serial number. And then
366 Pfc, private first class (055, Martin B. Bayer) and then his serial number.

The Witness: Yes, sir.

Mr. McGohey: In accordance with AR; Army Regulations, 30-2215, the Quartermaster will issue two meal tickets to two enlisted men for one-third days each——

The Witness: TC means Transportation Corps.

Mr. McGohey: The Transportation Corps will furnish necessary transportation.

Q. What does TDN mean? A. TDN means transfer directed is necessary in the military service.

Q. What is this? A. Those are procurement authorities to which the cost for everything would be charged, that is, Government charges.

Q. Then follows the authority. A. Yes, sir.

Q. The authority— A. WD is War Department, Headquarters Army Air Forces, Washington, D. C. The 25 November, 1943, the date that letter was written from the Army Air Forces, File AFPMP-2-KRS/mm/nlr—those are the identifying symbols for the office of origin in the Army Air Forces Headquarters. I can't tell you exactly what office that originated from. 368

Mr. Keenan: Can we have the date of that letter?

Mr. McGohey: The letter that has just been referred to, you mean?

Mr. Keenan: Yes.

Mr. Wallace: The 25th of November.

Mr. McGohey: I have no further questions of this witness.

The Court: Any questions?

*Cross-examination by Mr. Keenan.*

Mr. Keenan: Those were all the regular records of the United States Army? A. Yes, sir. 369

Q. And in proper form? A. Yes, sir.

Q. I noticed that in one, I think it was Government's Exhibit 2, the transfer of Melvin Usdan, there was some statement of twelve endorsements. You remember that? A. Yes, sir.

Q. What would that mean, Colonel? A. To make it clear, I had better explain first how that is handled, sir.

Q. I wish you would. A. The letter originates with an individual with the headquarters or from any source that would put it into the military administrative channels. Instead of a reply to that or any action being taken on that, it being handled in a new letter, each office through which it passes puts an endorsement on it, that is, they write a letter, a specific form used by the Army, and they call that endorsement. Since the letter had twelve endorsements on there, it indicates it was originated with the individual and passed through twelve offices in which it went to the First Fighter Command with a direction that transfer be effected, and each of those endorsements is tantamount
371 to a new letter. That is a form of correspondence that the Army uses entirely.

Q. In other words, in simple language, that had to pass through twelve different types of authority before it became valid? A. Yes, sir.

Q. And all of those things were recorded and are recorded some place in the Army records, all those endorsements? A. They were requested, but it is not required. Correspondence of that sort are not maintained in permanent records of any organization.

Q. Are those records available? A. I don't know, sir.

Q. Are the original records of whoever made that application available any place? A. No, sir, they are not.

Q. How soon are they destroyed after they are made? A. They may be destroyed any time after six months.

372 Q. After six months? A. That is correct.

Q. They were available for a period of six months? A. I couldn't say, sir. I don't know how long they were available after that transfer was effected. Ordinarily——

Q. Excuse me. If they were destroyed within six months they would be destroyed by someone before they should have been destroyed, under Army regulations? A. That would not be a violation of any Army regulations, sir. It is provided in the Army, and it was at the time, that once

the transfer of an enlisted man has been effected the order itself with the authority cited at the bottom of the orders as shown in these cases is sufficient.

Q. Are you familiar with these records, Colonel? A. Yes, sir.

Q. Do you happen to know how long Melvin Usdan and Martin Bayer remained as clerks at the medical base? A. No, sir, I do not.

Q. Do you know that they only remained there five days? A. I don't know that, sir.

Q. You don't know that? A. No, sir.

Q. When they were transferred out of that medical base to either Westover Field or Bradley Field, would that show 374
in this same file? A. No, sir.

Q. Where would you have to go to get that? A. The headquarters issuing the order affecting the transfer of the medical detachment at Mitchel Field would have the same record that you have there on this previous transfer, and that should be available—those orders should be available at the base at Mitchel Field; they should also be available in the medical detachment at Mitchel Field from which the men were transferred.

Q. Where do these records come from? A. From the headquarters of the First Fighter Command.

Q. At Mitchel Field? A. At Mitchel Field.

Q. Are all the records at Mitchel Field under your direction? A. No, sir.

Q. Just what records are under your direction? A. Only 375
the records of the headquarters of the First Fighter Command.

Q. Do those records show whether or not Melvin Usdan or Martin Bayer's status was changed, whether they were clerks before they were transferred to the medical department? A. No, sir. That shows only the status of the man when he was transferred. He was transferred as a 501. That is the only thing that is needed in that record.

Q. What is a 501? A. That is a clerk, administrative or technical. That 501 is a code for the man's military occupational specialty.

Q. Does that mean his last occupation or his coming occupation? A. The occupation at the time of the transfer, sir.

Q. So that he was then a clerk at the time of his transfer? A. That is indicated by that order, sir.

Q. So that you know, then, at the time that this transfer was made to the hospital, to the medical department, that these two boys were clerks? A. According to that record, yes, sir.

377 Q. They were not made clerks after they were transferred; they were clerks before they were transferred? A. It would be assumed, yes.

Q. Your record shows that? A. The record indicates at the time of this transfer they were transferred as clerks.

Q. The record shows that the transfer was initiated by an application made by both of these two soldiers, these two enlisted men? A. Yes, sir.

Q. And is there anything irregular about that, Colonel? A. No, sir.

Q. And if there was to be a regular orderly transfer that would be an entirely proper way to make it? A. Yes, sir.

Q. That happens time and time again in the Army? A. Frequently, sir.

Q. Both with enlisted men and with officers, too, they
378 make applications, too, to be transferred, don't they? A. Yes, sir.

Q. And before this happened there were twelve different endorsements on both of these orders that you have referred to? A. Yes, sir.

Q. So that if these men were transferred for just a period of five days to the medical department, it took twelve endorsements before that happened, from the time they were transferred from the headquarters, Headquarters Com-

pany, to the Medical Department? A. The same endorsements would have been applicable had the transfer been for one day or one year, sir.

Q. That is twelve. Is that the number they always have to be, twelve endorsements to transfer men? A. No, sir. The number of endorsements is governed by the number of offices through which the correspondence passed.

Q. The number of offices or officers? A. Offices.

Q. So that for this transfer to go through it had to go through twelve offices, is that right? A. It wouldn't follow by the number of endorsements that twelve different offices were passed through by that correspondence.

Q. What do these endorsements mean, then? A. Each 380
endorsement means that the correspondence went through a new office from the preceding endorsement, and that the new office put a new endorsement on the correspondence.

Q. Actually when they got—you are stationed at Mitchel Field now, are you? A. Yes, sir.

Q. How long have you been there? A. Almost five years.

Q. You have been there almost all this time? A. Yes.

Q. You were never transferred out of there at all, were you? A. No, sir.

Q. What were you in 1943, what was your rank? A. I was—what time in 1943? I was promoted that year, sir.

Q. In August 1943. A. I was promoted on August 18th to my present grade. Prior to that I was a Major.

Q. You were a Major. These two boys were just trans- 381
ferred from one part of the field to another, were they not, by these two orders? A. That is correct.

Q. Regardless of the fact that the original application for transfer may not be available, there would be a permanent record of every man or every office through which they passed—the transfer application? A. Not necessarily a permanent record. Again it goes back to the fact that each office through which that correspondence passed is not required to keep that as permanent records. Once the

transfer is effective, once the order is issued, even the correspondence itself has no more value to anyone.

Q. When a transfer like that occurs, Colonel, would it have to have the approval of some officer where the two soldiers were before they were transferred? A. Under ordinary conditions it would require the approval. In that particular case the authority to grant the—the headquarters authorized to effect the transfer was the headquarters of the air forces Eastern Defense Command and First Air Force, as appear in that twelfth endorsement. That was the authority to effect the transfer, and that was given to the First Fighter Command by its next higher echelon, the First Air Force.

383 Q. Translate it into a little simpler language, Colonel, for civilians. Just to approve these transfers, these were just—they were just enlisted men, first class privates, I guess both of them were? A. I believe they were, sir.

Q. They wanted to be transferred. A man makes the application to be transferred to another unit on the field. He is still in the air corps, isn't he? A. No, sir.

Q. Is he out of the air corps? A. He is transferred from the air corps to the medical department.

Q. That is not in the air corps? A. No, sir.

Q. Under whose command is the air corps out there—medical department at Mitchel Field? A. It is under the—the medical department at Mitchel Field is under the command of the Commanding General of the First Air Force.

384 The First Fighter Command and Air Corps Unit is also under the jurisdiction of the Commanding General First Air Force, and the Commanding General First Air Force is the only authority, at that time was the only authority who could authorize the transfer from one branch to another, of enlisted people at Mitchel Field.

Q. The commanding officer of that air field? A. No, sir, the commanding general of the First Air Force.

Q. The general of the air force? A. Yes, sir.

Q. He was the only man that could approve this transfer? A. That is right, sir.

Q. Who is he? A. Now it is Major General Hunter.

Q. Who was he in 1943, do you know, at the time? A. I do not recall, sir.

Q. So that do I understand you, in order to get a transfer out of that field you would have to get the Commanding General of the field to approve it? A. The commanding general himself would not come in contact with it. The staff officers would handle that as routine procedure.

Q. Is that true of all the transfers out there, Colonel? A. There are very few transfers that are ever brought to the attention of the commanding general himself. That 386
is what staff officers are for. They handle those.

Q. I understand that. But I am saying, do they all have to be approved by the General? A. No, sir.

Q. Or vicariously through one of his staff men? A. Through the staff officer. But the Base Commander is authorized to transfer personnel between the units of his base. The Commanding General First Fighter Command can transfer enlisted people between the units of the First Fighter Command.

Q. So that we don't get this matter confused, there is nothing unusual as far as that goes? A. No, that is quite general.

Q. It probably happened hundreds of times out there, hundreds of times with other people? A. Yes.

Q. Perhaps thousands of times? A. It is quite possible. 387

Q. And apparently, as far as these records show, it was done in the course of normal operations of the Army, is that right? A. Yes, sir.

Q. At least received the scrutiny of more than ten offices?

The Court: You have asked that.

Mr. Keenan: All right.

The Court: Any further questions?

Mr. Keenan: I have no further questions on that exhibit.

Mr. Robb: We have no questions.

Mr. Keenan: I would like to ask a question of the Colonel.

Q. This just shows the transfer from the headquarters, Headquarters Company, to the Medical Department at Mitchel Field? A. That is correct, sir.

Q. Now supposing these two soldiers remained only five days at this medical department at Mitchel Field and then
389 were transferred to Westover Field or to Bradley Field, there would be some records available, wouldn't there? A. There would be a similar order issued by another headquarters in that case.

Q. Right out there in Mitchel Field? A. Yes, sir.

Q. That is available to be brought in, just the same as th[illegible] available, so far as you know? A. So far as I know, yes, sir.

Q. But these records wouldn't show if a transfer was made from the medical department to Westover Field? A. That is correct, sir, they would not show that.

Q. By the way, where is Westover Field? A. It is in Massachusetts near Chicopee Falls.

Q. Where is Bradley Field? A. It is in Connecticut. I don't recall the nearest town, but it is in Connecticut.

390 Q. I don't care to press that. Since they have been referred to, those are both large air fields? A. Yes, sir.

Q. With perhaps thirty or forty thousand men? A. I wouldn't say there were that many, or ever that many, but it is a large air field. Probably the maximum strength of about nine or ten thousand men at any one time.

Q. They have airborne engineers there? A. They had at Westover Field, as I recall. That is purely recollection.

Q. But you don't have anything to do with those records? A. No, sir.

The Court: Have you any further questions, Mr. McGohey?

Mr. Keenan: Just one further question.

Q. Your records do not trace this Usdan boy and the Bayer boy beyond their arrival at the medical department? A. That is correct, sir. Our records do not indicate that they ever reached the medical department. We issued the order directing that they proceed there.

Q. Anyway, it doesn't go beyond the 20th of July, 1943? A. That is correct, sir.

Q. And doesn't even show they got there? A. No, sir.

392

The Court: All right, Mr. McGohey.

*Redirect examination by Mr. McGohey.*

Q. Now, Colonel, taking up this matter of the twelve endorsements that you talked about, and the ultimate transfer by the Commanding General, one of the officers through whose hands an application of this kind would have to pass on its way to the Commanding General, would necessarily be the immediate unit commander of the man making that request, is that right? A. Yes, sir.

Q. Do you know who was the commanding officer of the headquarters squadron of the First Fighter Command on the 19th of August, 1943, at Mitchel Field? A. I can't say positively, but from my recollection it was Major Radovich. 393

Mr. McGohey: That is all. No further questions.

The Court: All right, stand down. Call the next witness.

394 *Robert B. Travis—For Government—Redirect.*

FELIX L. VIDAL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. You are a Colonel in the United States Army, are you not, Colonel Vidal? A. Yes, sir.

Q. How long have you been an officer of the United States Army? A. Twelve years, sir.

Q. And prior to becoming an officer of the United States Army, were you a cadet at West Point? A. Yes, sir, I was graduated from there.

395 Q. And what is your present duty assignment? A. I am assigned to Headquarters, Army Air Forces, in Washington.

Q. How long have you held that duty? A. For two months.

Q. Prior to that time what was your duty? A. I was a Fighter Group Commander in Italy, and prior to that time, while in Italy, I was a Fighter Wing Commander.

Q. How long were you in the Italian theatre of operations? A. Approximately eleven months.

Q. Prior to that where had you been? A. I was Wing Commander in the Second Air Force in the United States, and prior to that in the First Fighter Command Headquarters at Mitchel Field.

396 Q. Now, were you in Mitchel Field during the Spring of 1943? A. Yes, sir.

Q. Now do you know the defendant Samuel Bayer? A. Yes.

Q. Do you see him in the courtroom? A. Yes, sir.

Q. Will you indicate him, please? A. He is the gentleman sitting on the right of the two there.

Q. You mean the gentleman in the brown suit? A. The gentleman in the brown suit.

Q. Do you know the defendant Elias Bayer? A. Yes, sir.

Q. Will you indicate him, please? A. He is the gentleman in the dark blue suit.

Q. Do you know the defendant Walter V. Radovich? A. Yes, sir.

Q. Will you indicate him, please? A. He is the officer sitting over there (indicating).

Q. When did you first meet the defendant Elias Bayer? A. I would estimate about January of 1943.

Q. And where did you meet him? A. It was in the Copacabana night club in New York City.

Mr. Keenan: What is the date of that, Mr. McGohey? 398

Mr. McGohey: I think he said about January 1943.

Q. Had you gone to the night club with him? A. No, sir.

Q. Were you accompanied by anybody at the time you met him? A. Yes, sir, a Lieutenant Roeser.

Q. What happened after you met him at the night club? A. Lieutenant Roeser and I were standing at the bar and Mr. Bayer was next to us, and during the time we were there he asked me whether I knew an officer who was stationed at Middletown Air Depot in Pennsylvania, and I said yes. And he introduced himself. That was about the context of the conversation.

Q. Did he have any discussion about any of his relatives? A. No, sir.

Q. Now when did you first meet the defendant Samuel 399 Bayer? A. I met him in his office at the Plymouth Thread Company, I think it is.

Q. I say when was that? A Oh, when. That was approximately a month later.

Q. A month after you had first met Elias? A. Yes, sir.

Q. Were you accompanied to the office of the Plymouth Thread Company by anybody? A. Yes, sir. I was accompanied by Lieutenant Roeser.

Q. Now was Elias Bayer there on that occasion? A. Yes, sir.

Q. Did you have a conversation with Elias Bayer and Samuel Bayer? A. Yes, sir.

Q. Will you tell us what that conversation was about? A. It was just a matter of getting uniforms at the I. Buss Company.

Q. Will you tell us a little about that, Colonel? What is the I. Buss Company, if you know? A. I think it is owned by a relative of Mr. Bayer's.

Q. Were you told that by anybody? A. I believe I must have been told that by—in fact I am certain one of the Mr. Bayers told me that.

The Court: What was the name of the uniform company?

The Witness: I. Buss.

Mr. Keenan: Your Honor, could we have the place where this conversation took place?

The Court: He said at the office of the Plymouth—

The Witness: Of the Plymouth Thread Company.

The Court: What was it?

The Witness: It is the Plymouth Thread Company.

Q. Well, will you go on and tell us about this conversation relative to uniforms? A. It was just a matter of they had some very good gabardine over there. I was interested in a summer uniform.

Q. Who told you, if anybody did, that they had good gabardine at the Buss Uniform Company?

Mr. Keenan: I don't like to interrupt, but I would like to have the witness, and to give the substance of the conversation and with whom, rather than to have suggestions made.

Mr. McGohey: I have asked that, your Honor.



The Court: I beg your pardon.

Mr. McGohey: I say I have asked for the substance of the conversation, and I am trying——

The Court: I don't think your question is objectionable. Go ahead. If I recall correctly, you were asked who told you that the Buss Company had good gabardine.

The Witness: Lieutenant Roeser had ascertained that from a previous visit. He told me that, and I came down with him to look it over. In doing so, I met Mr. Sam Bayer. I had met Mr. Elias Bayer previously.

Q. You had this conversation in the office of the Plymouth Thread Company? A. Yes, sir.

Q. Thereafter did you go to the office of the I. Buss Uniform Company? A. Yes, sir. That was the purpose of the visit.

Q. Were you accompanied there either by Elias Bayer or Samuel Bayer? A. By Mr. Elias Bayer.

Q. When you went to the Buss Company, what happened then? A. We were measured; examined the cloth and were measured by the employees of the I. Buss Company.

Q. For uniforms? A. For a uniform.

Q. Was the uniform that you ordered on that day subsequently made and delivered to you? A. Yes, sir.

Q. Did you pay for that uniform? A. No, sir.

Q. Do you know if it was paid for? A. No, sir.

Q. Now subsequent to this meeting with Elias Bayer, when you went to the Buss Company, did you see Elias Bayer at any time after that? A. Yes, sir, I saw him on several occasions.

Q. Were you in his company on those occasions? A. I was twice, yes, sir.

Q. Will you tell us approximately when was the next time you saw him, and where? A. I saw him in his apartment on the occasion of his birthday. I would say that was—that must have been around in May, at one time. I had seen him at another night club in New York; we were not in the same party.

Mr Keenan: May, 1943?

The Witness: That was still in the spring of 1943.

Q. Will you try to keep your voice up a little bit, Colonel, so that the last lady in the jury box can hear you plainly? Now after this day on which you first met Samuel
407 Bayer, did you see him thereafter? A. I saw him on about one or two other occasions, that was about all.

Q. Where were they? A. Once in his office and, oh, that is about all, until he came out to Mitchel Field.

Q. Well, now, can you tell us as nearly as you can recall, the time when you saw him at his office, that is, the second time? A. The second time? I would say about in May.

Q. Of 1943? A Yes, sir.

Q. Now you had a conversation with him on that day, did you? A. Yes, sir.

Q. Can you tell us the substance of the conversation? A. There wasn't much to it except we were—that was about the time we were getting delivery of our uniform.
408 In other words, we would stop by there to go over to the—about the same as the first visit.

Q. This time you were stationed at Mitchel Field, were you not? A. Yes, sir.

Q What was your duty assignment then, Colonel? A. I was the A3 of the First Fighter Command Headquarters. I was in charge of the operations and training of the fighter pilots that were being trained on the East Coast.

Q. Was there a man in the First Fighter Headquarters at that time by the name of Martin Bayer? A. Yes, sir, there was.

Q. Was there an enlisted man there at that time by the name of Melvin Usdan? A. Yes, sir; that was later in the spring.

Q. In the spring of 1943? A. In the spring of 1943. Both of them were there.

Q. At any time that you were in the company of Samuel Bayer did the names of these two men ever come up in the conversation? A. Yes, sir, I think they did. That was before I ever knew them actually by name or had ever seen them. That was probably early in the spring. Mr. 410
Samuel Bayer had made mention of the fact that he had a son stationed at Mitchel Field and also a nephew.

Q. Do you know whether or not Martin Bayer and Melvin Usdan were transferred out of the First Fighter Command? A. I never knew, no, sir.

Q. Do you know whether they ever applied for transfer out of the First Fighter Command? A. I was told, yes, sir.

Q. Now— A. No, I shouldn't say—excuse me. I knew that they were going to be transferred. I didn't know whether there was any application on their part.

Q. Let me ask you this. Did you ever have a conversation with Samuel Bayer about the transfer of Martin Bayer and Melvin Usdan? A. Yes, sir, I did.

Q. A transfer from the First Fighter Command? A. 411
Yes, sir.

Q. Can you tell us approximately when that was? A. That was—that must have been in latter July or early August at the latest, and he informed me that they were transferring from the Headquarters First Fighter Command which was at Mitchel Field to the Base Hospital at Mitchel Field.

Mr. Keenan: The year is 1943 also?

The Witness: 1943.

Mr. McGohey: Yes. I think he said July.

Mr. Keenan: Late July or early August, 1943.

Mr. McGohey: That is what I heard.

Q. You said that Sam Bayer told you that? A. Yes, sir.

Q. Where did he tell you that? A. He told me that at Mitchel Field.

Q. Had Sam Bayer come out to Mitchel Field? A. Yes, sir.

413 Q. Now, prior to his coming that day, did you have a telephone conversation with anybody? A. Yes, sir.

Q. With whom? A. Mr. Elias Bayer.

Q. Will you tell us what the conversation was? A. Yes, sir. He just simply asked me if he could see me that day.

Q. And what did you say? A. I said very well, to come on out to Mitchel Field.

Q. Then subsequently you saw Samuel Bayer? A. Yes, sir.

Q. Was he accompanied by Elias? A. Yes, sir.

Q. Just where physically at the field did you see him? A. I saw them outside the gate. At that time civilians were not allowed to come in the field without the company of officers.

414 Mr. Keenan: What was that, please?

The Witness: Without being accompanied by an officer.

Q. Were they standing outside the field? A. Yes, sir.

Q. You had a conversation with them? A. Yes, sir.

Q. Will you tell us the substance of that conversation? A. I was informed by Mr. Elias Bayer and Mr. Samuel

Bayer that Martin Bayer and Private Usdan were being transferred from Headquarters First Fighter Command to the Base Hospital at Mitchel Field. They requested me to ascertain if these orders had been written at that time.

Q. I didn't get that. A. They requested me to determine for them whether or not the orders had been issued effecting this transfer from the Headquarters First Fighter Command to the Base Hospital.

Q. Did you do anything— A. Yes, sir.

Q. —in connection with that request? A. Such orders, as always, would be issued by First Air Force Headquarters also at Mitchel Field, and so there being no restrictive nature or confidential nature to the orders, I said I would do that. So I went in and checked with the personnel officer in Headquarters First Air Force to find out if these orders had been issued. 416

Q. Did you thereafter come back and talk to them? A. Yes, sir; I came back and informed Mr. Bayer that the orders had not been issued but they were going to be.

Q. What, if anything, did Mr. Bayer say to you?

Mr. Keenan: Which Mr. Bayer?

Q. Mr. Samuel Bayer. A. Mr. Samuel Bayer? As I recall, he wondered if I could do anything about expediting the issuance of the orders.

Q. Was that substantially the end of that conversation? 417
A. Yes, sir.

Q. Now, when was the next time that you saw Samuel Bayer? A. I would say a few days later.

Q. Where did you see him? A. Under the same circumstances, at Mitchel Field.

Q. Outside the gate? A. Yes, sir.

Q. You had a converastion with him? A. Yes, sir.

Q. Was he accompanied by anybody? A. Yes, sir. I think he was with Mr. Elias Bayer.

Q. Will you tell us the substance of that conversation? A. I was told at that time when I was speaking with the Messrs. Bayer, that their—that the son and the nephew were now going to be transferred into an aviation engineer unit stationed at Westover Field, that this aviation engineer unit was scheduled for overseas shipment.

Q. You were told this— A. By Mr. Elias and Mr. Samuel Bayer.

Q. Go ahead, proceed, Colonel. A. Mr. Samuel Bayer was very upset by that and his manner demonstrated that
419 very clearly. He was worried about it. And I tried to explain to him then, realizing that undoubtedly the average civilian would not know what an aviation engineer unit was supposed to do, I tried to explain to him what the functions of that unit would be overseas, and that there was nothing much to worry about, it was relatively a nice, fairly safe, and adventurous type of work. However, he was still wondering whether or not they could be kept from being placed in that unit.

Q. Did he ask you anything on that occasion? A. Yes, sir, he asked me whether I could do anything about that.

Q. What did you say to him? A. I couldn't.

Q. You told him you couldn't? A. Yes, sir.

Q. Was that the end of the conversation on that visit? A. Yes, sir.

420 Q. Now, subsequent to that visit, did you have any further communication from either Samuel Bayer or Elias Bayer? A. I was telephoned several times by I imagine both of them; I spoke to Mr. Samuel Bayer once.

Q. That was a telephone conversation? A. Yes, sir, on the telephone.

Q. Will your tell us what that conversation was?

Mr. Keenan: Could we have the time approximately fixed for that?

A. That must have been within the next few days. It had to be because I left there; I was transferred from Mitchel Field within a week after, about a week after the last time I saw them at Mitchel Field.

This telephone conversation I had with Mr. Samuel Bayer was apparently—was precisely the same conversation I had with him before. He was still worried about his son and his nephew being transferred to the aviation engineer organization at Westover, and wondered whether I could do anything about it. And I couldn't do anything 422
about it.

Q. You so told him? A. I so told him.

Q. That was the last conversation you had with Samuel Bayer? A. Yes, sir.

Q. During this period in the summer of 1943, I think you said that you knew Major Radovich? A. Yes, sir.

Q. He was an officer in the First Fighter Command at that time, was he not? A. Yes, sir.

Q. And he was the commanding officer of the Headquarters Squadron of the First Fighter Command, was he not? A. Yes.

Q. Do you know whether or not the two boys Martin Bayer and Melvin Usdan were under his command at that time? A. Yes, sir, they were.

Q. What was Major Radovich's rank at that time, if you 423
know, Colonel? A. Major Radovich was then a captain.

Mr. McGohey: I have no further questions.

*By the Court.*

Q. Did I understand you to say that Captain Radovich was then the commanding officer of the Headquarters Company? A. Headquarters Fighter Squadron.

Q. Not a company? A. Not company, but a squadron. That, your Honor is—the Headquarter's squadron contains all the personnel that work in the Headquarters.

Q. Of the First— A. Of the First Fighter Command.

Q. First Fighter Command? A. Yes, sir.

The Court: I think we will take a recess here, gentlemen, and have the cross-examination after we have the recess. Colonel, I wish you would retire to the witness room and do not discuss the case with anyone until you have completed your testimony.

The Witness: Yes, sir.

425 The Court: And we will take a recess of ten minutes now.

(Short recess.)

*Cross-examination by Mr. Keenan.*

Q. Colonel Vidal, how old are you? A. I am thirty-three years old.

Q. And the name of Vidal is fairly well known in the air service of the country, isn't it? A. Yes, sir.

Q. You met Elias Bayer, as far as you know, purely by accident that night at the Copacabana? A. Yes, sir.

Q. You don't think he was, as far as you know, lurking around on the outside to see you come in there? A. No, sir.

Q. As far as you know, he didn't know who you were, or 426 where you were stationed at the time he met you, did he? A. No, sir.

Q. You were in there, officers, having a little relaxation in a night club? A. Yes, sir.

Q. And that is not uncommon in the Army in this country? A. No, sir.

Q. Was there anything extraordinary about the conduct of Elias Bayer at all to distinguish him from other people that you have met from time to time? A. No, sir.

Q. He was gentlemanly in his conduct? A. Yes, sir.

Q. There was nothing hilarious or boisterous about the meeting? A. No, sir.

Q. You came down to his office after that? A. Yes, sir.

Q. When you say the Plymouth Thread Company, that is located at 20th Street, I believe, 21st Street, off Broadway, and they have a little office up on the second floor? A. Yes, sir.

Q. And that is where you went? A. Yes, sir.

Q. And that is where you met Samuel Bayer? A. Yes, sir.

Q. You never saw him before that time? A. No, sir.

Q. Nor had you talked to him before that time? A. No, 428
sir.

Q. And you didn't know that he had a boy in the service at that time? A. No, sir.

Q. And nothing was said at your first meeting at least about his having any boy in the service that you recall? A. No, sir.

Q. The first time that there was a discussion that you recall, if I may sum up your testimony as I heard it correctly, was when Elias called you and asked you if he could come out to see you with his brother Sam, is that right? A. No, sir.

Q. Well, a conversation took place in their office first? A. Yes, sir.

Q. At that time did they ask you to do anything for 429
them? A. No, sir.

Q. At all? A. No, sir.

Q. Had you your uniform at that time? A. No, sir.

Q. Was there any statement made to you "If we get you a uniform you don't have to pay for it"? A. No, sir.

Q. Or "If we get you a uniform we will expect you to do something for it"? A. No, sir.

Q. Or anything implied from the circumstances, as far as you know? A. No, sir.

Q. Coming now to the time when you met them outside the gate, I believe you fix that as some time late in July or early in August of 1943? A. Yes, sir.

Q. And you have I think made it clear if I recall correctly, that no civilians could get inside that camp unless they had some pass or else were accompanied by an officer? A. That is true.

Q. That is true today as far as you know out there, isn't it? A. Yes, sir.

Q. And has always been the habit out at that field, is that right? A. That is right.

Q. So when Samuel Bayer came out the first time he, as
431 I recall, asked you if you would look up to see whether or not a transfer had taken place? A. Yes, sir.

Q. He didn't ask you to make the transfer, did he? A. No, sir.

Q. Or to have anything to do with it, did he, except to look up and see whether it had taken place or not? A. I will qualify that.

Q. All right, please qualify it. Let us have the whole story. A. Yes, sir. After he learned that the orders hadn't been issued, he wondered whether or not I could do anything to expedite them.

Q. Yes, that is right. But first he asked you to look up and see whether or not the orders had been issued? A. Yes, sir.

Q. And you did? A. Yes, sir.

432 Q. Was there anything wrong about that, Colonel? A. No, sir.

Q. Have you done matters like that, or do officers do that from time to time in the Army? A. Yes, sir.

Q. That has happened with a great big Army and with a lot of people in it; that is not infrequent, is it? A. No, sir.

Q. Nothing wrong about it that you know of? A. No, sir.

Q. And you were not derelict in your duty in looking that up, were you? A. No, sir.

Q. You didn't so consider it then? A. No, sir.

Q. And don't so consider it now? A. No, sir.

Q. And you found that the transfer hadn't taken place; right? A. That is true.

Q. And then you told that to Samuel Bayer? A. Yes, sir.

Q. Then he asked you if you could expedite it? A. Yes, sir.

Q. Did he offer to give you anything if you did that? A. No, sir.

Q. Did he attempt to corrupt you at that time? A. No, sir.

Q. In any manner? A. No, sir. 434

Q. And, by the way, we are here in a court of justice, you are representing the United States Army as a witness called by the Government—did Samuel Bayer as far as you could determine, attempt to corrupt you in any manner at any time that you have known him up to today? A. No, sir.

Q. Now when he came out the second time to the field that was a few days after his first visit to the field, there had been a transfer then of these two boys to Westover or Bradley, he told you? A. Yes, sir.

Q. And these boys you knew were clerks on duty? A. Yes, sir.

Q. And they have many clerks in the Army, do they not, Colonel? A. Yes, sir.

Q. They couldn't run the Army without clerks, could they? A. No, sir. 435

Q. There is nothing menial or wrong about the job of being a clerk in the Army? A. No, sir.

Q. Did you ever see Martin Bayer at the time you had these discussions with his father? Had you ever seen him? A. Yes, sir, I had seen him.

Q. Will you describe him to us, if you can? I realize you— A. No, sir. I could say that he was dark haired and

I would say about 19 or 20 years of age, probably about 5 feet 10 inches tall.

Q. Was he a big rugged fellow or slight in build? A. As I recall, he was slight.

Q. And if we could find a little bit more about the conversation, after the boys had been transferred to Westover Field—I won't draw any distinction between Westover and Bradley; they are about the same type encampments, aren't they? A. Yes, sir.

Q. By the way, they could not have been very long in the hospital unit, could they? A. No, sir.

Q. A matter of a few days at the outside? A. That is
437 true.

Q. They were clerks; they were not sent as patients to the hospital? A. No, sir.

Q. They were sent there for clerk duty at the hospital? A. Yes, sir.

Q. They had been clerks before in the Army? A. Yes, sir.

Q. So they carried their clerical duties on the same field, only to the medical unit, where they had clerks there; right? A. Yes.

Q. And had to have clerks there? A. Yes, sir.

Q. So when Samuel Bayer talked to you after they had been transferred from the medical department at Mitchel Field to Bradley Field or Westover Field, he was very excited, I think you said? A. Yes, sir.

438 Q. Quite agitated? A. Yes, sir.

Q. And he was disturbed, was he not, about the fact that these boys now were in the airborne engineers apparently slated for immediate overseas service? A. Yes, sir.

Q. And that excited him very much apparently? A. Yes, sir.

Q. And he showed that to you? And you attempted to calm his fears? Is that a fair statement, Colonel? A. Yes, sir.

Q. His son was about 19 years old, as you described? A. I think he was.

Q. He had been a clerk all the time he had been at the field and now his father saw a picture of him being a paratrooper with the engineers; is that right? A. Yes, sir.

Mr. McGohey: I object to this, if your Honor please. I am fraid it is too much like summation.

The Court: Objection sustained.

Q. And you explained to him that it was a good thing—I think you used the words "good, safe enterprise", that they were in, something of that nature? A. Yes, sir. 440

Q. What were the duties of these boys to be in the airborne engineers?.

Mr. McGohey: If the Colonel knows.

Mr. Keenan: If he doesn't know, then he won't tell us.

The Court: I think he has a general idea. Go ahead.

A. My knowledge is very limited. I have worked with aviation engineers overseas. They normally do the flight strip a flying organization will operate from; they put the hard stands in. In other words, they build an airdrome. They do construction work other than that. But normally that is their function, to prepare an airdrome for a combat aviation unit. 441

Q. You would know that, Colonel, but a man outside the Army would not know that. A. That is very true.

Q. And apparently Samuel Bayer didn't know that?

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: Well, I will not press it.

Q. Did he ask you if you could do something to keep them here longer in this country? A. Yes, sir.

Q. And you told him you couldn't? A. I told him I could not and would not.

Q. And wouldn't. Did he offer you any inducement if you would do it? A. No, sir.

Mr. Keenan: That is all.

*Cross-examination by Mr. Robb:*

Q. Colonel Vidal, what was your rank at the time that these various things you have told us about took place, your meeting with the Bayers, and so on? A. I was a Lieutenant Colonel at the time I met the Bayers; at the time
443 that they came to Mitchel Field I was a Colonel.

Q. What was your duty at that time? What was your assignment at that time? A. My assignment was A3, or operations officer of the First Fighter Command.

Q. What was the duty of the defendant Radovich, Captain Radovich at that time? A. Captain Radovich at that time was the commanding officer of the Headquarters Squadron of the First Fighter Command.

Q. He was not under you, is that correct? A. No, sir.

Q. Who was your assistant? A. I had several assistants.

Q. Was there a Colonel Jacobson? A. Yes, sir.

Q. Now, at the time that you first met the defendant Elias Bayer, how long did you talk to him that night? A. I would say the conversation probably covered a period of
444 an hour or two, but during that time I was only a few minutes with him.

Q. When you parted, did you have some understanding about seeing him again? A. No, sir.

Q. How did you next hear from him? A. I heard from him through Lieutenant Roeser, who was with me that night.

Q. You mean you heard from Lieutenant Roeser? A. That he had been down to see Mr. Bayer.

Q. You were invited to go on a party with Mr. Bayer, were you? A. No, sir.

Q. Well, afterwards you were asked to go on a party with Mr. Bayer, weren't you? A. That was much later on.

Q. How much later? A. I would say a good month or two.

Q. In fact, you went to Mr. Bayer's apartment to one party, didn't you, sir? A. Yes, sir.

Q. How long after your first meeting was that? A. I imagine at least two to three months.

Q. Who else was there? A. I think Lieutenant Roeser, and I think Colonel Jacobson.

Q. There wasn't anything wrong about that? A. No, sir. 446

Q. Was Mr. Bayer's wife there? A. Mr.——

Q. Elias Bayer. A. He was not married at the time.

Q. By the way, at that time were you married? A. Yes, sir.

Q. Was your wife there? A. No, sir.

Q. Where was she? A. She was at Mitchel Field.

Q. Did you afterwards go on other parties with Mr. Bayer, either of the Bayers? A. I went to a birthday party of Mr. Elias Bayer. That was another time.

Q. Where was that given? A. That was given in his apartment.

Q. How long afterwards was that? A. I would say that took place in May or June.

Q. There wasn't anything wrong about that, was there? A. No, sir. 447

Q. Were other officers present? A. I think I saw Major Radovich. He wasn't there all evening.

Q. Was his wife with him? A. I don't recall.

Q. Who else was there? A. Mrs. Jacobson and Colonel Jacobson and Lieutenant Roeser and myself, and I think there were several friends of Mr. Bayer.

Q. Did you go on any more parties with them? A. No, sir.

Q. Now, Colonel, as I recall your testimony, you told us that the first time you talked to Mr. Sam Bayer outside the gate, he asked you whether or not you could expedite this transfer? A. Yes, sir.

Q. I don't recall whether you told us what your reply was. Would you tell us. A. My reply was that I couldn't.

Q. That you couldn't? A. That is true.

Q. Let me ask you, Colonel, where did you have to go to find out about this transfer. A. At headquarters of the First Air Force, which is about a hundred yards from the headquarters that I worked in.

Q. How far from the gate was that? A. I would say
449 physically three-fourths of a mile.

Q. You hopped in your car and went over there? A. Yes.

Q. And checked up with some officer, there, I assume? A. Yes, sir.

The Court: Is the transfer you are now referring to the transfer from the Fighter Command to the Medical Corps?

The Witness: Yes, sir.

Q. You found, I believe you told us, that the transfer was in process but it hadn't yet been completed, is that right? A. Yes, sir.

Q. On whose desk was it, if you know? A. I wouldn't know, sir. That was just—in other words, I talked to the
450 officer who was in charge of issuing orders on transfers.

Q. Who was that officer? A. I don't recall.

Q. It wasn't Major Radovich? A. No, sir.

Q. By the way, Colonel, when did you leave Mitchel Field? A. I left Mitchel Field approximately the 26th of August, 1943, the 26th or the 28th.

Q. Where did you go from there? A. I went to Colorado Springs for a station, Colorado Springs.

Q. How long did you stay there? A. I stayed there until August, 1944.

Q. Then you went to Italy? A. Yes, sir.

Q. When did you arrive in Italy? A. I arrived in Italy on the 8th of August, 1944.

Q. Now, Colonel, when did you first learn that you did not have to pay for these uniforms or this uniform which you got? A. I wouldn't have paid for the uniforms anyway. I didn't want them. They didn't fit and they didn't look well. I have never worn them.

Q. How many did you get? A. I had one summer uniform and one winter.

Q. And one winter? A. Yes, sir. 452

Q. Would you answer my question—when did you first learn or decide that you didn't have to pay for them or you weren't going to pay for them? A. Right after I received them.

Q. Who told you that? A. No one told me that. I wasn't going to pay for them. I told Lieutenant Roeser to tell Mr. Bayer that the uniforms weren't satisfactory.

Q. Did you get any message back? A. Yes, sir. He said, "Forget about the whole thing."

Q. You kept the uniforms? A. They are in storage.

Q. There wasn't anything wrong about that, was there? A. I don't believe so.

Q. You weren't conspiring with anybody? A. No, sir.

Mr. Robb: That is all. Thank you. 453

The Court: Any further questions?

Mr. McGohey: I have no further questions, your Honor.

The Court: All right. Call the next witness.

454 *Joseph Busch—For Government—Direct.*

JOSEPH BUSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGoldrick.*

Q. Mr. Busch, where do you live? A. Sir?

Q. Where do you live? A. 4217 Sixteenth Avenue, Brooklyn.

Q. Where is your place of business? A. 84 Fifth Avenue, New York City.

Q. What is your business? A. Manufacturer of uniforms.

455 Q. What is the name of your company? A. I. Buss Uniform Company.

Q. Did you give us the address? A. 84 Fifth Avenue.

Q. What street is that near? A. The corner of 14th Street.

Q. Fourteenth Street and Fifth Avenue? A. And Fifth Avenue.

Q. Are you related to the defendant Samuel Bayer? A. Yes, sir.

Q. What is your relationship? A. Brother-in-law.

Q. Mrs. Bayer is your sister? A. Yes, sir.

Q. How long have you known Samuel Bayer? A. Oh, I guess about thirty years, over thirty years.

Q. You know his brother Elias Bayer, do you? A. Yes, sir.

456 Q. They are here in the court room, are they not? A. Yes.

Q. The gentlemen sitting here (indicating)? A. Yes, sir.

Q. Do you know an officer in the United States Army named Major Morris Saffron? A. Yes, sir.

Q. Where did you first meet Major Saffron? A. At my place of business.

Q. Was he a customer of yours? A. He came up to buy a uniform.

Q. Do you recall about when that was? A. No; I don't recall whether it was '42 or '43.

Q. Were you ever in the company of Major Saffron and Samuel Bayer at the same time? A. Yes, sir.

Q. When was that, that you were in their company? A. We had lunch together.

Q. When was that? A. Oh, in 1943, I believe.

Q. What part of 1943? Can you fix the time a little more definitely than that? A. It might have been about the spring.

Q. Where did you have lunch together? A. In a restaurant, a couple of blocks away from 39 Whitehall Street.

Q. Do you know whether or not Major Saffron at that 458
time was stationed at the Army Building in 39 Whitehall Street? A. Yes, sir, he was stationed there.

Q. You and Mr. Bayer and Major Saffron had a conversation at that luncheon? A. Yes, sir.

Q. Will you tell us the substance of the conversation? A. Well, we sat down and he asked Mr. Bayer——

Mr. Keenan: Excuse me. I want to interpose an objection to that on behalf of Elias Bayer if it was Samuel that was doing the talking.

Mr. McGohey: I submit that this is an act in furtherance of the conspiracy.

The Court: I will rule. I am going to overrule the objection and treat it as a motion to strike out if it is not properly connected. Go ahead. 459

Mr. McGohey: Mr. Reporter, will you read the last question?

(Question and answer read.)

A. (Continuing) We sat down and he asked how Mr. Bayer's boys were, and he asked me how my son was, and then after that we had a general conversation.

Q. And that was all there was to that? A. Yes, sir.

Q. You say that was some time in the spring of 1943? A. Yes, sir.

Q. Now I direct your attention to the summer of 1943, specifically to some time in August, 1943. Did you meet Samuel Bayer and Major Saffron at or about that time? A. Yes, I met them.

Q. What? A. Yes, sir.

Q. In the summer of 1943? A. Yes, sir.

Q. Where did you meet them? A. At the hotel, the Governor Clinton Hotel.

Q. Prior to that meeting did you have a conversation with Samuel Bayer any time that day? A. Yes, sir, in the
461 morning.

Q. Was that a personal conversation or was it by telephone? A. By telephone.

Q. Had you called Samuel Bayer or had he called you? A. He called me.

Q. You know Sam Bayer's voice? A. Yes, sir.

Q. What did he say to you? A. He called me that one morning and told me——

Mr. Keenan: Just a minute. I want to renew the objection to this conversation without proof of any conspiracy or any reason that I can see so far in this evidence why it should bind Elias Bayer.

The Court: The same action on your objection—objection overruled, and I am going to treat it as a
462 motion to strike out.

Mr. Keenan: Exception.

The Court: Go ahead. I treat it as a motion to strike out if the proper connection does not appear.

Mr. McGohey: Yes, your Honor.

The Court: You may proceed.

Mr. McGohey: May I have the question read.

(Question and answer read.)

A. (Continuing) And told me that the boys were being transferred.

Q. Did he mention what boys? A. Well, when he said "boys" I understood that it was Martin Bayer and Melvin Usdan.

Q. Did he say where they were being transferred? A. No, sir.

Q. What else did he say? A. And he asked me whether I wouldn't call up Major Saffron if he would do something "for me" or find out what happened over there.

Q. What, if anything, did you say? A. I said I would. And I called up Major Saffron and told him, and he said he would call me back in the afternoon.

Q. Did he? A. And he called me back in the afternoon, and I called up Mr. Bayer and told him that I made an appointment at the Governor Clinton.

Q. An appointment for whom? A. For him in the evening at the Governor Clinton.

Q. What, if anything, did Sam Bayer say? A. He said he was too nervous to go up and wouldn't I go up there and he would meet me later, and I said I would.

Q. Did you that evening go to the Governor Clinton Hotel? A. Yes, I went up to the Governor Clinton.

Q. When you got to the Governor Clinton, did you meet Sam Bayer there? A. I met Mr. Bayer.

Q. Then what happened? A. Then I met Major Saffron.

Q. Yes. A. And then Mr. Bayer said he would wait outside. And I met a Lieutenant Fabbricatore with Major Saffron.

Q. And where were you at this time? You were in the company of Major Saffron and Lieutenant Fabbricatore? A. Yes.

Q. Where in the hotel were you at this time? A. We went up to the balcony.

Q. When you were— A. Oh, at the time we were down in the lobby, we met him down in the lobby.

Q. Then what did you do? A. We went up to the balcony.

Q. Then what happened? A. And Lieutenant Fabbricatore and Major Saffron——

Mr. Keenan: Just a minute. If there is going to be any conversation now outside the hearing of Samuel Bayer, I would like to object to that. The question is asked, "Now what happened?" I may get a conversation that would be improper.

The Court: Are you leading to the conversation?

Mr. McGohey: I am leading to the statement that 467
there was a conversation but not any conversation except conversation in which the defendant Bayer participated.

The Court: All right.

Mr. Robb: If the Court please, I assume that all these conversations will of course not come in against the defendant Radovich unless there is some connection shown.

The Court: That is right.

Mr. Keenan: May I ask the Court at this time, instead of interrupting continuously, which I dislike to do, but I want to save my record as a lawyer, if we can consider an objection being made to every question that is asked of any statements made outside of the 468
presence of the individual defendants until and unless something by way of conspiracy is shown?

I understand your Honor is following the ruling of permitting all this testimony to come in subject to a motion that we can strike it out if it is not connected up. With great respect we object to that manner of doing it, we think it is not in accordance with our rights; we want to save our record, but we don't want to continue to object.

The Court: I am going to pursue that course. If a proper connection is not shown then I will entertain your motion. I don't much like these blanket objections. I understand you, sir. I think it would probably be better if there is anything which you wish to object to, that you simply just indicate that you do object, and I will make the ruling.

Mr. Keenan: All right, your Honor, I will abide by that. But I am sorry, I will have to object to every question that is asked of conversations that took place outside of the hearing of the defendant I represent until—and under the authority——

The Court: Well, don't let us have a legal argument 470
here. I will hear you on that fully if you wish to be heard, in the absence of the jury. I think it would be probably a better plan as to any conversation—there are three defendants you see; some conversations have been testified to with one, two—I don't think there are any so far with three; but for the rest of the afternoon certainly I would prefer for you not to ask each individual question, but as to the line which then develops——

Mr. Keenan: Your Honor understands why I have to do that.

The Court: I understand.

Mr. Keenan: I don't intend to be offensive by interrupting, but I will have to do it.

The Court: Certainly. All right, go ahead. 471

Mr. McGohey: Mr. Reporter, will you read the last question?

(Record read as follows: "Q. Then what happened? A. And Lieutenant Fabbricatore and Major Saffron——")

A. (Continuing) —walked to the rear and let me stand there, and they had a conversation together for about five minutes.

The Court: Who had the conversation?

The Witness: Lieutenant Fabbricatore and Major Saffron.

Q. Then what happened next? A. Then they came over to me and Major Saffron asked Lieutenant Fabbricatore—

Mr. Keenan: Just a minute. I object to that conversation.

Mr. McGohey: He hasn't got to the conversation, I submit, your Honor. Maybe I could clarify it by this question.

473 Q. When Major Saffron and Lieutenant Fabbricatore came back and joined you, was there a conversation among the three of you, without telling us what the conversation was? A. No. He just asked Fabbricatore——

Q. Wait a minute. Did the three of you talk together? A. No, sir.

Q. Was there a conversation between Major Saffron and Lieutenant Fabbricatore in your presence, without telling us the conversation? A. When they went to the rear?

Q. No. When they came back to you? A. No.

Q. You just said Major Saffron asked something? A. Well, he just started to ask him a question.

Q. He talked to Fabbricatore, is that it? A. That is right.

474 Q. Did Fabbricatore talk to him? A. No. He asked him a question to tell me.

The Court: Don't tell us what the question is. Just whether they did have a conversation.

Q. There was some talk between Saffron and Fabbricatore in your presence—some talk, some words expressed by each, is that correct? A. Well, I don't remember.

Q. I didn't ask you what they were. I say, they did utter words to each other, is that correct? A. Not when they came over to me.

Mr. Keenan: Just a minute. This is a Government witness and I will object to the leading form of the question. I think the witness ought to testify instead of the learned United States attorney.

Mr. McGohey: I am leading only for a purpose—I don't want any part of any conversation.

Q. The three of you came back and were together, were you? A. Yes, sir.

476

Q. Then what happened after that? A. Major Saffron asked Fabbricatore——

Q. Never mind what he asked him. The three of you were together on that balcony? A. Yes, sir.

Q. Then what happened? A. Then I was all through.

Q. Well, did you stay on the balcony? A. Yes, sir.

Q. Did you stay on the balcony? A. No, we went off the balcony after he had the conversation there, when he was through with me.

Q. You came downstairs, did you? A. Yes, sir.

Q. Then tell me what happened? A. Major Saffron walked out the side entrance with Lieutenant Fabbricatore and Major Saffron told me to wait in the lobby there until he got back.

477

Q. Did he come back? A. He returned in a few minutes.

Q. Then what happened? A. Then Major Saffron and I walked outside and met Mr. Bayer.

Q. That is, Mr. Samuel Bayer? A. That is correct.

Q. Then what happened? A. Then Mr. Bayer suggested that we take a cab, which we did; and we rode around for about fifteen minutes.

Q. You got into this taxicab? A. Yes, sir.

Q. It was yourself, Sam Bayer— A. Yes, sir.

Q. And Major Saffron? A. That is correct.

Q. Was there a conversation among the three of you in the taxicab while you were riding around? A. Yes, sir.

The Court: It may be noted that you object there. All right, go ahead.

Q. What was that conversation? A. Mr. Bayer asked him if there is anything that could be done for him.

Q. Mr. Bayer asked whom? A. Major Saffron—if anything could be done for him, and he said "Nothing".

Q. Did he say anything could be done for him? Did he say what about? A. About the boys.

479 Q. Yes? A. And he said no, he couldn't do anything for him.

Q. Did Major Saffron say anything else? A. Then he asked him what—Mr. Bayer asked him what happened.

Q. And what did Major Saffron say? A. Major Saffron told him that there was a rumor around that Mr. Bayer had spent a lot of money.

Q. A rumor around where? A. Around the field.

Q. What did Samuel Bayer say, if anything, to that? A. He didn't say anything to that. Major Saffron didn't want to listen to him any more. He told him to forget about everything.

Q. Did Samuel Bayer say anything in addition to what your have testified? A. No, sir.

480 Q. Is that the substance of the entire conversation? A. No. We had a general conversation after he got through with that.

Q. Then you say you rode around for about fifteen minutes? A. Yes, sir.

Q. Where did the ride end? A. We stopped by the hotel, at the Pennsylvania Station there.

Q. You came back directly to the Governor Clinton Hotel? A. Yes, sir.

Q. And then what happened? A. Mr. Bayer went home and I went home, and Major Saffron.

Q. The three of you separated? A. That is right.

Mr. McGohey: I have no further questions, your Honor.

The Court: You may cross-examine.

*Cross-examination by Mr. Keenan.*

Q. Did Samuel Bayer offer any money to anybody while you were there? A. No, sir.

Q. Did he offer any money to Major Saffron? A. No, sir.

Q. He was a Major in the United States Army, wasn't 482
he? A. Yes, sir.

Q. Was Mr. Samuel Bayer agitated at the time—excited? A. Well, he was a little bit nervous.

Q. Do you know where the boys were at the time of this conversation? Do you know what camp they were at, or where they were stationed? A. I think they were still at Mitchel Field.

Q. Do you know? A. No, I am not sure. I say I think.

Mr. Keenan: That is all.

The Court: All right, you may be excused.

The Court: I think it would cover the situation, gentlemen, and protect the rights of each of you if it be noted that there is a general objection and continu- 483
ing one as to each defendant as to the recital of any conversation with any of the three defendants not in the presence of all three.

Mr. Keenan: Yes, sir.

Mr. Robb: It will all be subject to a motion to strike, if the Court please.

The Court: The same thing.

Mr. Keenan: Thank you.

484 *Philip Busch—For Government—Direct.*

PHILIP BUSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Wallace.*

Q. Mr. Busch, you are a partner in the I. Buss Uniform Company? A. That is right.

Q. Who are the other partners? A. Joseph and Harold Busch.

Q. You are also related by marriage to Samuel Bayer? A. That is right.

Q. He is your brother-in-law? A. That is right.

Q. Do you know Elias Bayer? A. Yes, I do.

485 Q. Do you know Major Radovich? A. Yes, I do.

Q. Do your know an officer in the United States Army named Major Saffron? A. Yes, I do.

Q. Where did you first meet Major Saffron? A. Well, he was up at our place to buy some uniforms.

Q. Do you recall when that was? A. That was in the year 1941, before Pearl Harbor.

Q. Now, after you made up uniforms for him, did you ever meet Major Saffron again? A. Well, he was up the place again after that, after he took out the first uniform.

Q. Did you ever meet him away from the place of business? A. Yes, I did.

Q. Where did you meet him? A. Down at 39 Whitehall Street.

486 Q. Do you recall approximately when that was? A. That was in the year 1942.

Q. Do you know what part of the year? A. I think it was in the summer time, around the summer; either the spring or the summer time.

Q. Did you meet him at 39 Whitehall Street? A. Yes, sir.

Q. Will you tell the jury, if you can recall, how you happened to meet him at 39 Whitehall Street? A. I called up Major Saffron and told him my brother—my brother-in-law Mr. Bayer——

Mr. Robb: If your Honor please, we object to that.

The Court: Don't give us the conversation.

Q. Prior to your call to Major Saffron, had you received a telephone call from anyone? A. Yes, I did.

Q. From whom? A. Mr. Bayer, Samuel Bayer.

Q. What did Mr. Bayer say to you? A. He asked me if I knew someone downtown he could get some information about enlisting his boy in the air force.

Q. What did you say to him? A. I said I did.

Q. Then you called Major Saffron? A. I did, yes.

Q. Thereafter did you see Major Saffron? A. Yes. I think it was the following day, I called him up that day, and I went down there, and it was in the morning, and I 488 think we went down in the afternoon.

Q. Who went down? A. I went down with Mr. Bayer.

Q. Which Mr. Bayer? A. Samuel Bayer and his boy, Robert Bayer.

Q. Robert Bayer? A. That is right.

Q. Did you have a conversation with Major Saffron? A. Well, the only conversation I had with Major Saffron was just to tell him that Mr. Bayer wanted to get some information about his boy enlisting in the air corps.

Q. Did Samuel Bayer then have a conversation with Major Saffron? A. Yes; he just spoke to him and told him that his boy wanted to enlist in the air corps.

Q. Can you recall that conversation? A. Well, I wasn't there; I couldn't exactly recall the whole conversation. 489

Mr. Keenan: If he wasn't there I don't think we ought to have the conversation.

The Court: He just testified he was there, I thought.

Mr. Keenan: He just said he wasn't there.

The Court: It is a little bit conflicting.

Mr. Robb: If the Court please, I understand this was some other boy, not the boy involved in this indictment.

The Court: I understand that, but it is this defendant. I am going to overrule the objection on that ground. Clarify whether he was there or not and heard the conversation.

Q. Were you present during a conversation between Samuel Bayer and Major Saffron at 39 Whitehall Street? A. Yes, I was.

Q. As best you can recall, will you tell us what that conversation was?

Mr. Keenan: May we have the time fixed, to see whether it is even within the time described in the in-
491 dictment.

Q. When was the conversation? A. It was in the afternoon.

Q. What year? A. 1942. It was either the spring or summer time. I just can't recall the exact time.

Mr. Keenan: I object to it as being outside of the date of the conspiracy.

Q. Could it have been in September, 1942?

Mr. Keenan: I object to that, your Honor.
The Court: The objection is overruled.

492 A. No, it was not September.

The Court: Was it earlier than September?
The Witness: Yes, it was earlier than September.
The Court: I will sustain the objection.

Q. Then you had this conversation. Did your ever meet Major Saffron again? A. Yes. About a week later.

Q. Where? A. At 39 Whitehall Street.

Q. Were you alone? A. I was with Mr. Bayer and Robert Bayer.

Mr. Robb: Which Mr. Bayer?
The Witness: Samuel Bayer.

Q. That would be about a week later. It would also be in the spring or summer of 1942? A. That is right.

Q. Now, after that second meeting, did you ever meet Samuel Bayer and Major Saffron again? A. Yes. That was some months later.

Q. Where? A. At the Induction Center.

Q. Where was the Induction Center? A. At the Grand Central Building. 494

Q. Would that be after September 1, 1942? A. Yes, I believe it was.

Q. In whose company were you when you went up to the Induction Center at Grand Central? A. Well, Mr. Bayer was with me and I think his boy, Martin Bayer.

Q. Anyone else? A. Well, I don't recall anyone else with us at the time.

Q. Will you tell the jury how you happened to be there at that time? A. Well, Mr. Bayer asked me if I couldn't get in touch with Major Saffron. He told me that his other boy wanted to enlist in the air corps.

Q. Did he say anything else to you at that time? A. No, he did not, just that he wanted to enlist in the air corps.

Q. What did you do when he told you this? A. Well, I went along with him and I met Major Saffron, and Mr. Bayer and Martin, rather, went inside and told him that he wanted to enlist in the ground crew of the air corps.

Q. What else was said, if you remember? A. Well, that is all. I mean, he just gave him the information. He said that he coul still enlist, there were still openings yet.

Q. What was this about there still being openings? A. There were still openings in the air corps yet in the ground crew.

Q. Who said that? A. Major Saffron.

Q. Had he been asked any question before he made that statement by anyone? A. Not that I know of.

Q. He just made the statement without reference to any question that had been asked? A. Well, I guess he knew that there were some openings there.

Q. Was there any mention made to you about the infantry service at that time? A. No, there wasn't, sir.

Q. Was there any mention made about anything that had appeared in the newspapers at that time? A. No.

Q. Do you know Major Radovich? A. Yes, sir, I do.

Q. Where did you first meet him? A. Up at my place of
497 business.

Q. Do you know Colonel Vidal? A. Yes, I do.

Q. Colonel Jacobson? A. I do.

Q. Lieutenant Roeser? A. I do.

Q. Where did you meet these officers? A. Up at our place of business.

Q. Did they come there together? A. Well, no, they didn't all come together.

Q. Had you known them before they came to your place of business? A. No, I did not.

Q. Did anyone introduce you to them? A. Well, nobody introduced me to them; just that I took their measurements and I knew their names, I knew who they were.

Q. Was there anyone with them at any time who was not an officer? A. Yes.

498 Q. Who? A. Elias Bayer.

Q. Did he bring them up there? A. Yes, he did.

Q. When he brought them up did you have any conversation with Elias Bayer? A. No, I did not.

Q. Did you make uniforms for these officers? A. Yes, we did.

Q. Were you ever paid for making these uniforms? A. Yes.

Q. Who paid you? A. The Plymouth Thread.

Q. You say the Plymouth Thread? A. That is right.

Q. Did you receive a check from them? A. I suppose so.

Q. Do you know? A. Well, I wouldn't know. My brother Hal would know more about that because he takes care of the books.

Q. Is this Plymouth Thread a partnership? A. I guess so.

Q. Who are the partners? A. I really couldn't tell you.

Q. Is Sam Bayer a member of the partnership? A. That is right.

Q. Is Elias Bayer? A. I don't know.

Q. Now when Elias Bayer was at your place of business with these officers, did he introduce them to you? A. Well, 500
no. He didn't introduce them to me. Just my brother told me to—Elias told my brother to have somebody measure these officers for the uniforms, see.

Q. Was anything said about payment? A. No, not to me.

Q. Was it said to anyone in your presence? A. I don't know, it might have been said to Harold.

Q. Your brother, Harold Busch? A. That is right.

Mr. Wallace: No further questions.

*Cross-examination by Mr. Keenan.*

Q. By the way, you have used the name Major Saffron. Do you know what branch of the Army he was in? He was a doctor, wasn't he? A. That is right; he was a doctor. 501

Q. He was the medical man? A. That is right.

Q. When he was brought down there he was the one that had to do with arranging the physical examination? A. I don't know—yes, he arranged the physical examination, that is right.

Q. And there was some talk with him? A. You mean did I have any talk——

Mr. Keenan: I withdraw that.

502 *Philip Busch—For Governmgnt—Cross.*

Q. Have you discussed this case with the United States attorney and his assistant? A. Yes.

Q. How many times? A. I don't know, about six, seven times.

Q. Where? A. Well, I was in Mr. Wallace's office a few times and I think I was up to Mr. McGohey's office.

Q. Mr. Wallace is the young gentleman, the assistant U. S. attorney who asked you the questions? A. That is right.

Q. You were up in his office a few times? A. That is right.

Q. You have been over this whole story with him, is that correct? A. That is right.

503 Mr. Keenan: That is all.

*Cross-examination by Mr. Robb.*

Q. Mr. Busch, how many officers came to your place of business to get uniforms? A. Well, we have quite a number of officers coming up to our place. I mean we were making army officers' uniforms.

Q. That is your regular business? A. Well, it was part of our business at the time.

Q. You mentioned Colonel Vidal, Colonel Jacobson? A. Yes.

Q. And who else, Lieutenant Roeser? A. That is right.

Q. They all got uniforms? A. That is right.

504 Q. They were all out there at Mitchel Field? A. Yes, they were at the time.

Q. Do you recall which one of those officers came in first? A. That would be pretty hard for me to say now. That is quite a number of years back now.

Q. You don't remember? A. I wouldn't remember.

Q. How about Captain Engelhardt? Did he come up, too? A. Yes, he was up for uniforms too.

Q. Were these officers, Vidal, Jacobson, Roeser, Engelhardt, Major Radovich, all in the same group, so to speak? A. Well, I mean, they were never always together.

Q. They were all friends, is that right? A. I imagine so.

Q. They appeared to be at least, is that right? A. (No answer.)

Mr. Keenan: I forgot to ask one question.

*By Mr. Keenan.*

Q. Was there some complaint about the fit of your uniforms? A. Yes, there was.

Q. Did some of them leave their uniforms back there because they didn't like the fit? A. That is right. 506

*By Mr. Robb.*

Q. Mr. Busch, do you recall which officer it was that brought his uniform back? A. Major Radovich and Lieutenant Roeser.

Q. They brought them back and left them with you, didn't they? A. That is right.

Mr. Robb: That is all.

*Redirect examination by Mr. Wallace.*

Q. Mr. Busch, you have discussed this matter with Mr. Levy, who sits at the counsel table here? A. That is right. 507

Q. How many times have you been to his office? A. Twice.

Mr. Wallace: That is all.

Mr. Robb: May I ask a question?

The Court: I would like for you to get through.

Mr. Robb: One question.

The Court: I will permit you now, but I want this case conducted in orderly fashion.

Mr. Robb: It was suggested by the last question of Mr. Wallace.

*Recross-examination by Mr. Robb.*

Q. Mr. Busch, did you ever see me before in your life? A. No, I didn't.

Mr. Robb: That is all. Thank you.

The Court: All right, sir, you may be excused. Is there any other witness you particularly wish to put
509 on this afternoon?

Mr. McGohey: If your Honor please, I was going to ask your indulgence. I am suffering from a cold in the throat now. The next witness will be a rather long witness.

The Court: Ladies and gentlemen, I am going to adjourn now until tomorrow morning. Bear in mind the admonition about not discussing the case.

Court is adjourned now until ten-thirty tomorrow morning. Be here promptly.

(Adjourned until Thursday, October 4, 1945, at 10:30 a. m.)

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510 New York, October 4, 1945, 10:30 a. m.

Trial resumed.

Mr. Ansell: If your Honor please, may we speak to you for a minute at the bench?

(Conference at the bench between court and counsel.)

The Court: Call the first witness.

MORRIS SAFFRON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Major, will you keep your voice up as high as you can, please, so that the last juror in the box will hear you clearly? A. I will, sir.

Q. You are a Major in the United States Army Medical Corps, are you not? A. Yes, sir.

Q. What is your present duty assignment? A. I am now on terminal leave, and I am assigned to the separation center at Fort Dix, New Jersey.

512

Q. Now, how long have you been in the United States Army, Major? A. Since 1931.

Q. In the year 1942, where were you assigned? A. 1942, I was assigned to the Army Building, 39 Whitehall Street.

Q. In New York City? A. In New York City.

Q. What was your duty assignment there? A. I was an examining officer.

Q. Will you explain that a little more fully? What were your duties as an examining officer? A. I was a senior examining officer. It was my duty to supervise medical examinations and give information concerning enlistments of applicants for enlistment.

Q. Do you know the defendant Samuel Bayer? A. Yes, sir.

Q. Do you see him in the courtroom? A. Yes, sir.

513

Q. Will you indicate him to us? A. He is sitting right there (indicating).

Q. That is the gentleman in the brown suit? A. Yes, sir.

Q. Do you know the defendant Elias Bayer? A. Yes, sir.

Q. Do you see him in the courtroom? A. Yes, sir.

Q. Is he the gentleman sitting here next to Sam Bayer? A. That is correct, sir.

Q. Do you know the defendant Radovich? A. No, sir.

Q. Were you ever stationed at Mitchel Field? A. Yes, sir.

Q. When were you stationed at Mitchel Field? A. 1939, for a period of six weeks.

Q. For six weeks in 1939? A. That is right.

Q. After you left at the end of that six weeks in 1939, were you ever again stationed at Mitchel Field? A. I was never actually stationed again at Mitchel Field.

Q. Now, when did you first meet Samuel Bayer? A. I met Samuel Bayer in the spring of 1942.

Q. Were you introduced to him by anybody? A. Yes, sir.

Q. By whom? A. I was introduced to him by Phil Busch.

515 Q. And, do you know, is Phil Busch connected with the I. Buss Uniform Company? A. Yes, sir.

Q. Now directing your attention to the early part of December, 1942, did you meet Samuel Bayer about that time? A. Yes, sir.

Q. And was he accompanied by anybody? A. Yes, sir.

Q. By whom? A. Joe Busch.

Q. Anybody else? A. They were alone.

Q. Where did you meet them? A. At the Governor Clinton Hotel.

Q. I am talking about December 1942. I beg your pardon. I met them at the Induction Center, Grand Central Palace.

Q. Let me ask you this: did you ever meet a man named Bob Bayer? A. Yes, sir.

516 Q. Did you ever meet a man named Melvin Usdan? A. I do not recall ever meeting him.

Q. Where did you meet Bob Bayer? A. At the Induction Center.

Q. Did you meet him at the same time that you met Busch and Sam Bayer? A. Yes, sir.

Q. At the Induction Center? A. Right.

Q. Did you have a conversation with them that day? A. I had a conversation with Mr. Busch that day.

Q. With Mr. Busch. Will you tell us what that was? Was Mr. Bayer there while the conversation was going on?
A. Yes, he was there.
Q. Will you tell us what that conversation was?

Mr. Keenan: I object to that.

The Court: It is understood that your objection carries through to all conversations at which all three defendants were not present.

Mr. Keenan: In addition to that, we think the time has arrived to respectfully request that orderly procedure be followed in the trial and at some time we learn what the Government claims the agreement was that is the basis of this conspiracy—how it was made 518 and by whom it was made.

It is perfectly true, your Honor, if you can indulge me just a moment, it is perfectly true that it is not possible to show a conspiracy in one sentence or by one witness, but it is impossible to write all of the incidents of the story of Oliver Twist, and we do have a right to have some logical order followed in the discretion of this court without it being abused, with great respect. And we think that to put on continuously, from one day to another, isolated instances without regard to time or without ever being informed from the witnesses what the agreement was that is the core of the conspiracy, is so confusing to the jury that it amounts to an abuse of the process, and we are lodging our ob- 519 jection seasonably upon that point now.

The Court: I see no objection to the way the case is being presented. Your objection will be overruled.

Mr. Robb: If the Court please, may we ask the Court at this time to tell the jury that none of these conversations which may have taken place out of the presence of our client, Major Radovich, may be used against him unless and until in some way they are tied

up with him at the proper time. Now this witness has testified he doesn't even know our client.

The Court: That is not conclusive.

Mr. Robb: No, sir. But, nevertheless, these conversations took place out of his presence in 1942, apparently before he even knew the Bayers, and we think it only fair that the jury should be told that they must not take these conversations, if they took place, against our client unless and until he is in some way connected with them.

The Court: I will make an explanation briefly to the jury. Ladies and gentlemen, the charge which you
521 are trying, as I indicated, to begin with, is that of conspiracy, the fundamental element of which is an agreement, a mutual understanding between people to do something. It is not necessary that that be a formal agreement. It is not necessary that it come into existence at one precise particular time. Now if and when the evidence satisfies you beyond a reasonable doubt that a conspiracy, mutual understanding, came into existence, then statements made by any one of the parties involved, whether in the presence of the others or not, in furtherance of the scheme, is admissible as evidence against all. Now unless and until you are satisfied beyond a reasonable doubt that a conspiracy came into existence, you should not consider the statements made by one party out of the presence of
522 the others as evidence against the other person who did not make the statement. I will be more full about that at a little later time in the trial. Go ahead.

Q. Will you tell us what the conversation was that you had with Philip Busch?

Mr. Robb: May I make one further suggestion in that respect, that statements made prior to the entry

into this agreement or conspiracy, if there was any, would not be admissible against someone who hadn't joined in the conspiracy at that time, unless in some way afterwards he ratified it.

The Court: I attempted to make that clear, and I think I have.

Mr. Robb: Yes, sir.

Mr. McGohey: I will withdraw that question.

Q. Now I direct your attention to the summer of 1943. Did you see Samuel Bayer some time in the month of July 1943? A. Yes, sir.

Q. Where did you see him? A. I met him at the Governor 524
Clinton Hotel.

Q. In New York City? A. Right.

Q. About what time of day was it? A. It was about seven o'clock in the evening.

Q. Was anybody with him when you met him? A. He was accompanied by Joe Busch.

Q. And prior to meeting him there that evening, had you received a telephone call from Joe Busch? A. Yes, sir.

Q. Will you tell us what Busch said to you?

Mr. Robb: We object.

The Court: Objection sustained.

Q. Well, you met him in the Governor Clinton Hotel? A. Yes, sir. 525

Q. Now will you tell us what happened there after you met him? A. When I arrived at the Governor Clinton Hotel, Mr. Bayer and Mr. Busch were in the lobby. We were awaiting—that is, I was awaiting the arrival of another officer. Prior to the arrival of this other officer, Mr. Bayer left the hotel. Upon the arrival of this other officer, Lieutenant Fabbricatore, Joe Busch, Lieutenant Fabbricatore and myself then went to the balcony of the hotel.

Q. And after you got there, without telling me any conversation at this point, did you and Lieutenant Fabbricatore have a conversation out of the hearing of Mr. Busch? A. Yes, sir.

Q. And then did you come back and join Busch? A. Yes, sir.

Q. And then, without telling me any conversation at that point, what did you do? A. At that point Lieutenant Fabbricatore and I left the hotel, for a short while, and then I returned——

Q. Pardon me for a minute. When you came down from the balcony, did Busch come down with you? A.
527 Yes, sir, he did.

Q. He came down to the lobby? A. That is right.

Q. And then, as I understand it, you and Lieutenant Fabbricatore left the hotel? A. And I arranged to return to the lobby of the hotel and meet Joe Busch there.

Q. Had you told Joe Busch that—to wait for you? A. That is right.

Q. Did you come back? A. I did.

Q. Did you meet Joe Busch? A. I did.

Q. Then what did you do? A. I met Joe Busch and Sam Bayer.

Q. And what did you do then? A. We entered a taxicab and drove around for about ten or fifteen minutes.

Q. In the taxicab was yourself, Joe Busch, and the defendant Samuel Bayer? A. That is correct.

528 Q. Did you have a conversation in the cab? A. Yes, sir.

Q. Will you tell us the substance of that conversation, what you said and what Bayer said and what Busch said? A. Sam Bayer said, "I would do anything in my power to keep my boy from going overseas."

Q. And what did you say to him? A. I said, "There is absolutely nothing that I can do for you. I have been given to understand that your boy's case is a celebrated matter

at Mitchel Field and is full of dynamite. I'll have absolutely nothing to do with it."

Q. Was there any mention in that conversation about rumors at Mitchel Field? A. Well, that is what I intended to convey by the statement I just made.

Q. I asked you, was there any mention of rumors at Mitchel Field in the conversation you had.

Mr. Keenan: I object to that, your Honor. I don't think the time has come where we are going to convict a man on rumors. I object to that question.

The Court: I think your comment is not entirely pertinent. This is a statement made to one of the defendants. I overrule the objection. 530

Mr. Keenan: Exception.

The Court: You may proceed. What did you say to him?

The Witness: "There have been rumors at Mitchel Field that this case is being tampered with."

Q. Did you state that to Sam Bayer? A. I did.

Q. What did Sam Bayer say? A. He made no statement concerning it.

Q. Did he deny the truth of any such rumors?

Mr. Keenan: I object to that. Just a moment. If your Honor please, I object, and at least I think this witness ought to be permitted to testify without words being put in his mouth by the United States Attorney. 531

The Court: Your objection is overruled.

Mr. Keenan: Exception.

Mr. McGohey: Will you read the question?

Q. (Question read.) A. He did not.

Q. Was there anything further said in the conversation? A. No, sir.

Q. Have you given us all the substance of that conversation? A. Yes, sir.

Q. Now, when you concluded this taxicab ride, that was in the neighborhood of the Governor Clinton Hotel, was it? A. That is correct.

Q. At the conclusion of the ride did you get out of the car? A. Yes, sir.

Q. Did you leave Sam Bayer? A. I did.

Q. And you also separated from Busch? A. A few minutes later I separated from Busch.

Mr. McGohey: I have no further questions, your
533 Honor.

The Court: Do you wish to cross-examine?

*Cross-examination by Mr. Keenan.*

Q. When you first met Mr. Bayer, was that at Grand Central Palace Induction Center? A. No, sir.

Q. Where was it? A. It was at a lunch room.

Q. A lunch room? A. That is right.

Q. At that time were you asked to do anything by Mr. Bayer? A. No, sir.

Q. The next time you saw him, was that at the Grand Central Induction Center? A. Yes, sir.

Q. Was that where young men went to offer themselves for enlistment in the Army? A. Yes, sir.

534 Q. You happen to know that that is what Martin Bayer was doing down there with his father? A. Yes, sir.

Q. He was going down there to voluntarily enlist in the service of the United States? A. That is correct.

Q. Do you know what his age was at that time? A. No, sir.

Q. Do you know approximately? A. No, sir.

Q. Can you give any estimate of it at all? A. I should say he may have been around twenty.

Q. At that time were you asked to do anything by Mr. Bayer, in any conversation you had with him at the Grand Central Palace? A. No, sir.

Q. At the time of the induction? A. No, sir, not at all.

Q. I just want you to tell the Court and jury if there was any improper approach of any kind that you can think of made to you at that time? A. None whatsoever.

Q. And the next time you saw Samuel Bayer was at the Governor Clinton Hotel? A. That is correct.

Q. And Joseph Busch, was it, made the appointment with you to come down there? A. That is right.

Q. Were you conspiring with anyone at that time? A. No. 536

Mr. McGohey: I object.

The Court: Objection sustained.

Q. Was anyone conspiring with you that you know of?

Mr. McGohey: I object.

The Court: Objection sustained. That is a legal term, Mr. Keenan.

Mr. Keenan: I have thought so, your Honor, but I don't know what the precise limitations are as set forth in this indictment.

Q. Doctor, you said that you told Mr. Bayer that his son's case was a celebrated case in substance, didn't you? 537 A. That is right.

Q. You made some investigation out at the field about it, didn't you? A. I did not.

Q. You talked to someone about it? A. That is right.

Q. Had you heard about it before you came down to the Governor Clinton Hotel that night? A. No, sir.

Q. So that all you learned about the case you learned from Lieutenant Fabbricatore? A. That is correct.

Q. Was he Lieutenant or Sergeant then? A. I believe he was then a lieutenant.

Q. He had been a sergeant previously; did you know that? A. Yes, sir.

Q. Did you leave Sam Bayer from the first time you met him in the evening when you met him at the Governor Clinton to go away and then come back and see him again? A. I didn't quite get the question.

Q. What I am trying to bring out is, when Samuel Bayer went to meet you on that day in July, as you best fix the time, of 1943, you spoke about some officer coming in? A. Officer.

539 Q. That was Lieutenant Fabbricatore? A. Right.

Q. What you learned about the Bayer matter out at Mitchel Field you learned that evening? A. Exactly.

Q. You knew nothing about it before? A. Right.

Q. And of course had nothing to do with it later, did you? A. Right.

Q. So whatever rumors you heard, or whatever you heard, you acquired that information that evening? A. Right.

Q. During the matter of what—an hour or two? A. Exactly.

Q. Did Samuel Bayer ask you to do anything improper that you know of in that evening?

Mr. McGohey: I object to that—"improper"—your

540 Honor.

The Court: I am going to overrule the objection.

The Witness: Will you repeat that question?

Q. Yes, I will repeat it, and I am making it very broad purposely. Did Samuel Bayer ask you that evening, yourself, to do anything improper? A. No, sir.

Q. Did you ever have any conversations with Elias Bayer at all about this matter in any manner, shape or fashion? A. No, sir.

Q. Did you know him well or— A. Very casually. I met him once.

Q. Whatever there was to this business about the boy, you never had any relation—no questions were asked or no conversations with Elias Bayer at all? A. That is correct.

Q. Do you know where Martin Bayer, the son of Samuel Bayer, was at that time, in July, whether he was at Mitchel Field or Westover Field? A. I do not.

Q. Specifically, do you know whether he had been transferred at the time? A. I believe that he was not at Mitchel Field.

Q. That is your best recollection? A. That is correct. 542

Q. So that if he were transferred from Mitchel Field to Westover or Bradley Field, he would be at either one of those two places, as you best recall, at the time of this conversation in July? A. I do not understand the question.

Q. Well, assuming that Martin Bayer when he left Mitchel Field or was transferred from Mitchel Field, went over to Westover Field or Bradley Field, he would have been at either one of those fields, as far as you know? A. Well, if he had been transferred to one of those two fields, he would have been there.

Q. Your best recollection is that he had been transferred at the time of this conversation? A. I believe so.

Q. And Mr. Bayer was quite agitated, was he, Samuel Bayer? A. He certainly was.

Q. He seemed frightened? A. Certainly. 543

Q. And was he concerned about his son? A. Very much so.

Q. Did he tell you why? A. Yes, he did.

Q. Would you give us his reasons, what he said to you about that? A. He thought that his son was to be sent overseas.

Q. Yes? Did he tell you what unit he was in? A. No, sir.

Q. Did he tell you that he was suddenly transferred from a clerk's position to the airborne engineers? A. He did not. He merely said that his son was in an outfit that was being shipped overseas immediately.

Q. And that he was quite frightened about it? A. He was very much perturbed.

Q. You are a doctor? A. That is right.

Q. Would you say that he was in an agitated mental condition, too? A. I certainly would.

Q. You weren't offered any money of any kind, were you? A. No, sir.

Q. Well, I know that you indignantly reject the sug-
545 gestion, but I am saying no one offered it to you? A. That is correct.

Q. Or anything else of value? A. No, sir.

*Cross-examination by Mr. Robb.*

Q. You never saw the defendant Radovich, did you, until after this case started? A. I never saw him until the case started.

Q. Now, Major, you didn't think that there was anything wrong about a parent being concerned about his son's assignment, did you? There wasn't anything wrong about it? A. No.

Mr. McGohey: I object to that, your Honor.
546 The Court: Objection sustained.
Mr. Robb: I think that is all.
The Court: Redirect?
Mr. McGohey: I have some further questions.
The Court: All right.

*Redirect examination by Mr. McGohey.*

Q. In answer to Mr. Keenan's question, you said that prior to this conversation that you had at the Induction

Center, you had a previous conversation down at a lunch room or a restaurant? A. That is right.

Q. Can you fix the time of that? A. Yes, sir. That was early in 1942.

Q. Early in 1942? A. When I first met Mr. Bayer.

Q. You had a conversation at that time? A. That is correct.

Q. Now tell us what that conversation was. A. At that time——

Mr. Keenan: I think your Honor has ruled that out to the knowledge of the District Attorney before, that same type of question. If there is any reason why that is not objectionable under the law, the same as other conversations prior to the date of this alleged conspiracy, I would like to know, otherwise I want to renew my objection. 548

The Court: I am inclined to sustain the objection.

Mr. McGohey: If your Honor please, I hadn't gone into that conversation. I understood that counsel for the defendants had.

The Court: I don't think so. As to why he first met him, he said he met him at the lunch room.

Mr. McGohey: Your Honor, I respectfully submit that it was opened up by the question: Was there anything improper in that conversation?

Mr. Keenan: I will withdraw the objection.

Mr. McGohey: The question was, was there anything improper in the conversation. 549

The Court: I understood that to refer to the Governor Clinton conversation.

Mr. McGohey: Well, I will accept your Honor's recollection. Do I understand that the objection is withdrawn?

Mr. Keenan: Yes. I withdraw the objection. Let him tell about any conversation he had with him.

Q. What was that conversation, Major, the conversation in the restaurant in the early part of 1942? A. When I first met Mr. Bayer. Well, I first met Mr. Bayer at a lunchroom in the early part of 1942 at the suggestion of Mr. Phil Busch, from whose organization I had previously purchased several uniforms.

Q. Will you tell us what the conversation was? A. That is right. The conversation in substance was this: Mr. Bayer was worried about the fact that his son was shortly to be drafted and that he feared he would be assigned to an infantry outfit, a combat unit, and he wanted to know whether the boy could voluntarily enlist prior to his induc-
551 tion into the service, and I gave him the information, which was available to everyone at that time, to the effect that if the boy voluntarily enlisted prior to his induction he could select whatever branch of the service he was interested in. That was the substance of the conversation at that table.

Q. Now coming down to the meeting that you had with him at the induction center——

Mr. Robb: May I interpose here for just a moment. That conversation, as I understand it, took place before the date alleged in the indictment of the starting of this conspiracy. We therefore request your Honor to tell the jury that that does not bind the defendant Radovich and it cannot bind him.

The Court: All right. I will direct you not to con-
552 sider that in your consideration of the case of the defendant Radovich, that is, the conversation just related.

Go ahead.

Q. Coming down to the meeting that you had with him at the induction center, just prior to that meeting at the induction center had you met Samuel Bayer shortly before that? A. You mean at the end of 1942, the latter part of 1942?

Q. Yes. A. I believe I was called by Mr. Busch again, but I did not meet him until the time that his son was actually again enlisted—the second son.

Q. Have you told us the full conversation that you had with Samuel Bayer and Busch at the induction center? A. I have, sir.

Mr. McGohey: I have no further questions, your Honor.

The Court: Any further questions?

Mr. Keenan: I would like to ask a question.

*Recross-examination by Mr. Keenan.* 554

Q. How many times have you been down to the United States Attorney's office? A. Three times.

Q. And did you discuss the matter with our representatives of the Government in preparation for your attendance here? A. No, sir.

Q. With any members of the Federal Bureau of Investigation? A. Oh, yes.

Q. How many times? A. Twice.

Mr. Keenan: That is all.

The Court: All right. Call the next witness.

Mr. McGohey: Pardon me. Your Honor ruled at the beginning of the trial that I could only have one representative of the F.B.I. with me during the trial. 555 I asked at that time that Mr. Flynn, who was in charge of the investigation, be here. Now in connection with the next witness, however, I may have to go into some matters of accounts, and the work on that phase of the case was done by another agent. I might want to call him in.

The Court: Will that other agent testify?

Mr. McGohey: Yes, your Honor, he might.

Mr. Keenan: We have no objection, your Honor, to his presence.

The Court: All right.

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HAROLD BUSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Mr. Busch, what is your business? A. Uniforms.

Q. What is the name of your company? A. I. Buss
557 Uniform Company.

Q. Will you keep your voice up, please, so that the last juror here can hear you. A. I. Buss Uniform Company.

Mr. Ansell: I hope the United States Attorney will amend that so that the last counsel can hear.

Mr. McGohey: Very well.

Q. I will ask you to keep your voice loud enough so that the last juror and the last person in the room can hear you. A. I. Buss Uniform Company.

Q. You know the defendant Samuel Bayer, do you not? A. Yes, sir.

Q. Do you know the defendant Elias Bayer? A. Yes, sir.

Q. Are you related to Samuel Bayer? A. Yes, sir.
558

Q. What is the relationship? A. Brother-in-law.

Q. Your sister is married to Samuel Bayer? A. That is right.

Q. Do you know the relationship between Samuel Bayer and Elias Bayer? A. Yes, sir.

Q. They are brothers, are they not? A. That is right.

Q. Do you know the defendant Radovich? A. Yes, I do.

Q. Would you keep your voice up, please. Now, do you know an officer in the United States Army, named Colonel Vidal? A. Yes.

Q. Do you know an officer named Lieutenant-Colonel Jacobson? A. Yes.

Q. Do you know a Lieutenant Roeser? A. Yes.

Q. Do you know a Captain Engelhardt? A. Yes.

Q. Do you know where those men were stationed in the spring of 1943? A. I believe at Mitchel Field.

Q. Where did you meet these various officers? A. I met them at my place.

Q. At your place of business? A. At my place of business, that is right. 560

Q. Were you introduced to them by anybody? A. Yes.

Q. By whom? A. By Elias Bayer.

Q. Did Elias Bayer bring them to your place of business? A. He just brought Radovich.

Q. Now at the time that Elias Bayer brought Radovich to your place of business, did you have a conversation with him? A. With Elias Bayer?

Q. With Elias Bayer. A. To what extent?

Q. Well, to any extent. A. Well, I may have had a conversation with him.

Q. Well, did you? A. Yes; to make him a uniform.

Q. Will you tell us what the conversation was? A. To make him a uniform.

Q. Would you keep your voice up, please. A. To make him a uniform. 561

Q. To make whom a uniform? A. Radovich.

Q. The defendant in this case? A. Yes, sir.

Q. The man sitting over at the other end of the table? A. That is right.

Q. Now in that conversation was the question of payment mentioned? A. Well, no question of payment was mentioned, but it was understood that if——

Mr. Robb: Just a moment, we object to that.

The Court: I have to sustain the objection as to the understanding. What was said in that connection, what was said by anybody?

The Witness: That they will pay for the uniforms.

Q. Who said that? A. Elias Bayer.

Q. Said that he would pay for the uniforms? A. That Radovich would pay for the uniforms.

Q. That Radovich would pay for it? A. That is right.

Q. Did you subsequently make a uniform for Major Radovich? A. Yes, sir, we did.

563 Q. Did you make one for Colonel Vidal? A. Yes, we did.

Q. Did you make one or more for Jacobson? A. Yes, we did.

Q. And for Roeser? A. Yes.

Q. Were you paid for those uniforms? A. Yes, we were.

Q. Who paid for them? A. Plymouth paid for them.

Q. Plymouth? A. Plymouth Thread.

Q. Now, do you know who owns the Plymouth Thread? A. Samuel Bayer.

Q. You never received payment for those uniforms from any of the officers? A. No.

Q. You never received payment for the uniform from the defendant Radovich, did you? A. No.

Q. That payment you received from the— A. Plymouth
564 Thread.

Q. Plymouth Thread. That was some time in the spring of 1943? A. That is right.

Q. Now I direct your attention to the latter part of the summer of 1944. Did you in the latter part of August, or latter part of July or August of 1944, have a conversation with Samuel Bayer concerning the payment for these uniforms? A. In the latter part of 1944?

Q. Yes, in the summer of 1944. A. In the summer of 1944? Well, the uniforms were paid for around that time.

Q. No. I say, did you have a conversation with Samuel Bayer in the summer of 1944? A. Before the uniforms were paid for?

Q. Well, when were the uniforms paid for? A. I think the uniforms were paid for in June.

Q. Of '43? A. Of '43, that is right.

Q. I am talking about the following year. A. Oh, the following year, 1944.

Q. 1944. Did you then have a conversation with Samuel Bayer? A. Yes; he came into my place.

Q. Did the conversation relate to the payment previously made for those uniforms? A. Yes. 566

Q. Tell us what that conversation was?

Mr. Robb: If the Court please, this conversation obviously took place after the defendant Radovich had been arrested by the military authorities. We request the Court to instruct the jury that this conversation cannot be considered by them as against the defendant Radovich.

The Court: What have you to say to that?

Mr. McGohey: There isn't any evidence here as to when the defendant Radovich was arrested by the military authorities.

The Court: That would not necessarily be a termination of the conspiracy. 567

Mr. McGohey: Precisely.

The Court: Overruled.

Mr. McGohey: There is no evidence of the abandonment of the conspiracy.

The Court: All right; overruled.

Mr. Robb: May I have an exception.

The Court: Yes.

Mr. Keenan: Exception.

The Court: Very well. Go ahead.

Q. What was that conversation that you had with Sam Bayer in August, or the summer time, of 1944? A. In the summer time of 1944?

Q. Yes. A. The conversation I had with Mr. Bayer?

Q. Yes. A. How the uniforms—about the uniforms being paid for?

Q. Yes. Will you tell us what the conversation was? A. He asked me how I had it entered.

Q. Will you please keep your voice up so that everybody back here can hear you, Mr. Busch? A. He asked me how I had it entered, how the uniforms were paid for. So I told him that it was entered that the Plymouth paid for

569 these uniforms.

Q. In other words, your books showed that the payments for these uniforms which were made for the officers, your books showed that they had been paid for by the Plymouth Thread Company, is that right? A. That is right.

Q. What, if anything, did Samuel Bayer say to you then? A. He said I shouldn't have done it that way, that it should have been billed to look that the uniforms should have been paid for by the men themselves.

Q. Did he ask you anything else? A. Yes, he asked me to make the change.

Q. You mean make changes in your books of account? A. Yes, that is right.

Q. Did you make changes in your books of account? A.

570 I did.

Q. Was anybody with you while you were making those changes? A. No.

Q. Was Sam Bayer with you? A. Yes.

Q. While you made these changes? A. Yes, sir.

Q. Who does the bookkeeping for your company? A. I do.

Q. Is that book you have before you a book which you keep in the regular course of your business? A. That is right.

Q. What is it? A. This here is a ledger.

Q. This is a ledger. Directing your attention particularly to this page, did you make the entries on that page? A. Yes, I did.

Q. And you made them in the regular course of your business, is that correct? A. That is right.

Mr. McGohey: Now I offer the book in evidence, your Honor.

Mr. Keenan: Objected to.

Mr. Robb: May we see it?

Mr. McGohey: I am offering only that page at this time.

572

The Court: You said you offered the book.

Mr. McGohey: I withdraw that. I intend to offer only the page that I showed to the witness.

Mr. Keenan: The record ought to show what page it is.

Mr. McGohey: The page entitled, "Mitchel Field, New York, U. S. Army."

Mr. Keenan: "Mitchel Field, New York, United States Army."

Mr. McGohey: That is right. That is the page.

The Court: Is there objection, gentlemen?

Mr. Keenan: Yes, your Honor. We object to this. We understand that the Government is offering it on the theory that it was part of the conspiracy to conceal, and your making the suggestion that not necessarily would the conspiracy terminate with the departure of Major Radovich for the war in the Pacific on November 5th, 1943, we think, your Honor, with great respect, that it indulges in flights of fancy in the ridiculous assumption that there would be a continuing conspiracy to which Major Radovich would take part when he was at the same time thousands of miles away from the scene, in the United States Army,

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engaged in war. In other words, we think that there is entitled to be some sense to the allegation of the terms or agreement of the conspiracy. And we are alleging that we are objecting on that ground.

The Court: Rather strenuously, I would say.

Mr. Robb: We object also, if the Court please, on the ground that these acts and conversations took place after any conspiracy which may have ever existed even which could be alleged to exist had terminated. We think that should not be admitted against the defendant Radovich for that reason.

The Court: Objections overruled. The page may
575 be received.

Mr. Robb: Exception.

The Court: It is not necessary to physically detach it at this time. Just mark it. It may be physically detached and filed later.

(Government's Exhibit 5 received in evidence.)

Q. I ask you to look at Government's Exhibit 5 and tell the Court and jury whether you made a change on that page? A. Yes, right here (indicating).

Q. Mr. Busch, you must understand that your voice must be loud enough so that all counsel and the members of the jury can hear it. Will you please do that. A. Yes. Right here (indicating).

Q. Are you indicating the word— A. "May".

576 Q. May 10? A. That is right.

Q. Can you tell from looking at that page what was on there before you made the change? A. June.

Q. June what? A. Eleventh.

Q. June 11th.

Mr. McGohey: May I show this to the jury at this time, if your Honor please.

The Court: Yes.

(Government's Exhibit 5 shown to the jury.)

The Court: All right, go ahead.

Q. Now are the entries that appear on page 74 of this book in your handwriting, Mr. Busch? A. Yes.

Q. Is that a book that is kept in the regular course of your business? A. Yes.

Q. Is that a book in which you enter the receipts of each which come into your company each day? A. That is right.

Mr. McGohey: I offer page 74 of this book in evidence.

Mr. Robb: We make the same objection, your Honor. 578

The Court: I hope the objection will be in more temperate language.

Mr. Robb: I hadn't thought I was being intemperate, if the Court please.

The Court: Quite so.

Mr. Robb: Very earnest, though.

The Court: Objection overruled. Exception may be noted.

Mr. Keenan: We have the same objection, your Honor.

(Government's Exhibit 6 received in evidence.)

Q. I call your attention to the tenth line from the top, that is, the tenth item of entry from the top, and ask you if 579 you made any changes on the tenth line of that book? A. Yes. This one (indicating), and this one (indicating).

Q. You made a change of a figure appearing in the column headed "Net Cash," did you? A. That is right.

Q. And then immediately below that in the same column did you make another change? A. Yes.

Q. Then moving over to the right, on the tenth line did you make a change? A. Yes.

Q. Under the column headed "Accounts Receivable"? A. Yes.

Q. And likewise on the eleventh line in that same column? A. Yes.

Mr. McGohey: May I show this to the jury, if your Honor please.

The Court: Yes.

(Mr. McGohey shows Exhibit 6 to the jury.)

Q. I call your attention particularly to the last item on this page in this book bearing the red numerals 5512, and ask you if the entry there is made in your handwriting?

581 A. Yes.

Q. Tell me, what is this book? A. That is a bill book.

Q. Is it a book that you keep in the regular course of your business? A. Yes.

Q. Do you enter in there all of the— A. Merchandise that is billed out.

Q. That is billed out? A. That is right.

Q. This page here represents a carbon copy? A. That is right.

Q. The book itself then is a regular record kept in the regular course of your business? A. That is right.

Q. I call your attention to the item red numeral 5580 and ask you if that entry was made by you? A. Yes.

Q. It is your own handwriting? A. Yes.

582 Q. In the regular course of your business? A. Yes.

Q. Then item 5604, is that made by you? A. Yes.

Q. It is your handwriting? A. Yes.

Q. It is a record kept in the regular course of your business? A. Yes.

Mr. McGohey: Now, if your Honor please, I would like to offer the entries appearing as items 5512, 5580 and 5604 from this book in evidence.

Mr. Robb: We make the same objection.

Mr. Keenan: I have never seen the book. I would like to see it. We object to that on the same theory, your Honor.

The Court: Objections overruled.

Mr. Robb: The same objection for the defendant Radovich. Exception.

(Government's Exhibit 7 received in evidence.)

Q. Mr. Busch, I call your attention to the item 5512. Did you make changes in that? A. Yes.

Q. Was Samuel Bayer present with you while you did it? A. Yes. 584

Q. By the way, was Samuel Bayer present while you made the other changes that you just testified to? A. Yes.

Q. And this 5580, did you make changes there? A. Yes.

Q. And Samuel Bayer was present with you? A. Yes.

Q. And 5604? A. Yes.

Q. You made a change there? A. Yes.

Mr. McGohey: May I show these to the jury, your Honor?

The Court: Yes.

(Mr. McGohey shows exhibit to jury.)

Q. Mr. Busch, have you from time to time received loans of money from Samuel Bayer? A. He endorsed notes for us. 585

Q. Will you keep your voice up? A. He just endorsed notes for us.

Q. To that extent he loaned you his credit, did he not? A. Well, to an extent, yes.

Q. Yes. And he has done that on several occasions, has he not? A. Yes.

Q. You are friendly with Samuel Bayer, are you not? A. Yes.

Q. You have no ill will against him? A. No, sir.

Q. Now at the time Sam Bayer came up and asked you to make these changes to which you have testified— A. Yes.

Q. In the conversation that you had was the word "investigation" mentioned? A. No.

Q. Was there any discussion about any investigation? A. No, sir.

Q. By the Army? A. No, sir.

Q. By anybody? A. No, sir.

Q. Are you sure of that? A. I am sure of that.

Q. Did Sam Bayer say to you why he wanted to make these changes? A. Why he wanted to make those changes,
587 he felt the way I had it, showing that the Plymouth paid for it, he didn't want it to show that way, and he wanted it to show that the officers had paid for it themselves.

Q. Did he say why he wanted that change made? A. Why?

Q. Yes. A. Well, he never mentioned it to me why, but he just asked me to do him that favor.

Q. He didn't give you any reason? A. No, sir.

Q. How long did it take you that day to make those changes? A. Probably about an hour and a half, two hours.

Q. By the way, what time of day was it? A. I believe it was in the afternoon.

Mr. McGohey: I have no further questions.

588 *Cross-examination by Mr. Keenan.*

Q. Mr. Busch, how large an establishment have you? A. It is not a large establishment.

Q. How many brothers have you? A. Two brothers besides myself.

Q. You all work there? A. Yes, sir.

Q. How many employees have you, approximately? A. We only have—normally we have one; during the season we have two.

Q. You didn't have any large Fifth Avenue tailor establishment, did you? A. No, sir.

Q. And I assume since Mr. McGohey has mentioned something about notes, credit, that would indicate that you were working on a pretty close margin of credit? A. That is right.

Q. And you had to watch every dollar, is that correct? A. That is right.

Q. When Elias Bayer brought these officers in, there was nothing secret about that, was there? A. No, sir.

Q. They came in like anyone else would come in? A. That is right.

Q. They didn't wear any masks or any instrumentalities of hiding? A. No, sir. 590

Mr. McGohey: I object to that.

Mr. Keenan: Well, I will not elaborate on it.

Q. Did they come in the daytime or the nighttime, as you recall? A. During the day.

Q. And as far as you know, they all wore uniforms showing themselves to be officers in the United States Army? A. That is right.

Q. There was nothing hidden about the proceeding at all, was there? A. No, sir.

Q. And I believe you answered the District Attorney that when Radovich came in with Elias Bayer, Elias Bayer told you that Radovich would pay for the uniform? A. 591 That is right.

Q. Now, by the way, I imagine you have made a few appearances down to the District Attorney's office haven't you? A. That is right.

Q. How many, about? A. Oh, I would say about three.

Q. Were they lengthy? A. Well, the first day I was brought down, the first time I was held for ten and a half hours.

Q. You were? A. Yes, sir.

Q. Who brought you down? A. Two agents, two F.B.I. men.

Q. You were here on other occasions besides that ten and a half hour conference? A. Yes, sir.

Q. Was Mr. Wallace, the young able assistant to Mr. McGohey, there on occasions? A. Well, I saw Mr. Wallace down there without Mr. McGohey and then I saw Mr. McGohey I think twice.

Q. And they asked you about these matters that you testified to? A. That is right.

Q. Did you bring your books with you? A. No, my books
593 were brought down the first time I was called down by the F.B.I. men.

Q. They were in the condition they exist now when they were brought down, is that right? A. Yes, sir.

Q. But, in any event, when Major Radovich—or I believe he was Captain Radovich then, wasn't he? A. That is right.

Q. When he came in with Elias Bayer, Elias told you to measure him for a uniform and that Radovich would pay for it? A. That is right.

Q. Did Radovich voice any objection to that, or did he say anything then? A. No, there was no question on that.

Q. And, by the way, we haven't got a statement of what those uniforms cost in the aggregate. I would like to refer to that for a moment. About how much did the uniforms
594 cost? A. I think one was $35 and some was $45. The summer was $35 and the winter uniform was $45.

Q. Made to order? A. That is right.

Q. Gabardine? A. The summer was gabardine and the winter was regular elastique.

Q. Did you make a lot of uniforms for officers? A. Yes, we did.

Q. Was that a big part of your little business? A. It wasn't a big part, but it was a part of it.

Q. How long do you usually wait before you get paid for your merchandise, when you measure them up and sell them? A. We usually get paid right away.

Q. You have to, don't you, to keep in business? A. That is right.

Q. With the size of business you do? A. That is right.

Q. So that when you didn't get your money from Radovich, what did you do about it? A. I immediately got in touch with the Plymouth Thread and asked them to pay for them.

Q. Why? A. Because I needed money to conduct my business.

Q That is, as I understand it, neither Sam nor Elias 596
came to you and said they would pay you for the uniforms, you asked them to pay for them since they brought these officers there? A. Since they brought these men there I asked Plymouth to pay for them, yes.

Q. As you couldn't conduct your business without being paid reasonably promptly? A. That is right.

Q. And you weren't paid, so therefore you made a mild complaint about it and asked them to get the money? A. That is right.

Q. You had a little trouble in the fitting, Mr. Busch? A. Well, we did have trouble I think with Major Radovich's uniforms.

Q. As I understand, you of course naturally had some trouble in the fitting of these uniforms to these officers, some of the others were dissatisfied with them besides 597
Major Radovich, weren't they? A. I don't know. I know Radovich did bring his uniforms back.

Q. Oh, he didn't keep them? A. No, sir.

Q. Was that one of the reasons why he refused to pay you for them? A. I don't think so, because we were paid for it before he brought them back.

Q. Oh, you were paid for them before they were brought back? A. That is right.

Q. How long did he keep them before he brought them back? A. Quite a few weeks.

Q. Quite a few weeks. By the way, how long did you wait before you called Sam Bayer to see why the bill wasn't paid? A. I called him within about a week.

Q. About a week. A. Ten days.

Q. Are you in the habit of sending bills out? A. Yes.

Q. Do you recall whether or not you sent any bills? A. Bills were given to them, they were made out to them.

Q. Made out to them? A. Yes.

Q. Did you hand them to them? A. They were given in each package.

599 Q. So when you delivered the uniform to the officer you send out a bill and you charged such officer? A. That is right.

Q. You entered right in your books that you were making the uniforms for the various officers at exactly the fixed price at which you were charging, is that right? A. They were wholesale prices.

Q. Oh, wholesale price? A. Yes.

Q. I didn't know that. So these officers did get the wholesale figure? A. They did.

Q. And I assume that was due to the fact that your brother-in-law brought them in that you gave them a concession? A. That is right.

Q. Did you ever do that with anybody else, give wholesale prices? A. No, not unless they are recommended.

600 Q. Ah, not unless they are recommended. But I suppose there are quite a few people recommended from time to time who get the lower price? A. That is right.

Q. What happened to the Radovich uniform ultimately, or finally? A. The Radovich uniform, I mean his size was very hard to get rid of; we practically peddled it out in pieces, wherever we can get a few dollars for it.

Q. Anyway, Major Radovich didn't keep it? A. No, he did not.

Q. Did Colonel Vidal complain about the fit, so far as you know? A. Not that I know of.

Q. Did Colonel Jacobson? A. Not that I know of.

Q. Are there people that charge more than your price for officers' uniforms? A. Yes, there are.

Q. I suppose there are different grade establishments? A. No. They don't come recommended for a wholesale price. It is more or less of a favor.

Q. I am getting at something different. Do they have many tailors that fit uniforms for officers the way they do for civilians, so that some tailors charge more than others? A. Yes, there are.

Q. And some do a little finer work? A. That is right. 602

Q. Would you class yourself as medium priced? A. Medium price.

Q. Anyone could see, of course, who these uniforms were for at all times, and what the prices of them were? A. Yes, sir.

Mr. Keenan: That is all.

The Court: Have you any questions, Mr. Robb?

Mr. Robb: No, sir, I have no questions.

The Court: Any further questions, Mr. McGohey?

Mr. McGohey: Yes, your Honor, just a few more.

*Redirect examination by Mr. McGohey.*

Q. Can you tell from looking at this book before you, 603 whether or not the uniforms you made for these officers, Jacobson, Vidal, Roeser, Radovich, Engelhardt, were delivered to those men personally? A. Yes; at our place.

Q. Each one of these men came in and picked up his uniform? A. That is right.

Q. And at the time he received his uniform did he receive a bill? A. Yes; it was in the package.

Q. Did you tell him that he had a bill there? A. No, I didn't tell him he had a bill there.

Q. You just put it in the package? A. That is right.

Q. Did you ask them at that time for the payment of any uniforms that they were taking out? A. No, we did not.

Q. Do you usually do that with customers? A. Yes, we do, because we were recommended by them anyway, so—we were recommended by these officers to us, so we didn't ask them for the money. I figured they would pay us in a few days anyway.

Q. No. The question I asked is, is it your practice to deliver merchandise at your place without receiving cash for it? A. Yes, at times.

Q. Do you do that to people who have not previously established lines of credit with you? A. No, sir.

605

Q. You had never met any of these officers prior to the time they came in and ordered their uniforms, had you? A. No.

Q. So that as far as each one of them individually was concerned, he had no established line of credit with your company, did he? A. No, but they had come recommended.

Q. By Elias Bayer? A. By Elias Bayer.

Q. Now at any time after you delivered uniforms to them, did you—you knew where they were stationed, did you not? A. I knew where they were, but I didn't know exactly what position they were in.

Q. You knew they were at Mitchel Field, did you not? A. I did, yes.

Q. Did you ever call them up on the telephone— A. No.

606

Q. —and ask them to pay for their uniforms? A. No.

Q. Did you ever write to them and ask them to pay for their uniforms? A. No.

Q. Did you ever call on anybody and ask them for the payment of those uniforms except the Bayers? A. That is right.

Q. Going back to the first time that Elias Bayer introduced you to Major Radovich, then Captain Radovich, I

think you testified that he asked you to measure him up for a uniform? A. That is right.

Q. I ask you again, was there any conversation at that time about payment for that uniform?

Mr. Keenan: I object.

Mr. Robb: I object to that.

Mr. Keenan: It has already been gone into.

The Court: I overrule the objection.

Mr. Keenan: Exception.

Mr. McGohey: Will you read the question?

Q. (Question read.) A. Well, yes, that Radovich would pay for the uniform. 608

Q. That Radovich would pay for the uniform? A. That is right.

Q. Is that your best recollection of that? A. That is right.

Q. Did you testify in the grand jury——

Mr. Robb: We object to this.

Q. In this investigation?

Mr. Robb: We object to this.

The Court: Let me see what you want to examine him on.

(Mr. McGohey approached the bench.) 609

Mr. Keenan: May I ask if the United States Attorney is claiming surprise at this time and attempting to impeach this witness, your Honor?

The Court: I am going to sustain the objection.

Mr. McGohey: I will withdraw the question, your Honor. I have no further questions.

The Court: Any further questions, gentlemen?

610 *Harold Busch—For Government—Recross.*

*Recross-examination by Mr. Keenan.*

Q. By the way, I don't believe I have ever seen you before today? A. No, sir.

Q. Or ever talked with you before you got on the witness stand? A. No, sir.

Q. When these officers came in and you saw a man wearing the insignia of a Colonel in the Army, you rather suspected he would pay for his uniform? A. That is right.

Mr. McGohey: I object to that.

Q. Didn't you? A. That is right.

611

The Court: I am going to allow the question.

Q. The district attorney asked you about whether you called on these officers to pay for the uniforms. Wouldn't you say there was a slight hint that you expected them to pay for uniforms when you sent a bill out with the goods? A. I would expect to get paid for them, but after a few days they didn't pay me for them.

Q. But when you sent a bill out to them with the goods, directed to them, that was rather a hint that you expected to get your money? A. That is right.

Q. Perhaps a broad hint? A. That is right.

612 Mr. Keenan: That is all.

*By Mr. Robb,*

Q. Mr. Busch, you also had some trouble with Captain Engelhardt about his uniform? A. He never took his uniforms. There is a credit bill issued in the book for it.

Q. He never took those either? A. No, sir.

Q. I believe the other day Colonel Vidal testified that his didn't fit. You had trouble with him about that? A. Yes, but we made him a new one.

Mr. Robb: That is all.

Mr. McGohey: Could I ask one question, if your Honor please.

*Redirect examination by Mr. McGohey.*

Q. Since the first time that you have been down here in this building, have you talked to any of the attorneys for the defendants? A. The only one I spoke to was Mr. Levy. 614

Q. Mr. Levy? A. That is right.

Q. That is the gentleman sitting over here? A. Yes.

Q. You talked to him about this case? A. Yes, sir.

Q. You talked to him about what you have been asked up here, did you not? A. Yes.

Mr. McGohey: All right.

The Court: All right, stand aside. The court will take a ten-minute recess.

(Short recess.)

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JOHN K. PEPPER, called as a witness on behalf of the Government, being first duly sworn, testified as follows: 615

*Direct examination by Mr. McGohey.*

Q. Captain, you are an officer in the United States Army, are you not? A. Yes, sir.

Q. What is your present assignment? A. I am presently acting personnel officer of Headquarters, First Air Force.

Q. Where are you stationed? A. Mitchel Field, New York.

Q. How long have you been at Mitchel Field? A. I arrived at Mitchel Field on or about August 2nd, 1942.

Q. What was your rank at that time? A. Second Lieutenant.

Q. Keep your voice up, please, Captain, so that everybody at the counsel table and the last juror can hear you. A. Yes, sir.

Q. Thank you. You say you were a Second Lieutenant? A. That is right, sir.

Q. How long have you been in the Army altogether? A.
617 I was inducted into the Army on June 6th, 1941.

Q. Where? A. At New Cumberland, Pennsylvania.

Q. Thereafter did you go to Officers' Training School? A. I did.

Q. Do you know the defendant Radovich? A. I do.

Q. Do you know the defendants Bayer? A. I do not.

Q. Either one of the Bayers? A. I do not.

Q. Where did you first meet Captain Radovich? A. At Headquarters, First Fighter Command, Mitchel Field.

Q. Now directing your attention to the spring of 1943, do you know what Captain Radovich's rank and duty assignment was at that time? A. He was a Captain. He was a squadron commander of headquarters, Headquarters Squadron, First Fighter Command.

Q. What was your duty assignment at that time? A. I
618 was classification officer, First Fighter Command.

Q. So you and Captain Radovich were in the same organization? A. Same organization.

Q. In that organization at that time was there an enlisted man named Martin Bayer? A. During the summer of 1943 there was.

Q. Was there an enlisted man by the name of Melvin Usdan there at that time? A. There was.

Q. You said they were there in the summer of 1943. Do you know whether they were there in the spring of 1943? A. I am not certain.

Q. Well, at any rate, they were in the Headquarters Squadron in the summer of 1943? A. In the early summer of 1943.

Q. At any time in the summer of 1943 did you have a conversation with Major Radovich concerning these two enlisted men? A. I did.

Q. Will you tell us where that conversation was held? A. In the lower hallway of the Headquarters building.

Q. At Mitchel Field? A. At Mitchel Field.

Q. When you say the Headquarters building, you mean the building which houses the Headquarters of the First Fighter Command? 620 A. That is right, sir.

Q. That is the building where you did your work, is that it? A. That is right, sir.

Q. Will you tell us what captain, he was then captain, was he not? A. He was.

Q. Will you tell us what Captain Radovich said and you said?

Mr. Keenan: I object to the conversation.

The Court: Overruled. Go ahead, Captain.

A. We had just a general conversation. Some time during the conversation the men—the names of the two men came up—this man Bayer. I told Captain Radovich of the 621 rumors which were rampant at Mitchel Field at that time concerning the two men, those rumors being——

Mr. Keenan: I object.

The Court: I don't know what the rumors were, Captain, but I do want you to tell the Court and jury what you told Captain Radovich; just what you told him in the conversation.

Q. Tell us what you said to Captain Radovich? A. I told him I had been——

Mr. Keenan: Objection.

The Court: Objection overruled. Go ahead.

A. (Continuing) Told that there was a remarkable similarity in uniforms worn by different people on the base, and that people in the home districts where the men lived were also complaining about the fact that they had spent so much time at home, which was unusual for low ranking men—it is usually restricted to the first three grades. I also repeated to him the fact that they appeared to have
623 claimed that they were established at Mitchel Field. Major, Captain Radovich at the time, made no substantial comment that I can recall.

Mr. Keenan: I ask that all that be stricken out.

The Court: Motion overruled.

Mr. Keenan: Exception.

Q. Was there anything said in that conversation about a transfer of these men to the medical unit?

Mr. Keenan: I object to the leading form of the question, your Honor.

The Court: Objection overruled.

624 Mr. Keenan: Exception.

A. I do not recall.

Q. Well, at any time subsequent to that conversation which you have just described, did you have any other conversation with Captain Radovich about these two men? A. I believe during the latter part of August Captain Radovich was then made Major, I believe. He stopped at my desk in my office and asked me to verify the location of the same two men for him. I called the statistical control

unit, which runs a card index on all personnel assigned, and obtained from them the fact that one was assigned to an airborne engineer unit at Westover Field, and the other to a similar unit at Bradley Field. I relayed that information to Major Radovich. He then asked me my opinion of whether these men could be transferred from these two organizations. My answer was no, because the two units were organized and activated for overseas duty, so far as I knew, and had a relatively high priority, at least on a par with other organizations which were destined for the same overseas duty—other types of organizations.

Q. And what, if anything, did Major Radovich say? A. He said that he was acquainted with the families of the men and would like to do something for them, would like to see them transferred, but that was about the entire conversation at that time. 626

Q. Was there anything said about how they might be transferred? A. During the discussion I told Major Radovich that the only way the men could be transferred would be on request from an organization with a higher priority.

Q. Now that is substantially this conversation? A. Yes, sir.

Q. Now at any time subsequent to that and in the summer of 1943 did you have any further conversation with Major Radovich about these two men?

Mr. Keenan: Your Honor, could we have the date fixed as nearly as possible on this? We are talking about the spring and summer and we don't get the distinction. 627

The Court: All right. Fix it as nearly as possible.

Q. First of all, did you have a subsequent conversation? A. Yes, I did.

Q. Now will you tell us as nearly as you can when that third conversation was had? A. Well, the second conversation was had toward the end of August. This third conversation was some two or three weeks later. It was during the interval that Major Radovich was preparing to leave the Fighter Command and physically joined the First Air Commando Group.

Q. Will you tell us what that conversation was? A. He telephoned from Washington to the Fighter Command on some job and when he was finished with that he had the call switched to me.

Q. Then you had a conversation with him on the tele-
629 phone? A. That is right.

Q. Will you tell us what was said by him and what was said by you? A. He asked me if the men were still at the same place, and I told him that so far as I knew the two organizations were still there.

Q. By that did you mean the organizations at Bradley Field and Westover Field? A. Had not moved. He asked me then if a request came through for a transfer to the Air Transport Command, did I think it would be approved. I gave him my opinion as no, inasmuch as the A.T.C. at that time was predominantly a continental installation. I did not know of any priority that they might have.

Q. You say a continental installation; you are talking about the A. T. C.? A. Yes; predominantly that.

Q. What did Captain Radovich say, if anything, after
630 that? A. That was about the complete telephone conversation.

Q. Subsequent to that conversation did you at some time later have a further conversation with Major Radovich about these two men? A. I did.

Q. Will you tell us as nearly as you can when this latest conversation was had? A. Approximately the end of September? At least several weeks after the phone conversa-

tion. I met Major Radovich on the base. He was back visiting. Then he later stopped in my office and we had another conversation.

Q. Give us the conversation, the substance? A. He was still interested in the two individuals; he still wanted to have them transferred if at all possible.

Q. That is, transferred out of the units at Westover and Bradley Fields, is that correct? A. Yes.

Q. What did he say? A. So he asked me at that time if I thought, if he asked for them, he was then a member of the First Air Command Group, if he asked for them through the group did I think the request would be honored and the men transferred to the group. I told him what little I knew about the group which was that it was a strictly volunteer organization so far as I knew which was being activated right from Army Air Force Headquarters and had the highest priority in the country at the time. It was activated for a special mission, which Major Radovich knows much more about than I do. I said I thought it probably would be, although I couldn't say yes or no. 632

Q. You mean the transfer from Bradley and Westover would be approved; that is, the transfer from Bradley and Westover to the Air Commandos probably would be approved? A. That is right. Then he asked me, after he got them into the group, how he could ever get them out of it. His intention was not to retain them in the group. So I told him, as in all fighter groups with which I have been familiar, that prior to shipment they drop their surpluses; they have to; they couldn't go through the port carrying surplus personnel. 633

So then he told me he was going to request the men—request the surplus, and through a connection he had in Washington, drop them when the unit left to A.T.C.

Q. Did Captain Radovich promise you any consideration? A. During one of our conversations he said that if he could make such a transfer it would be worth his while.

and he would see to it that it would be worth my while also.

Mr. Keenan: May we have the date of that fixed, your Honor?

The Court: Yes.

Mr. Keenan: Which conversation?

The Court: Which one do you refer to as best you can tell.

The Witness: The last conversation I believe, sir, to the best of my knowledge.

635 Q. Now, in December of 1943 did you receive in the mail a cashier's check in the sum of $500? A. I did.

Q. Did you know at the time you received it by whom it had been sent? A. I received a check in an envelope which was postmarked from West Palm Beach, Florida, and in the envelope was a cashier's check drawn on a West Palm Beach bank. The check surprised me, and I kept it for two or three days, wondering first what it was, and who from. Finally, knowing that no one owed me that money and I had no relative who would ever send me a check like that, I decided that the Air Commando Group must have moved or be moving, and it must have been from Major Radovich.

Q. Did you subsequently find out——

636 Mr. Keenan: Just a minute. Your Honor, I ask that all that answer be stricken out and this jury instructed by this Court to disregard every single word of it.

The Court: I shall grant that motion. I will strike that out and direct you ladies and gentlemen not to consider that at all.

Mr. McGohey: Do I understand your Honor is striking out the testimony that he received the check?

The Court: No, not that; only the surmise as to where it came from. That is a surmise and I will direct you not to consider that.

Mr. Keenan: Your Honor, we object to any evidence of his receiving a check. Is it charged that we sent that check? We haven't heard of that yet.

Mr. McGohey: May I proceed?

The Court: You may proceed.

Mr. Keenan: We object to this, and the jury being left to consider the fact that this man had received a check unless there is some showing or some charge made as to who sent it.

The Court: Objection overruled. 638

Mr. Keenan: Exception.

Q. Did you subsequently find out who sent that check to you?

Mr. Keenan: I object.

Mr. Robb: We object to that.

Mr. Keenan: It is highly improper.

The Court: Objection overruled.

Mr. Keenan: Exception.

Mr. Robb: Exception.

The Court: You were asked did you find out.

The Witness: Yes, I did.

Q. And who? 639

Mr. Keenan: I object.

Mr. Robb: I object.

Q. Who?

Mr. Keenan: I object to that. I think the United States Attorney knows full well that that is not a proper question.

The Court: I don't think it is. He may have found out by inadmissible testimony. He may have found it out by any method. I don't know whether his testimony would be proper on that.

Mr. McGohey: I understand your Honor sustains the objection to the question?

The Court: Yes, to your question, "who".

Q. Subsequent to the receipt of that check did you have a conversation with Major Radovich? A. I did not.

Q. With respect to that check? A. I did not. I never heard from him after that. He departed for overseas, I understand.

641 Q. I say at any time subsequent to the time you received the check did you have any conversation with Major Radovich with respect to that check? A. None that I can recall, sir.

Q. When did you first meet Major Radovich at Mitchel Field? A. When he first reported to the Headquarters.

Q. Do you recall when that was? A. Not exactly. It was some time in the early part of 1943, as closely as I can recall.

Q. Some time in the early part of 1943 you were the personnel officer for the Fighter Command? A. No, I was not, sir. I was the classification officer.

Q. Classification officer? A. Yes, sir.

Q. How old is Major Radovich, do you know? How old
642 was he in 1943? A. All I know is from the newspapers; he was approximately 25 or 24 at that time.

Q. At that time, and in 1943 his rank was what? A. Captain.

(Mr. McGohey confers with Mr. Wallace.)

Mr. McGohey: I don't think I caught the last answer, your Honor.

The Witness: He was a captain.

Q. He was a captain? A. Yes.

Q. And his age was about 24? A. Yes, sir.

Q. What did you do with this check that you testified you received? A. I destroyed it.

Mr. McGohey: I have no further questions of this witness.

*Cross-examination by Mr. Keenan.*

Q. Captain, how old are you? A. I was 31 this month, sir—last month, excuse me.

Q. And where are you located now? A. Mitchel Field, New York. 644

Q. Where were you located before that? A. Jefferson Barracks, Missouri.

Q. When? A. That was in July of 1942.

Q. Did you come from Jefferson Barracks, Missouri, to Mitchel Field in July of 1942? A. Yes, sir.

Q. Since then you have been permanently stationed there? A. That is right, sir.

Q. At Mitchel Field? A. Yes.

Q. As a member of the ground force, is that correct? A. In the First Air Force.

Q. I believe you have said that you never met any of the Bayers, either Samuel or Elias Bayer? A. That is right.

Q. Before today in the court room have you ever seen them? A. I understand they were at Mitchel, but I didn't recognize them and wouldn't remember them. 645

Q. I didn't ask you whether they were at Mitchel; I just asked you if you ever saw them before, or recognized them? A. They were pointed out to me yesterday for the first time.

Q. And I assume you never had any conversation with them? A. No, sir.

Q. Or any communications of any kind? A. No, sir.

Q. Now, when you first discussed these two boys with Major Radovich, where were the boys located? A. They were assigned to the Airdrome Defense Section, Headquarters First Fighter Command.

Q. That first conversation I think you said was some time in the spring, was it, of 1943? A. It was the early summer of 1943. That is the best I can put it.

Q. You were asked some questions about their transfer by Major Radovich at the first conversation? A. I don't recall other than the fact that the two men's names came up in the conversation.

Q. That is all you recall? A. That is all I recall.

647 Q. You don't know how it came up. You don't recall anything more definite than that? A. No.

Q. Is that right, captain? A. That is right.

Q. Were you asked to transfer them any place on Mitchel Field by Major Radovich? A. No, sir, I had no——

Q. That is all. I asked you, if you were asked to do it. A. No.

Q. If you will just answer my questions we will get along all right. Did you have anything to do with the transfer of personnel as classification officer? A. No, sir.

Q. It wasn't part of your duty at all? A. No, sir.

Q. By the way, what were your duties as classification officer, very briefly? A. To determine what abilities a man had for training in a particular army specialty, that is, to select for training, to earmark trained men properly and to

648 recommend to the A1 proper assignments.

Q. Are you talking now about enlisted men and officers both? A. Both.

Q. And did you have some assistants on your staff as the classification officer at Mitchel Field? A. Well, I was the classification officer, First Fighter Command.

Q. What did that comprise? A. It comprised a Headquarters and Fighter Control Squadrons which were spread from Maine to Florida.

Q. Yes. A. And Fighter groups which were in training for the same spread of territory.

Q. And as far as you recall, some time in the early summer, which was the first time you ever talked to Radovich about these boys—when I say boys, I mean Usdan and Martin Bayer; I don't want to keep repeating their names—you believe they were some place at Mitchel Field and he was in the First Fighter Command, in your outfit? A. They were definitely in the First Fighter at that time.

Q. Do you know whether they were then in the hospital unit? A. The Fighter Command has nothing to do with the hospital unit; that is a base function.

Q. There is nothing but the Air Force out at Michel Field, is there? A. No, sir. There are four Headquarters at Mitchel Field. 650

Q. Is there a headquarters of anything besides the Air Force of the United States? A. Headquarters First Air Force; headquarters First Bomber Command.

Q. Bomber Command. That is two. A. Headquarters First Fighter Command.

Q. Fighter Command. A. And then the Base Headquarters itself, that performs all the housekeeping duties.

Q. But it all has to do with aviation. A. It is an air force organization.

Q. Exclusively. A. That is right.

Q. And you have many clerks out there in that organization? A. Hundreds.

Q. Hundreds of them? A. Yes. 651

Q. And I suppose it would be proper to ask you as classification officer, you have a good deal to do with clerical work, don't you, supervising it or discussing same? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And it is a useful occupation, of course, isn't it? A. Yes.

Q. In the Army? A. Yes.

Q. And a necessary one? A. Very.

Q. Did you know these two enlisted men? A. I did not.

Q. Did you ever see them, to be sure that you saw them? A. No.

Q. You have told us about the first time that the names came up; you don't know in what connection; you discussed it with Major Radovich. Then there was a second conversation where you were asked, I think, if you wouldn't identify their designation? Is that the term? Identify their position where they were? A. Their unit of assignment.

Q. Is that what you were asked to do, to identify their unit of assignment? A. Yes, sir.

653 Q. You were asked to do that by Captain Radovich? A. Yes, sir.

Q. And was he a captain then? A. He was.

Q. And were you a lieutenant or a captain then, do you recall? A. I was just in the process of change. I think I was still a lieutenant.

Q. Well, you were an officer at that time? A. Yes.

Q. And was he talking to you, as I understand it, in the line of duty making these inquiries of you, or just in a friendly conversation? A. Friendly conversation.

Q. Was he trying to influence you to do anything at all, Captain Radovich, at that time?

Mr. McGohey: I object to that.

The Court: I sustain the objection.

654 Mr. Keenan: I except.

The Court: It calls for a conclusion.

Q. Did he ask you to do anything excepting to see where the men worked? A. He asked me for an opinion only.

Q. I mean, did he ask you to do anything with reference to transferring them from one place to another? A. He did not because he knew——

Q. Well——

Mr. McGohey: I submit the witness ought to be allowed to answer the question.

Mr. Robb: I object to that, sir.

The Court: I don't think what he was about to say is proper. It concludes what the other man was thinking. If it is with reference to anything he said, Captain, go ahead.

Q. What I am trying to get at is, you didn't have anything to do with effecting these transfers yourself? A. I did not.

Q. And you were not asked to, were you? A. No, sir. 656
I was asked for an opinion only.

Q. And that, as you told us frankly, in a friendly way by Radovich? A. Yes, sir.

Q. Not in the line of duty at all? A. No, sir.

Q. Did Radovich offer to give you any money? A. I have testified that in one of my conversations that he stated it would be worth my while too.

Q. Did you know what he meant by that? A. Not that I recall.

Q. Did you consider that he was attempting to corrupt you by that suggestion?

Mr. McGohey: I object to that.

Mr. Keenan: I think it is highly important. 657

The Court: I will let him answer.

A. Will you repeat the question?

Q. (Question read.) A. I did not.

Q. Now, these clerks that were out there, they wore the same uniforms as the other soldiers? A. All soldiers wore the same uniform.

Q. And they were subject to the same discipline? A. Yes, sir.

Q. By the way, can you tell us something about the duties of the clerks out there? Soldiers who were assigned to clerical duties? Just very briefly. A. Clerk's duties in the Army vary considerably; it would take a long time to do that.

Q. And you don't happen to know what these boys were doing while they were in the Fighter Command? A. No, sir.

Q. Do you know whom they worked for? What particular officers? A. I know that they were working—I know that the Airdrome Section was a subsection of the A3 section.

659 Q. Do you know anything about the training that they got? A. I know nothing about the men personally whatsoever.

Q. Well, do you know whether or not they had basic training? Do you know of your own knowledge? A. I know of my own knowledge only that I myself received basic training.

Q. I did not ask you that. You are not the subject matter of the inquiry. Did these boys? A. I don't know, sir.

Q. You went to Officers' Candidate School? A. Yes.

Q. And you had basic training, didn't you, before you went to the Officers' Candidate School? A. The first three months of a man's service are devoted entirely to basic training.

Q. Yes, should be. A. By regulation should be.

660 Q. That is not always true, is it, Captain? A. No, it is not.

Q. I say that because I had a son in the Army who didn't get it, and I tried to get it for him. Captain, when Captain Radovich spoke to you about where these men were, to find out, you reported back to him? You told him where they were. A. Yes, that is right. He sat there while I called the statistical control section.

Q. And they told you they were at Westover Field? A. That is right, sir.

Q. Do you know how long they had been there at the time that you made the inquiry? A. No, I do not.

Q. Approximately? A. Well, they were still in the Fighter Command in July. So they couldn't have been up there more than a month and a half.

Q. More than a month and a half; and I imagine you have looked into this matter fairly carefully in the last few months, haven't you? A. I know considerable more about it now, sir.

Q. You had several conversations with the United States Attorney? A. I have, sir.

662

Q. And with Mr. Wallace, his assistant? A. I have, sir.

Q. And with some of the military intelligence? A. I have, sir.

Q. And some of the members of the Federal Bureau of Investigation? A. Yes, sir.

Q. Statements have been taken from you? A. Yes, sir.

Q. And signed by you? A. Yes, sir.

Q. So that it has been the subject matter of your own inquiry on your own part? A. Yes, sir.

Q. And you say it was about, the best you can recall, a month and a half that they had been at Westover Field when you called up; the best you can recall? A. Well, that was approximately the last lapse of time between the time I knew they were definitely at the First Fighter Command and the time I made the call.

663

Q. We realize that is an approximation. We hope to get the exact time later. The Army will have the exact dates of when these men were transferred, won't they? A. Yes.

Q. And they will be permanent? A. Yes.

Q. And they are at Mitchel Field. They shouldn't be difficult to be brought in.

Mr. McGohey: I object to whether it is difficult. That is not part of the direct examination.

The Court: Sustained.

Q. When Captain Radovich spoke to you about these men and they were then at Westover Field, you told him, without going into it, that there were a good many rumors around about these men, right? A. Yes, sir.

Q. You also told him there was a remarkable similarity, or I think I have you using the term—I might have overemphasized it—in the uniforms of certain officers? A. Yes, sir.

665 Q. Was there something peculiar about the uniforms the officers used out there? A. Nothing that I had personally observed.

Q. But some other people had observed? A. Yes, sir.

Q. Did they look as though they weren't regulation? A. No, sir, strictly regulation.

Q. Well, what was it that was similar about the uniform of an officer? Don't they all wear garbadine uniforms? A. You can call in any military witness and have him stand next to me and closely examine our attire; you will find they are not alike. They are green or they are pink or green and green cut on a similar pattern, but there are distinct differences.

Q. I don't suppose the men out there in the air force pay particular attention to the cut of any officer's uniform, or
666 the particular grade garbadine he has on.

Mr. McGohey: I object to this line of questioning. This witness testified to a rumor that he repeated to Radovich. The witness didn't testify he made any observation of similarities. All he testified to is the rumor that he repeated to Radovich. I object to the whole line of questioning about the similarity of uniforms.

Mr. Keenan: They brought it out.

The Court: I am not going to strike that out. It has been testified to already. Go ahead.

Q. You didn't notice anything strikingly similar about the uniforms of any officers, did you?

The Court: You asked him that question and he replied in the negative.

Mr. Keenan: I beg your Honor's pardon. I didn't hear it.

Q. May I ask you if it would be correct to assume that you were rather putting Captain Radovich on his guard 668
that there was a good deal of talk about the transfers of these boys out of Mitchel Field, from Mitchel Field to Westover Field? A. I simply repeated to him what had been told me, which he may or may not have known before.

Q. By the way, you were on friendly terms with Captain Radovich at the time, were you not? A. Yes, sir.

Q. You had always gotten along with him all right? He was a brother officer? A. We never disagreed.

Q. Well, you were out in the same field together and friendly? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And he felt friendly enough to you to ask you questions about this, apparently? A. Yes, sir.

Q. Is it not in substance a fact that you felt that there 669
was trouble brewing about these transfers at that time and you wanted to let Captain Radovich know about that? A. Yes, sir.

Q. Did you make any report to your superior officer about any activities of Captain Radovich at that time that you felt were irregular or improper?

670

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection.

A. I did not, sir.

Q. By the way, was he your commanding officer? A. He was not.

Q. He was next in command to you? A. In the A-1.

Q. I know, but please tell us who A-1 was; that is the name of— A. At that time it was Colonel Kunish.

Q. You had discussed this matter with Colonel Kunish? A. I did not.

Q. Any of these matters? A. I did not.

671 Q. Have you ever discussed it with him? A. He has been overseas for some time.

Q. When did he go overseas?

The Court: Are we interested in when Colonel Kunish went overseas?

Mr. Keenan: I am just interested, your Honor, in finding out if he considered this irregular.

The Court: You asked him that.

Q. Well, in substance you didn't consider that there was anything about what you heard from Captain Radovich or what he was apparently involved in that called for you to make any complaint about him or to tell any of your superior officers about him?

672

Mr. McGohey: I object.

Q. Is that correct?

The Court: I will overrule the objection.

Q. (Question read.)

Mr. McGohey: I press the objection. I think that is wholly immaterial.

The Court: I am going to sustain the objection on that ground, and also because he has already testified that he made no complaint.

Mr. Keenan: Exception.

Q. There were rumors of other irregularities out at Mitchel Field, were there not?

Mr. McGohey: I object to that. There is no testimony on that.

The Court: Objection sustained. 674

Q. Was it not the subject matter of wide inquiry?

Mr. McGohey: I object, your Honor.

The Court: What was the question?

Mr. Keenan: Was it not the subject matter of wide inquiry within this witness' knowledge, the irregularities at Mitchel Field.

Mr. McGohey: At what time?

Mr. Keenan: At any time. We tried to fix it as accurately as you do.

Mr. McGohey: It is immaterial, if your Honor please.

The Court: I sustain the objection.

Mr. Keenan: Exception. 675

Q. Now, you got a check for $500 in December of 1943? A. I did, sir.

Q. And what bank was it drawn on? A. It was drawn on a West Palm Beach bank. I don't know which one. I don't recall.

Q. Well, is that the only check you ever got of that nature while you were in the Army? A. It is.

Q. Did you take a copy of it? A. I did not, sir.

Q. Did you tell anyone about it when you got it? A. I did not, sir.

Q. Did you consider it had anything to do whatsoever with the Radovich episode that you discussed at any time? A. I thought it might have.

Q. Well, wouldn't that indicate, if true, some corruption upon the part of Radovich if he was trying to give you some money?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: Oh, your Honor, I think in fairness I ought to be able to ask that.

677 The Court: All right. Answer it.

Q. (Question read.) A. It might.

Q. Well, didn't it? A. Inasmuch as I had no way of contacting him and making sure in my own mind, I didn't do anything about it.

Q. Well, you could have told your superior officer about it without contacting Major Radovich, couldn't you? A. I could have but I didn't.

Q. You destroyed it? A. I destroyed it.

Q. Without taking a photostat of it or without any notation as to the name of the bank or in any manner trying to trace where that check came from? A. Yes, sir.

Q. Have you ever told the F.B.I. or the military intelli-
678 gence or Mr. McGohey the name of that bank? A. No, I never knew the name of the bank.

Q. Do you know the date of the check? A. I do not, sir.

Q. Don't you know that there would be a number on that check if it was a cashier's check of a bank? A. I am familiar with cashier's checks.

Q. You are familiar? A. Yes, sir.

Q. What was your avocation before you got in the Army?
A. I worked for an automobile finance company.
Q. Well, you knew very well that if you reported to the Army the number of that check and the bank upon which it was drawn, that an inquiry would have been made and found out who the bank delivered that check to?

Mr. McGohey: I object to that.
The Court: Overruled. I will overrule the objection. Go ahead.

A. The military knew who the check came from.
Q. The military knew who the check came from? A. Some time during September or October following—that would be 1944—— 680

Mr. Robb: If the Court please, I submit this answer is not responsive to the question.
Mr. Keenan: I think it is not responsive, but I don't object to it. I want to hear all about this check.
The Court: What is the objection?
Mr. Robb: Upon the ground that this answer that he is trying to give does not respond to the question that he was asked.
The Court: All right. I sustain the objection.
Mr. Keenan: May I have an exception to that?
The Court: Do you want him to testify to it?
Mr. Keenan: Oh, yes. I want all the light I can get on this check. 681
The Court: You say it is not responsive?
Mr. Robb: Yes.
The Court: All right, I will overrule the objection. You may proceed. Go ahead.
Mr. McGohey: I would like to know what the state of the record is.

The Court: The state of the record is that counsel for the defendant Radovich objects to the answer because it is not responsive to the question.

Mr. McGohey: And may I have the Court's ruling?

The Court: I overrule his objection.

Mr. McGohey: The Court is overruling the objection?

The Court: Yes. Mr. Keenan wants the testimony.

Mr. Keenan: Your Honor has sustained the objection, and I assume that is to protect——

The Court: You insisted upon the answer, so I now overrule the objection.

683 Mr. Keenan: Well, if your Honor feels that it would be unfair to one of the defendants in this case to permit that testimony, I will withdraw it at least for the time being.

The Court: Counsel for the defendant Radovich based his objection on that ground. He based it on the ground it wasn't responsive to your question.

Mr. Keenan: Well, now, I withdraw the question.

Q. I ask you if you do not know yourself that that check could be identified if you would give the number to your superior authorities, the number of the check and the name of the bank. I am asking you about your own knowledge now. A. Yes. If you turn in the number of a cashier's check it can be traced if you know the name of the bank.

684 Q. Were these boys, either of them, under your jurisdiction in any manner, fashion or form when they were located at Westover Field or Bradley Field, either Usdan or Bayer? A. Only insofar as I was the over-all classification officer for everybody assigned to the Fighter Command. They never worked for me.

Q. They still were in the Fighter Command, were they, at Westover Field? A. No, sir. I misunderstood your

question. At Westover Field they were entirely outside of the Fighter Command jurisdiction.

Q. And that is where they were at the time of your second and subsequent conversations with Radovich? A. Yes, sir.

Q. You wouldn't, of course, then have any authority to order their movements any place at Westover Field? A. I would not have any authority no matter where they were because I was classification officer.

Q. If anybody was attempting to pay you $500 for anything, you don't want to take it because, of course, it would be highly improper, but you hadn't done anything to earn it, had you? A. No, sir. 686

Q. You said something about voluntary service in answer to one of the questions. I didn't get it very clearly. What did you have reference to? A. In my discussion of the First Air Commando Group, I stated that it was my belief or understanding that the group was composed entirely of volunteers. I don't know that definitely as a matter of fact.

Q. Where did you get that understanding from? You testified to it. I would like to know. Do you know that that is a fact today, now? A. All I know about the group is this, that a certain air force officer was authorized or volunteered to perform a special mission for the Army Air Force in the C.B.I. theatre.

Q. What is the C.B.I.? A. China, Burma, India.

Q. All you know is that a certain officer was designated 687
or authorized or directed or all three of them, to organize some force for the China, Burma, India theatre of war? A. That is right. To do a very special type of job.

Q. Do you know anything more about that? Can you describe that any better? A. I think Major Radovich can give you more——

The Court: I don't think that is material.

Mr. Keenan: Well, he testified about it, your Honor. He testified it was a voluntary service.

The Court: Now you want to know what he was to do in China, Burma and India?

Mr. Keenan: I want to know something about it if I can find out.

The Court: I sustain the objection to what he was going to do in China, Burma and India.

Mr. Keenan: Perhaps there is a misunderstanding on my part.

The Court: Go ahead.

689 Q. Was this the unit to which these two boys were sent from Westover Field down to Goldsboro? Yes or no, if you know? A. I don't know except what I have been told. I don't know as a matter of fact.

Q. Do you know from your preparation for testifying in this case? Did you study the matter? A. I know from the military only.

Q. You wouldn't expect to know it from any place other than the military, would you? What do you know from the military as to whether or not this special mission to Burma, India and China was the mission or the outfit to which these two boys were plucked out of this company?

Mr. McGohey: I object to "plucked out".

690 Q. Taken out of this camp at Westover and Bradley Field and transferred to——

Mr. McGohey: I object to the form of the question and I object on the ground that it is not material.

Mr. Keenan: It is cross-examination.

The Court: I am going to overrule the objection. Go ahead and answer, if you know.

A. I simply know that the unit——

The Court: You were asked a simple question, whether these men Usdan and Bayer were transferred to the Air Commandos. Do you know?

The Witness: No one ever told me directly, your Honor.

The Court: We will take a recess now for lunch until 2.15.

(Recess until 2.15 P. M.)

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AFTERNOON SESSION.

692 The Court: Call Captain Pepper back.

JOHN K. PEPPER, resumed the stand.

The Court: Mr. Keenan, have you further questions?

Mr. Keenan: Just one or two.

The Court: Go ahead.

*Cross-examination continued by Mr. Keenan.*

Q. The outfit to which Usdan and Bayer were transferred you have referred to as a volunteer outfit, I believe? A. So far as I know.

693 Q. Is that what is commonly referred to as—I think his Honor did—a commando unit or commando outfit? A. The correct designation is First Air Commando Group.

Q. And they were going on the special mission that you referred to? A. Yes, sir.

Q. Do you, as classification officer, do you have knowledge as to whether or not men would have to volunteer to go on such a mission or whether they could be compelled to go regardless of their wishes? A. The extent of my knowledge is this, that the colonel who is in command of the

group could have anyone he desired. He selected all of his officers, and the officers in turn, who knew enlisted men who were good, submitted requests for them and all requests were honored.

Q. I will ask you again then: When you used the term "volunteer" what did you mean by that? A. Normally, if an officer goes to a man and asks him—he wants him to go with his outfit and the man says, "I am not interested; I don't want to go," he won't take him.

Q. I would still like to ask if the word "volunteer" means that it is optional with the man whether he goes or not? A. So far as I know, it was optional in that group.

695 Q. Would that apply to Usdan and Bayer, privates too, or was that just optional with the officers? A. Officers and enlisted.

Q. So that, as you understand it, either Usdan or Bayer could have objected to going with that outfit and they could not have been compelled under the Army regulations to have gone with that unit to which they were transferred? A. I don't know. The thing that I do know is this; that if they were requested by name, the request would be honored from their current organization and they would be so transferred.

Q. When they have those volunteer organizations, is it customary to order the enlisted men to go or to ask them whether they would like to go or not? A. The enlisted men are always ordered to go.

696 Q. Then it is not voluntary upon their part? A. In a unit like this, the men would not be asked unless they were willing to go, as I understand it.

Q. How would they find out whether the men were willing to go or not? A. The channels between the unit to which the men were assigned and the First Air Commando Group are not interested in whether the men volunteer or not. They are simply honoring a request.

Q. What I am asking you is, if I understand, and I want to do this as briefly as possible, to get to this matter: You have told us that these men did not have to go unless they wanted to and that applied to enlisted men as well as officers, they did not have to go to this Commando unit? A. I didn't say that. I said that the unit, so far as I knew, was composed of volunteers. I don't know whether these two men volunteered or not.

Q. But you can't help us then, to enlighten us as to whether or not it was purely a voluntary service or whether they could have been compelled to go regardless of their wishes? A. No, I cannot say.

Q. That, by the way, was the unit that was commanded by Philip Cochran? A. That is right, sir. 698

Q. And that was very well known; was in the strips of the newspapers of Philip Cochran? A. Yes.

Q. Like Superman and these other strips of that type? A. It was, sir.

Mr. Keenan: That is all.

The Court: Any questions?

Mr. Robb: Yes, sir.

*Cross-examination by Mr. Robb.*

Q. Captain Pepper, when did you tell us you came into the Army? A. I was inducted in June of 1941, Mr. Robb.

Q. You testified, I believe, that you were stationed for awhile at barracks in Missouri—Jefferson Barracks? A. That's right. 699

Q. Was that your first station? A. That was my first station as an officer.

Q. Where were you stationed before that? A. I was at Fort Sill, Oklahoma, as an enlisted man.

Q. You went from there to Jefferson Barracks? A. No, I went from there to Officers Candidate School.

Q. Then to Jefferson Barracks? A. That is right.

Q. Then to Mitchel Field? A. Yes.

Q. Where you still are? A. That is right.

Q. Captain, you have made a great many statements, both written and oral, about this case, have you not? A. Yes, sir, it has been a very long investigation.

Q. You made them to the FBI? A. Yes, sir.

Q. And you made them to Mr. McGohey and his assistants? A. Yes, sir.

Q. You made one or more written statements to the investigators out at Mitchel Field, the Army investigators, did you not? A. Yes, sir, I did.

701 Q. When did you make your first statement to any Army investigator? A. Approximately in August 1944.

Q. Who was the officer to whom you made that statement? A. A Major Hogan, I believe, sir, from Washington.

Q. What was his position? A. Frankly, I don't know, except that he was an investigating officer.

Q. I mean, Army Intelligence? A. I don't know.

Q. Or the Inspector General's? A. I didn't notice what his branch was.

Q. How many statements did you make to him? A. I made one in August and then one, approximately, a month later.

Q. Those were both written statements? A. Yes, they were taken by a stenographer.

Q. That was 1944? A. Yes, sir.

702 Q. Did you also make some verbal statements to him that were not taken down? A. No, sir. I think that everything that I had to say to Major Hogan was taken by a stenographer.

Q. What other officer or officers did you make statements to? A. The only other written statement that I can recall, sir, was to Mr. Flynn or one of his associates.

Q. Didn't you make a statement to a Colonel Snyder at Mitchel Field? A. Yes, sir, I did.

Q. When did you make that statement? A. During the early winter, I believe, of 1944.

Q. Colonel Snyder was the investigating officer in this particular case? A. Yes, sir, he was.

Q. By that I mean the case of the defendant Major Radovich. A. He was the First Air Force investigator.

Q. How many statements did you make to Colonel Snyder? A. Only one, in so far as I can recall.

Q. Then you subsequently testified, did you not, at the court-martial trial of the defendant Major Radovich? A. I did, yes, sir.

Q. And that was last June at Mitchel Field? A. Yes, sir.

Q. Before you testified at that trial you were interviewed, weren't you, by one or more officers who were prosecuting the case? 704
A. Members of the Judge Advocates Section, yes, sir.

Q. Major Osborn? A. Yes, sir.

Q. Anybody else? A. Major Osborn was, I believe, the only one, sir.

Q. How many times have you made statements to Mr. McGohey or any of his assistants, either verbal or written? A. There are possibly four, sir.

Q. Where? A. Where?

Q. Yes. A. In this building, sir.

Q. Captain Pepper, it is a fact, is it not, that as a result of certain statements that you made to Army officers at Mitchel Field you yourself were charged with a violation of the 95th Article of War, conduct unbecoming an officer 705
and gentleman, and with a violation of the 96th Article of War, conduct to the prejudice of good order and discipline in that you had not told the truth, isn't that correct? A. That is not true, sir.

Q. Weren't you charged under those Articles of War? A. So far as I know, no, sir.

Q. Were charges not preferred against you? A. Not to my knowledge.

Q. Let me see if I can refresh your recollection. Would you know your statement to Colonel Snyder if you saw a copy of it? A. Yes, sir.

Q. I show you this document and ask you if that is not an official copy of your statement to Colonel Snyder? The pencil notations on there are mine, if that will help you. A. This is a copy, sir.

Q. That is the copy of the statement you made to Colonel Snyder. Let me read the opening paragraph of that statement, which is a statement to you by Colonel Snyder. The statement is headed, "Statement of Captain John K. Pepper, Air Corps, 01000168, given to Lieutenant Colonel
707 George Snyder, Air Corps Investigating Officer at Headquarters, First Fighter Command, on 21 August 1944.

"Colonel Snyder: This is an investigation of courts-martial charges preferred against you in relation to making a false statement. Court-martial charges have been prepared against you and you have been charged under the 95th and 96th Articles of War. I will show you the charges. And in the meantime will you please state your full name, rank and serial number.

"Answer. John K. Pepper, 01000168, Captain, Air Corps."

Do you still say that charges were not preferred against you under the 95th and 96th Articles of War for making a false statement? A. No, sir, I do not. I had forgotten completely about that statement and I was referring simply
708 to the fact that I was punished under the 104th Article of War.

Q. I am going to get to that, Captain. Had you forgotten about the charges being preferred against you? A. Yes, sir, I had.

Q. You had forgotten that? A. Yes, sir.

Q. That was not sufficiently important so that you remembered it? A. No, it was very important, sir.

Q. You mentioned pleading guilty under the 104th Article of War. You subsequently pleaded guilty under that Article of War, to making a false statement, and accepted a relatively minor punishment, didn't you? A. Yes, sir.

Q. And what was the punishment? A. I was administratively reprimanded and forfeited 50 per cent of my base pay for one month.

Q. And when did you do that? A. That was in February or March of this year.

Q. Of this year? A. Yes, sir.

Q. Captain, did you have any discussion with any officers at Mitchel Field or anybody else about any consideration that might be given you by letting you plead guilty under that lesser Article of War, any consideration that might be given you in return for your testimony in this case? A. No, sir, none. My decision to take—— 710

Q. You have answered the question.

The Court: You may finish your answer.

Q. Nobody said anything about that?

The Witness: May I continue?

The Court: I said he may finish his answer.

Q. Go ahead. A. I accepted the 104th against my own will upon the advice of my immediate superior, Colonel Nichols.

Q. Who is that? A. He is the A-1 of the First Air Force. 711

Q. Who is he? A. He is an Army officer, Colonel.

Q. What is his name? A. Colonel R. T. Nichols.

Q. Those charges were pending against you then from August, the date of this statement that I read you, until February of this year, right? A. Yes, sir.

Q. When did you first talk to the United States Attorney or any of his assistants about this matter? A. In the fall of 1943.

Q. 1943? A. 1944. I am not positive.

Q. Did you have any discussion with him about the charges pending against you with the Army? A. I don't recall, sir.

Q. You would not say you did not? A. I wouldn't say I did.

Q. But you would not say you did not either, would you? A. No, I could not.

Q. Could you have forgotten that discussion the same way you forgot these charges that were pending against you? A. No, sir.

Q. That would be more important? A. No, sir.

713 Q. Captain, would you tell us again just what your duties were as a classification officer? A. To determine what type of training a man should be given based on his background, education and general level of intelligence.

Q. Did you have anything to do with transfers? A. I did not.

Q. It was not your business, was it? A. No, sir, it was not. However, I would like to qualify that.

Q. Go ahead. A. Most of my time was spent on the road with fighter groups, checking fighter groups for proper assignment and utilization of the assigned people; in other words, that a mechanic was working as a mechanic and not as a cook.

Q. In particular, the transfer of Bayer and Usdan was not any concern of yours, was it? A. No, sir, it was not.

714 Q. Captain, isn't it a fact that before you ever had any conversation with the defendant Major Radovich about these boys, you had been checking on their status to see if they could not be transferred? A. See whether they could be?

Q. Or to see if they were going to be. A. Their names were first mentioned——

Q. Pardon me. A. I will have to go into this in order to answer the question.

Q. I think you can answer that question. Hadn't you checked on their status before you ever talked to Major Radovich? A. Yes.

Q. You called up a Captain Adams, is that right? A. That is right.

Q. And Captain Adams was the classification officer in their particular unit, is that right? A. That is right.

Q. How long before you had this conversation that you told us about with Major Radovich did you yourself begin checking on these boys? A. Just a relatively short time.

Q. How many days? A. I don't know.

Q. Captain, your testimony is that it was a few days after that call you made to check on the status of these 716
boys that you had this conversation about the boys with the Major, is that right? A. Yes, sir.

Q. You told us that Major Radovich brought up the matter—pardon me—that you told Major Radovich about these uniforms, isn't that right? A. That is right, after their names had come up earlier in the discussion.

Q. That is right. Now, Captain, isn't it a fact that the man who mentioned the uniforms was Major Radovich and not you? A. No. Someone else mentioned the uniforms to me before he did.

Q. I beg pardon? A. Someone else——

Q. No. But in that conversation, isn't it a fact that he mentioned it to you, about these uniforms being similar or something of that sort? A. I think that I mentioned that 717
to him, Mr. Robb.

Q. Didn't Major Radovich tell you that it seemed to him that there was a lot of rank interested in these boys? A. He did, and I also said that to him.

Q. By "rank," meaning high-ranking officers? A. That is right.

Q. That is right. Now, Captain, that conversation you had at that time with Major Radovich was continued, was

it not, in the office of Colonel Vidal, Colonel Felix Vidal? A. About 30 minutes later or less.

Q. That is the same Colonel Felix Vidal who was here in the witness room yesterday? A. That is right, sir.

Q. That was continued in the presence of the defendant Radovich, wasn't it? A. Yes, sir.

Q. Tell us what was said in that part of the conversation which you didn't tell us before.

Mr. Keenan: I think these conversations in the absence of the Bayers are taken under that same exception?

The Court: All right. Go ahead.

719

Q. The conversation was continued in the office of Colonel Vidal. Now tell us about that situation of the conversation. A. When I left Major Radovich I went back to my office and 10 or 15 minutes later received a phone call to report to Colonel Vidal, which I did. Major Radovich was there. And he told me in no uncertain terms——

Q. Who told you? A. Colonel Vidal. (Continuing) —to mind my own business.

Q. Is that all? A. He said that in a colorful way, but that was all.

Q. Is that all that he told you? A. That is all that I recall.

Q. Do you recall you testified at the court-martial, the
720 court-martial of the defendant Major Radovich? A. I do.

Q. Were you asked this question and did you make this answer: "And you were told at that time"——

Mr. Wallace: What page?

Mr. Robb: Page 48.

Q. —"And you were told at that time"—meaning the time you talked to Colonel Vidal—"You were told at that

time, were you not, that nobody was helping or protecting these men, is that right?" A. Yes, sir.

Q. And did you make this answer, "I was told that in so many words, yes, sir." A. Yes, I did.

Q. And that was the truth, wasn't it, that you were told that? A. I was told that.

Q. Yes, sir. You were told that by Colonel Vidal? A. That is right, sir.

Q. Captain, did you ever tell the defendant Radovich that you woud like to help get these boys transferred but you couldn't do anything about it? A. I told the defendant Radovich that I would like to help him if I could, because he was a friend of mine.

Q. You told him you would like to help him, is that right? A. Words to that effect.

Q. By transferring these boys? A. No, not necessarily by transferring——

Q. That is what he was talking about, according to you, wasn't it? A. I had nothing to do with transfers. Give him any advice, but that was all.

Q. Would you say now that you didn't tell Major Radovich you would like to help transfer these boys? A. I may have said to him, just as I would say to anyone who came in to me and asked me something which wasn't, I believe, my jurisdiction, that I would like to help him but couldn't.

Q. Do you recall whether you said that or not? A. Frankly, I am not sure.

Q. Captain, will you give us the exact words again that you say were used by Major Radovich when he told you that there might be something in it for you or him if you transferred these boys? What was the exact expression that he used? A. I can't say; I don't recall, Mr. Robb.

Q. You don't recall? A. Not exact words, no, sir.

Q. You testified on direct examination that he said that it would be worth your while. Are you sure that is what he said? A. I don't think he said worth my while or his

while, because he doesn't use that type of expression, but something similar to that.

Q. Do you recall testifying at the court-martial——

Mr. Wallace: What page?

Mr. Robb: 43.

Q. —that what he said was, "It might be to your advantage"? A. Yes. It means the same thing to me. I don't think he used those words, exact words.

Q. You were under oath at the court-martial, weren't you? A. Yes, but I was not repeating exact——

Q. Just a minute.

725

The Court: Let him finish.

Q. Go ahead. A. I wasn't trying to repeat exact conversations, which is almost an impossibility; trying to convey the same feeling or the same——

Q. But you had been over this matter time and time again, haven't you? A. Very, very frequently.

Q. And a great many people asked you what was said, hadn't they? A. Yes, sir.

Q. And you had made a lot of statements about it, haven't you? A. Yes, sir.

Q. And you tried to remember just exactly what was said, haven't you? A. Yes.

726 Q. And at the court-martial you testified the words used were "it might be to your advantage," didn't you? A. Yes, sir.

Q. Captain, is it your testimony now that that conversation took place at Mitchel Field when you were both there, both you and Major Radovich? A. Yes, sir. He visited the field; he was no longer assigned there.

Q. He was at the field? A. He was physically present.

Q. Didn't you testify at the court-martial that that conversation took place over the telephone when he called you from Washington? A. I don't think so.

Mr. Robb: Page 43, Mr. Wallace.

Q. Let us see if I can refresh your recollection. "Sometime, approximately the time the First Air Commando Group was being organized, I believe, Major Radovich had already left Mitchel Field, I received a telephone call from him regarding the two men and asking what their current status was, whether I thought they could be transferred from the units to Air Transport Command. I told him that the units, being alerted, would certainly have a higher 728
priority than an A.T.C. organization and I did not believe they could be transferred.

Q. "Can you fix the approximate time of this conversation to which you are referring? A. September or October of the same year.

"Q. During the course of this conversation did he indicate to you that he might have any particular interest in this transfer that he suggested?" And you answered, "Yes. He stated he knew the families or the family, at least, of one of the men and it might be to my advantage as well as his if they could be transferred."

You made that answer, didn't you? A. That is right, sir. The two conversations were very close together.

Q. So it is our testimony that the statement about it 729
being to your advantage took place over the telephone? A. I testified this morning that it took place the second time we met.

Q. At Mitchel Field? A. At Mitchel Field.

Q. I am asking you if you want to change that testimony in the light of what I just read you? A. No, because I am not sure now exactly when it did occur, except that it did occur.

730 *John K. Pepper—For Government—Cross.*

Q. It didn't take place twice, did it? A. I don't believe so, sir.

Q. All right. Captain Pepper, you had quite a bit of talk about these two boys with the defendant Major Radovich, didn't you? A. Yes, sir.

Q. You told him, didn't you, that one of the reasons that you objected to these boys being there was, in substance, that you didn't think that——

Mr. Robb: Strike that.

Q. You told him in substance, didn't you, as one of your objections to these boys that they were Jewish, isn't that
731 right? A. I don't recall that, sir. I never make any open statements on that.

Q. Didn't you say to him in substance that that was one of the things about these boys which irritated you and made you interested in their being there? A. I am irritated at anyone who doesn't want to go overseas.

Q. But didn't you say that in substance to Major Radovich? A. I do not recall, sir.

Q. You wouldn't say you didn't, would you? A. No, sir. I would not.

Q. You said you were irritated at anybody who didn't want to go overseas? A. Yes, sir.

Q. Have you had a chance to go overseas? A. Yes, sir, I did.

732 Q. Did you go? A. No, I didn't.

Q. That is all. A. But—just a moment, sir.

Q. All right.

The Court: You may answer the question.

A. I had two chances to go overseas. I asked someone who was going to request me when he arrived, which he did. When the request came I never had a chance to say yes or no, it was turned down by the headquarters, saying

I was more essential on my present job. The second time I was actually placed on orders for a Far Eastern headquarters which is a key position, a very good one, and this investigation and trial have held me here.

Q. When was that second time, Captain? A. This Spring.

Q. This Spring? A. Yes, sir.

Q. Where were you going? A. To Manila.

Q. Manila, Philippine Islands? A. Yes, sir; before the war was over.

Q. Yes, sir. And the first time, when was that? A. Approximately a year preceding.

Q. Where were you going that time? A. I don't know.

Q. I beg pardon? A. I don't know exactly.

Q. You said you asked somebody to request you? A. Yes.

Q. There wasn't anything wrong about that, was there? A. No.

Q. In fact, that is the regular Army routine, isn't it? A. It happens very often, yes, sir.

Q. Surely. One final question, Captain: There wasn't any reason in the world that you knew of why anybody should send you a check for $500, was there? A. No, sir.

Mr. Robb: That is all.

*Redirect examination by Mr. McGohey.*

Q. Captain Pepper, did you at any time inform any of your superior officers about this $500 check? A. I did not, sir.

Q. After the receipt of it? A. I did not, sir.

Q. Well, you have just testified here that you pleaded guilty to a charge under the 104th Article of War, did you not? A. Well, that was after the investigation started.

Mr. Robb: I can't hear the witness.

(Answer read.)

Q. Prior to the time that you pleaded guilty to this offense under the 104th Article of War, did you speak to any superior officer about this $500 check? A. To the investigating officers only.

Q. I say, to any superior officer? A. To both investigating officers because both represented the headquarters which were superior to me.

Q. Well, when was it that you talked to any of these officers about that check? A. In August '44 I spoke to Mr. Hogan.

Q. About this check? A. Yes, sir.

Q. Now what precisely, if you know, was the specification in support of the charge of violation of the 104th
737 Article of War? A. The only thing I recall about it, sir, is that——

Mr. Robb: Pardon me. If the Court please, I don't think that we ought to retry that particular case here. I object——

The Court: We are not going to retry it. But you have developed the fact.

Mr. Robb: That is correct, sir.

The Court: And I am going to permit him to state the charge. I am not going to have it retried.

Mr. Robb: That is right.

The Court: All right.

The Witness: Under the 104th Article of War I
738 was punished for——

Q. What were you charged with, Captain? A. Well, under the 104th, so far as I know, there are no specific charges—the charge is—the original charges you under a different Article of War and you make a reply by endorsement, and then a decision is made by the commanding general of what action he is going to take as a result of the investigation. Then if he decides——

The Court: Captain, we don't want all that. You were asked the question what was the specification under the 104th Article to which you pleaded guilty. Tell us if you know; but if you don't know, say so.

Mr. McGohey: Maybe I can straighten it out, Judge, with this question.

The Court: All right.

Q. You were originally charged with a violation of the 95th Article of War, a violation of the 96th Article of War? A. Yes, sir.

Q. Then you pleaded to a violation of the 104th Article of War, is that correct? A. That is right, sir.

Q. And under the plea to the 104th Article of War 740
you were given whatever punishment you were given? A. That is right.

Q. But were the specifications in support of the charges that you had violated the 95th and 96th Articles of War? A. The only thing stated in the endorsement to me from the General was that he was punishing me under the 104th Article of War—I can't quite remember the phrase, but the last two words were quibbling and lack of frankness during the investigation.

Q. Quibbling and lack of frankness in answering some questions that were put to you in the investigation? A. That is right, sir; and I can recall the specific question, if you are interested.

Q. No. And that was when? A. I finally received that 741
in February or early March.

Q. No, I mean when; at what time was it charged that you had quibbled? A. During the investigation made by a Major Hogan.

Q. When was that? A. August and September, '44.

Q. Can you recall what question you were asked by Captain Hogan? A. As close as I can recall he asked me this specific question upon which the whole thing hinged

and that was, did I in December, 1943, receive a check for $500 from Major Radovich, to which I answered no.

Q. Was that substantially the— A. That was substantially the question.

Q. The question and the answer. And you have testified here that when you received that check you did not know whether you got it from Major Radovich or not? A. Yes, sir.

Mr. Keenan: That is slightly leading, your Honor.

The Court: And repetitive, too.

Mr. McGohey: Sir?

743 The Court: And repeating, too. I say you are repeating. He has been over that.

Mr. McGohey: Yes. I have no further questions.

The Court: Any further questions?

*Recross-examination by Mr. Keenan.*

Q. If I understand it, Captain, you never said anything about the $500 check to anyone until Major Hogan of the Intelligence Branch of the Army was interrogating you? A. That is right, sir.

Q. And then he asked you if you got a $500 check from Major Radovich, and you replied in the negative? A. Yes, sir.

Q. Did you volunteer then any information that you did 744 receive a $500 cashier's check? A. He did not permit me to. He went right on to the next question.

Q. Did you volunteer that at any time during the interview? A. Not the first time I saw him, no, sir.

Q. How long did that interview take place between you and Major Hogan, the first time you saw him? A. How long did it last?

Q. About? A. Approximately 20 minutes.

Q. You could have told him if you had wanted to; nothing prevented you from telling him? A. I could have told him lots of things if I wanted to.

Q. Including the receipt of a $500 check? A. Yes, but not one from Major Radovich, as he phrased it.

Q. Didn't the fact when he spoke to you about a $500 check from Major Radovich, didn't it occur to you to say, "No, I didn't get it from Major Radovich, but I got a cashier's check for $500 and I don't know who it was from"? Did that occur to you? A. Yes, it did.

Q. But you didn't so answer? A. No, I did not.

Q. Now, you have been asked the question—I would just like to repeat it and I want to get over it quickly, but I understand you have been asked the question in this court room as to whether or not you said you were irritated because these boys were Jews and you say you couldn't say that you didn't say it. 746

The Court: I am not going to permit first one counsel and then the other to ask the same question.

Mr. Keenan: Your Honor, this is not the same question.

The Court: So far it is the same.

Mr. Keenan: It will not be when I finish.

The Court: Go ahead.

Q. I am asking you if you are in the habit of making statements of that kind so you wouldn't know whether you happened to make it on that occasion or not? 747

Mr. McGohey: I object to that question, your Honor.

The Court: Sustained. It has all been covered and I am not going to permit first one and then the other to ask the same question.

Mr. Keenan: I want to know whether or not——

748 *John K. Pepper—For Government—Recross.*

The Court: He has answered that. I sustain the objection.

Mr. Keenan: Then I will ask another one if the Court will permit me.

Q. Have you made statements about other boys that they irritated you because they were Jews?

Mr. McGohey: I object to that.

The Court: I overrule the objection. You may answer.

A. To the best of my knowledge, no.

749 Q. Well, why is there any doubt about that in your mind today about these boys?

Mr. McGohey: I object to that, your Honor, to this line of questioning. It has no relation to this case at all.

The Court: I will allow that question. All right.

Q. Why is there any doubt in your mind today, as you have expressed there is, whether or not you made that statement about these two boys being Jews and their irritating you? A. Normally I would not say anything like that because I am not open in any prejudice I may or may not have.

750 Q. You are not open about your prejudice? A. And I may or may not be prejudiced.

Mr. Keenan: That is all.

The Court: Any further questions?

Mr. Robb: One further question.

*Recross-examination by Mr. Robb.*

Q. Captain, you mentioned the endorsement that came to you— A. Yes.

Q. —of this—whatever you call it— A. On the basic communication.

Q. That is it. Basic communication to the 104th Article of War in response to a question by Mr. McGohey. A. Yes, sir.

Q. You said that you were being punished for quibbling. A. Quibbling and lack of frankness.

Q. Captain, what was the punishment possible under the 95th and 96th Articles of War under which you were first charged?

Mr. McGohey: I object to this, your Honor, as immaterial. 752

The Court: Objection sustained.

Mr. Robb: Would the Court hear me on that? May I have an exception?

The Court: I think it is too plain. I sustain the objection.

Anything further?

Mr. Robb: That is all, thank you.

Mr. McGohey: I have no further questions.

The Court: Stand aside. Call the next witness.

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EDNA S. GOERTZ, called as a witness on behalf of the Government, being duly sworn, testified as follows: 753

*Direct examination by Mr. McGohey.*

Q. Miss Goertz, will you please try to keep your voice up so that the last juror in the box and all of counsel and the defendants at this side of the table can hear you.

By whom are you employed, Miss Goertz? A. Headquarters Army Air Forces, Washington, D. C.

754 *Edna S. Goertz—For Government—Direct.*

Q. Will you please try to be just a little more forceful so that everybody can hear you. How long have you been employed in your present capacity? A. Three and a half years.

Q. Three and a half years? A. Yes, sir.

Q. You were employed, then, in that capacity in the Summer of 1943, were you not? A. Yes, sir.

Q. Now, do you know the defendant Major Radovich? A. Yes, sir, I do.

Q. He is here in the court room, is he not? A. Yes, sir.

Q. That is the officer sitting at the righthand side of the table? A. Yes, sir.

755 Q. Can you tell me when it was you first met the Major? A. The latter part of August of 1943.

Q. And where? A. In my office.

Q. At your office in Washington? A. Yes, sir.

Q. What officer was your immediate superior? A. Colonel Goetz.

Q. Colonel Goetz? A. Yes, sir.

Q. How do you spell that? G-o-e-t-z? A. Right.

Q. And do you know what the Colonel's duty assignment was at that time? A. He was Chief of Foreign Assignments Branch.

Q. The Chief of the Foreign Assignments Branch of the Army Air Forces? A. Of Military Personnel Division, Assistant Air Staff Personnel.

756 Mr. Keenan: I can't hear from here.

Mr. McGohey: I think the jurors haven't heard it.

Q. Would you repeat that. A. Foreign Assignment Branch, Military Personnel Division, Assistant Chief of Air Staff Personnel.

Q. Now in the performance of your duties did you have anything to do with the preparation of orders for the transfer of personnel in the Air Forces? A. Yes, sir, I did.

Q. Now directing your attention, in the summer of 1943, to the latter part of July, do you know whether or not there was in the Army Air Forces a project known as Project CA281? A. Yes, sir, I do.

Q. Can you tell us what that project was? A. Well, it turned out later to be the First Air Commando Group.

Q. Was that project number assigned to it for security reasons? A. Yes, sir.

Q. Now in connection with the performance of your duties, did you become familiar with the manner in which the personnel of this First Commando Group was organized? A. Yes, sir, I did.

Q. Who was the head of the group? A. Colonel Phil Cochran. 758

Q. Do you know any other officers that were associated with him? A. Yes, sir, I do.

Q. Was Major Radovich associated with him? A. Yes, sir.

Q. Was there a Colonel Boebel? A. Yes, sir.

Q. Now will you describe to us how the recruiting for that unit was done?

Mr. Keenan: I object to that, your Honor. I think if it is a matter of record we ought to find out, more than from some young lady that apparently worked there in the office.

Mr. McGohey: I think the witness has testified, your Honor, that in the course of her duties she became familiar with it, and she can testify to it of her own knowledge. 759

The Court: I think so. I am going to overrule the objection.

Mr. Keenan: Exception.

Mr. McGohey: May I have that question, please?

Q. (Read.) A. These different officers that were——

Q. You will have to keep your voice up. Even I can't hear you back here. A. These officers that were selected by Colonel Cochran were sent out into the field to get these members for this Air Commando Group on Project CA281, and when they found any officers or enlisted men that were good material for this project, they came in with their names and gave those names to me, and I requested orders on them.

Q. Now did Major Radovich ever come in and give you the names of anybody and request orders for them? A. Yes, sir.

Q. What was your duty when an officer made such a re-
761 quest? Will you tell us just what you did? A. I immediately requested the orders.

Q. Well, now, you requested the orders in what way—orally or did you make any written memorandum? A. They were written R and R's, as we call them in the office.

Q. You made out some kind of written memorandum, and did you transfer that to another section of the Air Force Headquarters? A. Yes, sir; to the Orders Branch.

Q And then do you know what happened to it after that? Do you know what the Orders Branch did in the regular procedure? A. They either wrote the orders or directed some other headquarters to write them. I mean by that, that if another officer or office was in charge of men that had been requested, they would naturally write the orders rather than the Headquarters Army Air Forces.

762

Mr. Ansell: If your Honor please, I don't think my capacity to hear is a fair test and I don't know how I can overcome it; I am only saying to your Honor I cannot hear this witness. I wonder if the reporter might be permitted to read that answer back to me.

The Court: Couldn't you come and sit closer, and use the clerk's desk.

Mr. McGohey: Would you like to come up here and sit in my chair?

(Last question and answer read.)

Q. Now, Miss Goertz, if the man who was being transferred into this group whose name you had received was stationed at a post some distance from Washington, would that transfer be handled by a mail direction to his station or by telephone or by a telegraphic direction? A. Telegraphic. It all depended on the urgency of it.

Q. Were there occasions when the Orders Section of the Army Air Force would send to a camp a telegraphic instruction to the post where the man was stationed directing or requesting the commanding officer of that post to 764 issue orders transferring a man under his command out of his command into the Air Commando Group? A. Yes, sir.

Q. There were occasions when that happened? A. Yes, sir.

Q. Now you testified, I think, that Major Radovich on occasion did come to your office and asked you to prepare requests for orders for certain men in the Armed Forces? A. Yes, sir.

Q. Did he ever on any occasion request you to make out request orders for a private named Martin Bayer? A. Yes, sir.

Q. Did he ever request you to make out request orders for a private named Melvin Usdan? A. Yes, sir. 765

Q. Do you recall about when he made those requests to you? A. The latter part of November, 1943.

Q. Can you give us the date any more closely than that? A. The 22nd of November, if I recall correctly.

Q. I ask you to look at that and see if that refreshes your recollection (handing). Does it? A. Yes, sir.

Q. Now, with your recollection thus refreshed, can you tell us when it was that you issued the orders for those two men? A. On the date of this copy.

Q. What is that date? A. The 22nd of November, 1943.

Q. Did you make out those orders on the same day that you talked to Major Radovich? A. Yes, sir, I did.

Q. Now, thereafter did you have a further conversation with Major Radovich about the same two enlisted men? A. Yes, sir, I did.

Q. Can you tell us when that conversation was? A. The 24 November, 1943.

Q. The 24th of November, 1943. That was two days after you had had the first conversation, was it? A. Yes, sir.

Q. Will you tell us what the conversation was that you
767 had with Major Radovich on that day?

Mr. Keenan: And where it took place.

Mr. McGohey: Yes. I will withdraw that question.

Q. The first conversation you had with Major Radovich, was that a personal conversation in your office? A. Yes, sir, it was.

Q. Now when you talked to Major Radovich two days later, on the 24th, was that a personal conversation? A. No, sir, it wasn't.

Q. Well, was it by telephone? A. Telephone, yes, sir.

Q. Do you know where Major Radovich was telephoning from? A. Goldsboro, North Carolina.

Q. You talked to him on the telephone? A. Yes, sir.

768 Q. Will you tell us what the conversation was? A. He said the project was up to strength, that these two enlisted men were not needed——

The Court: He said what?

The Witness: The project was up to strength and these two enlisted men were not needed, and would I please request orders to take them off the project and reassign them.

Q. Did he ask you to reassign them to any particular unit? A. Yes, sir.

Q. What unit did he ask you to reassign them to? A. Air Transport Command in Wilmington.

Q. Air Transport Command at Wilmington? A. Yes, sir.

Q. That was not the same organization from which they had come when they went into the commando outfit, was it? A. No, sir.

Q. Now, reverting to the first conversation that you had with Major Radovich on the 22nd of November, 1943, you told us that he asked you to issue orders for the transfer of these men. Was there anything else said in that conversation by Major Radovich? 770

Mr. Keenan: Your Honor, I take it that all these conversations are subject to the same objection?

The Court: It may be so understood. I so understand it. Go ahead.

The Witness: Would you mind repeating that question, Mr. Reporter?

Q. (Read.) A. He asked me to assign these men to the project as a favor of——

Q. I can't hear you. A. He asked me to assign these two enlisted men to the project as a favor to a friend.

Q. As a favor to a friend? A. Yes, sir.

771

Mr. McGohey: I have no further questions of the witness.

The Court: Do you wish to cross-examine?

*Cross-examination by Mr. Keenan.*

Q. Ordinarily I don't like to ask this question of a lady, but I am sure you won't object. What is your age? A. 25.

Q. 25. And you have been three and a half years in the service? A. Yes, sir.

Q. You had a good deal of authority in that commando unit, didn't you? A. To a certain degree, yes, sir.

Q. You could order men around about where you wanted, in substance, couldn't you? A. To a certain degree, yes, sir.

Q. Well, to the degree that they went where you told them to go, is that correct? A. Well, some I wrote the orders, I mean I requested the orders; I wrote them myself.

Q. You wrote them yourself? A. But Colonel Goetz always signed them, and if he disapproved he didn't sign them.

773

Q. Well, did Colonel Goetz always sign the orders you gave him to sign? A. Yes, sir, I believe he did.

Q. I can understand that. Now, what was your rank? A. My rank, sir?

Q. Yes. A. I was CF3 at the time.

Q. What is CF3, please? A. That is a civil service rating.

Q. Civil service rating? A. Yes, sir.

Q. Well, that is the same as a lot of the clerks here in this court house, and all over the United States, a civil service rating—CF3? A. CAF3.

Q. What was the pay range of that? A. That was 1620.

Q. 1620?

Mr. McGohey: I object to this line of questioning.

774

Mr. Keenan: I will not pursue it.

Mr. McGohey: It has no materiality to this issue.

Mr. Keenan: It is rather astounding to me.

Mr. McGohey: I move to strike out the comment.

Mr. Keenan: I am sorry, I beg your pardon. I apologize for that statement, your Honor. I am sorry. I made it.

The Court: All right.

Q. You have given some expert—you have given some testimony about how this commando organization operated. Would you sign any officers' names to these orders yourself or would you give the orders to them to sign? A. Well, no, sir, I didn't sign them.

Q. You didn't sign them. Was that the first you ever heard of these two boys, Bayon and Usdan, on the 22nd of November, 1943? A. Yes, sir.

Q. Never heard of them before? A. No, sir.

Q. But did you have any discretion of your own, Miss Goertz, in what you were doing there; did you have any real authority or were you just—and I don't say this in an impertinent fashion, but were you just a clerk at $1650 like a lot of other clerks were? 776

Mr. McGohey: I move to strike out this reference to salaries. We are getting back to that question and I think that was taken care of.

Mr. Keenan: And I will withdraw that question.

Q. Did you have any authority in your position? Oh, what was your authority? A. I was Colonel Goetz's secretary.

Q. And that is where you got your authority? A. Yes, sir.

Q. You didn't know of your own knowledge how this unit operated, did you? A. No, sir, not fully, no, sir.

Q. Then, by the way, no one offered you any money for issuing this order? A. No, sir. 777

Q. But, as you understood it, Captain Radovich—by the way, was he Captain or Major at that time? A. He was Captain at that time.

Q. Do you know the Captain very well? Were you pretty good friends? A. We were friends, yes, sir.

Q. Was he stationed at Washington then? A. Yes, sir.

Q. Did you see him from time to time visiting in Washington, socially?

Mr. McGohey: I object to that, your Honor, as being immaterial.

The Court: Objection overruled.

Q. You never were a WAC, were you? A. No, sir.

Q. Did they have the WACs around where you worked? A. No, sir.

Mr. Keenan: I think that is all.

Mr. Robb: I have just a few questions.

779 The Court: All right.

*Cross-examination by Mr. Robb.*

Q. Miss Goertz, as I understand it, there were a number of officers going around the country more or less as scouts lining up people for this project, wasn't that it? A. That is right, sir.

Q. When they found somebody they would get in touch with you and you would make the arrangements to transfer them, was that it? A. That is right, sir.

Q. So there wasn't anything unusual in this call you got from Major Radovich asking to have them transferred, was there? A. Not at all, sir.

780 Q. Other officers were making calls to you about transfers, too, isn't that right? A. That is right.

Q. As a matter of fact, other officers asked to have men transferred into the organization because they knew the men, didn't they? A. That is right.

Q. This was going to be a rather choice group, wasn't it? A. That is right.

Q. So that officers naturally would get any man that they knew, isn't that right? A. Right, sir.

Q. Mr. Keenan asked you if you knew the Major and were a friend of his. All these officers in the group used to come to your office, didn't they? A. Yes, sir.

Q. And I suppose, like aviators, they always had something to say to you, and all that, didn't they? A. Yes, sir.

Q. And, Miss Goertz, there were other men moved in the organization and moved out, weren't there? A. Yes, sir, they were.

Q. Men moved into this Air Commando Group and then moved out? A. Yes, sir.

Q. So that wasn't unusual either, was it? A. No, sir.

782

Mr. Robb: I think that is all. Thank you very much.

The Court: You may stand aside. The Court is going to take a recess. The Court will take a ten-minute recess.

(Short recess.)

RICHARD W. BOEBEL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. What is your rank? A. Lieutenant Colonel.

Q. You are a member of the United States Army Air Corps? A. Yes, sir. 783

Q. What is your present assignment, Colonel? A. I am commanding officer of an Army Air Force, Convalescent Hospital, at Pawling, New York.

Q. Prior to that time what was your assignment? A. I had three alert plane squadrons in Colonel Cochran's First Air Commando Group.

Q. You served with that unit in the China-Burma-India theatre, did you not? A. Yes, sir.

Q. During what period? A. From November, 1943 to December, 1944.

Q. How did you come to join the Air Commando Group? A. You mean, under what circumstances?

Q. Yes. A. I was at the Commanding General Staff School at Fort Leavenworth and was requested by Colonel Cochran to join the organization. I was asked whether I wanted to or not, and I told him that I did; and received orders subsequent to that transferring me to the First Air Commando Group, known then as Project CA 281 I believe it was.

Q. Where were you stationed after that transfer? A. I
785 was sent first to Washington and from there to Goldsboro, North Carolina.

Q. Would you just keep your voice up a little more, Colonel, so that all in the jury and counsel for the defendants over on the right can hear you clearly? A. Yes, sir, I will.

Q. Now at one time in your service, Colonel, were you stationed at Mitchel Field? A. Yes, sir, I was. Did you say at what time?

Q. When were you at Mitchel Field? A. From January, 1941, until November of that year.

Q. Well, in the spring of 1943 were you at Mitchel Field then? A. Yes, sir, I was.

Q. What was your duty assignment at that time? A. I was Base Adjutant.

786 Q. At any time were you a member of the First Fighter Command? A. No, sir, I wasn't.

Q. While you were at Mitchel Field did you know the defendant Major Radovich? A. Yes, sir, I did.

Q. While you were at Mitchel Field did you have under your command in your unit two soldiers named Private Bayer and Private Usdan? A. Yes, sir, I did.

Q. Did there come a time when those men were transferred out of your organization? A. Yes, sir.

Q. Do you know where they were transferred to? A. They were transferred to Headquarters Squadron First Fighter Command.

Q. Prior to their transfer, did you have a conversation with anybody with respect to that transfer? A. Yes, sir, I did.

Q. With whom? A. Colonel Jacobson.

Q. Now, after those two men, Private Bayer and Private Usdan, were transferred out of your organization at Mitchel Field, did you ever see them again? A. Yes, sir, I did.

Q. And where? A. At Seymour Johnson Field, Goldsboro, North Carolina.

Q. That is when you were down there with the First Air Commando Group? A. Yes, sir. 788

Q. And when was that? A. That was in November of 1943.

Q. Now what was your duty assignment with the Air Commando Group at the time that these men arrived? A. I was Adjutant.

Q. And when these men came, did they report to you? A. Yes, sir, they did.

Q. Did you have a conversation with them? A. Yes, sir, I did.

Q. Did you inquire of them how they came to come into that outfit? A. Yes, sir, I did.

Q. What did they say?

Mr. Robb: We object. 789

The Court: I sustain that objection.

Q. You did have a conversation with them? A. Yes, sir, I did.

Q. In that conversation did the name of Major Radovich occur?

Mr. Robb: I object.

Mr. Keenan: Just a minute. I haven't any objection to the giving of the entire conversation, as representing the two Bayers. I wish he would. But certainly if he is not permitted to give it entirely I don't think that Mr. McGohey wants to pick out something that would leave a wrongful influence in the jury's mind.

Mr. McGohey: I will withdraw the question.

The Court: I will direct the jurors to disregard any inference.

Mr. Robb: In view of Mr. Keenan's statement I will withdraw my objection to the question. Let him answer it.

791 Mr. McGohey: I have withdrawn the question, your Honor.

Q. Was Major Radovich at Seymour Johnson Field at the time these men arrived? A. No, sir.

Q. I mean at or about that time; I am not talking about the precise minute that you met them. A. He was there later, yes, sir.

Q. How long later? A. Oh, a day or two.

Q. Now, did you have a conversation with Major Radovich about these two men? A. Yes, sir, I did.

Q. Will you tell us what that conversation was? A. I told Major Radovich two men had arrived, reported to our organization, whose names were Bayer and Usdan. I asked them—I asked Major Radovich why they were as-
792 signed to our organization. He told me that he did it, is a favor to Colonel Jacobson. I told him from previous experience that I had had with these two men I did not think that they were the type we wanted in our organization. He said he would take my word for it and have them transferred out of our organization. That is about the substance of the whole conversation.

Q. Were they subsequently transferred from your organization? A. Yes, sir, they were.

Q. When? With respect to the time they arrived there, when were they transferred out? A. About a week later.

Q. Coming back to the time that the men arrived and you had a conversation with Bayer and Usdan— A. Yes, sir, I did.

Q. Will you tell us now what that conversation was? A. I asked them who had arranged their transfer into our organization. They told me that Major Radovich had. I asked them if they knew this was an entirely volunteer organization. They told me that they did. I asked them if they were the two men who had previously worked for me at Mitchel Field. They told me that they were. And I assigned them to a barracks and they left. 794

Q. And that is the substance of the conversation that you had with them? A. Yes, it is.

Mr. McGohey: I have no further questions.

*Cross-examination by Mr. Keenan.*

Q. I am not certain, Colonel, that I got your exact language of your statement to Major Radovich about these boys not being the type of men needed, something of that nature. Was that in substance what you told him, or do you mind repeating it? A. No, sir, I don't. What I implied to Major Radovich at the time was——

Q. I would rather you said what you said. I don't object to your—we would like to get the statement—— 795

The Court: Tell us as near as you can. I know you don't remember the exact words, but as near as you can remember the conversation, the words he said and the words you said.

A. I said "Rad, I don't think these are the type of men we want in our organization. They are not the calibre of

man that we are looking for." Whether he asked me to substantiate that and give my reasons for it, I don't remember, but I do know that I told him that I didn't think we wanted them. That is about all, sir.

Q. Now, had you known Martin Bayer previous to this time? A. You mean, did I know him personally, sir?

Q. Yes. A. No, sir, I didn't.

Q. Had you any knowledge as to his character or his conduct as a soldier of the United States Army? A. Yes, sir, I did.

Q. And was that from your own observation? A. No, sir, it was not.

797 Q. Something that you had heard about him from someone else? A. Do I have to answer that yes or no?

Q. Well, you answer it so as to tell the fair sense of the matter. A. Yes.

Q. I won't require a yes or no answer to it.

Mr. Keenan: Let me withdraw it.

Q. Let us get the truth, the full point of it. Was there something wrong with Martin Bayer in your opinion? A. Yes, sir.

Q. You thought he was trying to evade overseas service— A. No, sir, nothing of that sort.

Q. Well, I don't know. Now will you tell the Court and jury just what do you mean by that, why you thought they 798 didn't belong on that outfit, or he didn't belong in that outfit? A. When they were originally transferred from my organization to the Headquarters Squadron, First Fighter Command, a request was made to me for their transfer. Rather than just let the men go, I inquired from my sergeant who was running the file room for whom they worked. The sergeant told me that they were not good clerks for the file room, that they were soldiering on the job and that he couldn't get much work out of them. And it was from

that conversation that I had with the sergeant that I first let the men go and later on formed my opinion of them when they had arrived at Goldsboro.

Mr. Keenan: Will you mark this as a defendant Bayers' exhibit?

(Marked Defendants' Exhibit A for Identification.)

Mr, McGohey: Are you offering it?

Mr. Keenan: I want to show it to him.

Q. I would like to show you this paper marked Defendants' Exhibit A for Identification, and ask you if you recognize what type of communication that is; just whether you do or not, yes or no, without stating what it is or anything further about it? A. Yes, sir, I recognize the type correspondence it is. 800

Q. What would you describe it to be, just stating the type, without stating its contents?

Mr. McGohey: I object to this, your Honor.

The Court: I haven't the slightest idea what the document is. May I see it?

(Witness hands paper to the Court.)

The Court: All right. Now what is your objection?

Mr. McGohey: My objection was to the last question.

The Court: I overrule the objection. 801

Mr. McGohey: If your Honor please, I would like to press it a little bit. I don't think he can describe it without getting into the document itself, and I am going to object to the introduction of the document. May we come to the bench for a minute, your Honor, where I can more fully explain my objection?

The Court: Yes.

(Conference at the bench between Court and counsel out of hearing of the reporter.)

The Court: I am going to overrule the objection.

Q. (Question read.) A. May I have that again, sir. (Paper handed to witness.) Its subject is commendation.

Q. Whom does it concern?

Mr. McGohey: I object, your Honor, to any reference to the contents of it unless it is in evidence.

Mr. Keenan: Well, I will offer it in evidence at this time.

The Court: All right.

803 Mr. McGohey: Now, your Honor, I object to its introduction on the ground that it is incompetent.

The Court: I will permit its introduction.

Mr. McGohey: Your Honor, there is no way of knowing who signed it, whether it is official or what it is.

The Court: It has a signature on it.

Mr. McGohey: Whose signature?

Mr. Keenan: The young lady who testified here before.

Mr. McGohey: She testified. The lady was here herself and testified as to her own knowledge. This is a document that we have no way of knowing where it is from or who signed it or anything else.

804 Mr. Keenan: It purports to come from headquarters——

Mr. McGohey: I object to that, your Honor.

The Court: I am going to admit it. It may be admitted.

(Defendants' Exhibit A for Identification received in evidence.)

Mr. Keenan: May I read it, your Honor?

The Court: Yes.

(Mr. Keenan reads Defendants' Exhibit A.)

Q. I will ask you if you know that Lieutenant Colonal (referring to Exhibit A)? A. No, sir, I don't.

Q. I will ask you, in the light of that communication, if that wouldn't describe this Private Martin Bayer as being a valuable and energetic and efficient member of the United States Army within the service group?

Mr. McGohey: I object to that, if your Honor please; the document speaks for itself.

The Court: Sustained.

Mr. Keenan: I think that is true.

Q. Major, as far as your own observation is concerned, you saw nothing wrong with the conduct of either one of 806 these two boys, did you? A. No, sir.

Q. And all they told you was that they came there as a result of Major Radovich's—in substance—some action on his part, is that correct? A. You are talking about my experience in Goldsboro, now?

Q. That is right, yes. A. Yes, that is true.

Q. Did they say anything more about it than that? A. No, sir.

Q. Your subsequent investigation caused you to conclude that they told you the truth when that statement was made to you? A. What statement are you speaking of, sir?

Q. The statement that the Bayer boy made to you when he said he came to Goldsboro because of some action of 807 Captain Radovich or Major Radovich. A. What is your next question?

Q. That is true, isn't it? A. You mean is the fact the fact?

Q. Yes. A. I do not know, sir.

Q. You don't know. By the way, you have used the term "voluntary" with reference to the Commando outfit to which these boys were assigned? A. Yes.

Q. And you told them, if I understood you, that it was voluntary? A. That is right, sir.

Q. And that they didn't need to serve unless they wanted to, is that correct? A. Yes, sir.

Q. Did either one of them state to you that he didn't want to? A. No, sir.

Q. Or anything in substance that would cause you to so believe that, from anything either one of these boys said to you? I am saying, if they didn't use the exact language, I am asking you was there anything that they said that caused you to conclude from their statement that they didn't want to serve in that Commando outfit? A. There
809 was nothing.

Mr. Keenan: That is all.

*Cross-examination by Mr. Robb.*

Q. Colonel, if these boys had wanted to get out of the organization, all they had to do was just say so, is that it? A. That is right, sir.

Q. Now, Colonel, let me get something straight here. When you first knew these boys they were working as clerks in your organization out here at Mitchel Field, is that right? A. Yes, sir.

Q. And what was your particular organization? A. First Base Headquarters and Air Base Squadron.

810 Q. And they were transferred out of there to where? A. Headquarters Squadron, First Fighter Command.

Q. Who was in command of that squadron to which they were transferred from you? A. I don't remember, sir.

Q. Now, who ordered that transfer, who arranged it? I will put it this way, Colonel: that was arranged by this same Colonel Jacobson that you mentioned, wasn't it? A. Yes, sir.

Q. He is the same one that you mentioned in connection with your talk down at Goldsboro when Major Radovich

said that he had done something as a favor for Colonel Jacobson, is that right? A. That is right, sir.

Q. What was his job, Colonel Jacobson's job? A. At the time of the transfer he was Commandant of the Headquarters Building, First Fighter Command.

Q. Was he a full Colonel or Lieutenant Colonel? A. Lieutenant Colonel.

Q. Who was his superior, do you remember? A. At the time he was Commandant of the Headquarters Building—

Q. Yes, sir. A. The Commanding General of the First Air Force.

Q. And he is the same Colonel Jacobson— A. I beg your pardon. Commanding General of the First Fighter 812
Command.

Q. He is the same Colonel Jacobson who was mentioned as being the assistant to Colonel Vidal, is that right; he was at one time Colonel Vidal's assistant? A. Yes, he was.

Q. Colonel, you testified that you knew the defendant Radovich out at Mitchel Field. Had you known him up to that time—prior to that time at all? A. What time are you talking about at Mitchel Field?

Q. The time you met him at Mitchel Field. Had you known him before you got to Mitchel Field? A. No, sir.

Q. In other words, you first met him in the Army? A. That is right, sir.

Q. And after you left Mitchel Field you went to Burma with this Air Commando Group? A. Well, yes, that is substantially correct. 813

Q. He was along in that group, wasn't he, sir? A. Yes, he was.

Q. And you were the adjutant of the group? A. Yes, at the time we left the States.

Q. Pardon? A. Yes, I was.

Q. You served throughout that campaign? A. Yes, sir, I did.

Q. What was your group's mission out there? A. We were air support for General Wingate's ground army.

Q. What did you do, Colonel? I am trying to find out out what your particular function was. A. We supplied all the air support that a ground army would normally need; we took his troops into Burma, supported them by air power while they were in there, evacuated their wounded, and dropped supplies to them.

Q. I suppose you shot up Jap supply trains? A. Yes, we did.

Q. And personnel? A. Yes, sir.

Q. Air fields. I believe your group was the one that
815 introduced this so-called low level bombing out there? A. We introduced it in that theatre, yes, sir.

Q. How many men were in your group, Colonel? A. About 520.

The Court: This is extremely interesting and I would love to pursue it personally, but I can't see its materiality to any issue.

Mr. Robb: I am just about through, if the Court please. One further question.

Q. You received several medals for your part in that work? A. A few, yes, sir.

Q. So did the Major, didn't he, Major Radovich? A. Yes, he did.

816 Q. D.F.C. and British D.F.C.? A. Right.

Q. In fact, he got two D.F.C.'s, didn't he? A. Two American D.F.C.'s.

Q. And one British? A. Yes.

Q. For gallant conduct? A. Yes, sir.

Q. You got one American and one British, didn't you, sir? A. Yes, I did.

Q. And you knew Major Radovich intimately during that time, didn't you? A. Yes, I did.

Q. A good soldier, wasn't he? A. Very good.

Q. He had an excellent reputation? A. The best.

Q. Pardon me. The best, you say? A. The best, yes, sir.

Q. Not only a good soldier but an excellent one, isn't that right? A. He certainly was.

Q. Colonel, when you talked to Major Radovich down there at Goldsboro about these men, was it understood that you were telling him to get those men out of there? A. Right.

Q. It was an order, not in formal shape, but it was supposed to be a direction, wasn't it? A. Well, it could have been interpreted that way. 818

Mr. Robb: I think that is all. Thank you.

The Court: You may step down. Call the next witness.

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EDWARD M. KOGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Wallace.*

Q. Captain Kogan, you will have to keep your voice up so that counsel at this table can hear you. Captain Kogan, you are in the United States Army, are you not? A. I am. 819

Q. How long have you been in the Army? A. Nine years.

Q. When did you first enlist in the United States Army? A. 1936—October, 1936.

Q. As a private? A. As a private.

Q. Did you see service then in 1936? A. Yes, sir, I went to Panama in 1936.

Q. You will have to talk louder, Captain. A. I went to Panama in 1936.

Q. When were you first assigned to Mitchel Field? A. October, 1939.

Q. Have you received various promotions through the rank of master sergeant and then commissioned to first lieutenant and then now as a captain of the United States Army? A. I did, sir.

Q. Where are you assigned right now? A. Fifth Air Force Service Command.

Q. Where is that located? A. Tokyo.

Q. Were you stationed at Mitchel Field in the years 1942
821 and 1943? A. I was, sir.

Q. Do you know the defendant Samuel Bayer? A. I do.

Q. Do you see him in the courtroom? A. Yes, sir, sitting right over there.

Q. Do you know Elias Bayer? A. I know him by sight, sir.

Q. Do you see him in the courtroom? A. Yes, sir.

Q. Do you know Major Radovich? A. I know Major Radovich by sight, sir, too.

Q. You never spoke to him?

Mr. Robb: I did not get that. Speak louder.

The Witness: I know him by sight, sir.

Mr. McGohey: May the witness keep his voice up? Even I have difficulty hearing him here.

822

Q. When did you first meet the defendant Samuel Bayer? A. 1942—spring of 1942.

Q. Could you tell us the circumstances under which you met him? A. I met Mr. Bayer through his oldest son, Robert. Shortly before I met Mr. Bayer my wife had had a baby and I met Mr. Bayer shortly thereafter; he came to my home with his son Robert.

Q. Was Robert in the Army then? A. He was, sir.

Q. What was his rank or rating? A. He was a private.

Q. What were you at the time? A. Master sergeant.

Q. Were you both at Mitchel Field? A. We were, sir.

Q. Did you ever meet Samuel Bayer's other son, Martin Bayer? A. I did, sir.

Q. When did you first meet him? A. In the summer of 1942.

Q. Where? A. I met him first at Mr. Bayer's home, Far Rockaway.

Q. Did you ever have any discussion with Samuel Bayer regarding Martin Bayer? A. Yes, sir.

Q. Where? A. The first occasion was at Mr. Bayer's home, that summer, 1942.

824

Q. Will you tell us what he said to you and what you said to him?

Mr. Keenan: Just a minute. I object, your Honor, as not material to this inquiry.

The Court: When is this, now? Summer of 1942? I sustain that objection; too remote.

Q. Just what months do you refer to when you say the summer of 1942? A. Late summer—about August or September.

Q. Could have been in September of 1942? A. September of 1942. I think it was very possible it was around that time.

825

The Court: I shall overrule the objection.

Mr. Keenan: Exception.

Q. Will you tell us what that conversation was? A. My wife and I were visiting Mr. Bayer and his family at his home and we were talking about Martin going to the Roosevelt School of Aviation Mechanics, and Mr. Bayer asked me if, when he graduated that school, if he would

be eligible for enlistment in the Air Corps, and our conversation was just about that subject.

Q. Do you recall anything else that was said at that time? A. Well, Mr. Bayer said he would like to get Martin into the Air Corps just as his older boy Robert did at the time.

Q. Did he say anything else that you recall? A. I believe he asked me if he could get to Mitchel Field; would it be possible he would be enlisted for the Air Corps at Mitchel Field.

Q. Did he say anything else that you can recall? A. No, nothing else I can remember at that time.

827 Q. Do you recall whether any other branch of the Army was mentioned at that time? A. Not at that occasion.

Q. Well, did there come a time when there was some mention of some other branch of the Army? A. Yes, sir, later that year, early December.

Q. Did you have a conversation with Samuel Bayer in early December of 1942? A. I did, sir.

Q. Where did that conversation take place? A. On the telephone, sir.

Q. Where were you? A. I was in my office, sir.

Q. Will you tell us what that conversation was?

Mr. Keenan: This we object to, too, if your Honor please.

The Court: Objection overruled. Go ahead.

828

A. Mr. Bayer called me and asked me if I knew that all enlistments in the Army were going to be closed on the 15th of December. I told him I did. He asked me what happened to most of the boys who were inducted, what branch of the service they went into. I told him that in my opinion the bulk of inductions went to the infantry. He said, "Well, if Martin could get enlisted now, do you think it is still possible for him to get in the Air Corps?"

I told him I thought they could. That was about the gist of the conversation at that time.

Q. Do you recall whether there was anything else said about the infantry by Samuel Bayer at that time? A. Well, Mr. Bayer made it very clear that he wanted his boy in the Air Corps rather than the infantry; he preferred him to be in the Air Corps rather than the infantry.

Q. What part of the Air Corps, do you recall? A. Well, as ground crew, I think.

Q. Did Martin Bayer then enlist in the Army? A. Yes, he did.

Q. Do you know where he was assigned when he enlisted? A. He eventually came to Mitchel Field. Enlisted 830
at Grand Central Palace and eventually arrived at Mitchel Field, via Camp Upton.

Q. How long after he enlisted did he arrive at Mitchel Field? A. I would say ten days.

Q. Where did he take his basic training? A. I believe he took it at Mitchel Field.

Q. In the early part of 1943 you were out at Mitchel Field, weren't you? A. That's right, sir.

Q. Do you know the organization commonly known as the Waes? A. I do, sir.

Q. Were they taking over any duties at Mitchel Field at that time? A. They had not arrived as yet. We were expecting our first shipment of Waes at that time.

Q. Where were those Waes to be assigned when they arrived at Mitchel Field? A. Various administrative offices 831
throughout the field.

Q. You had a base headquarters and you had the headquarters of the First Fighter Command and First Bomber Command, you had some other headquarters, too, stationed at Mitchel Field, is that right? A. That is right, sir.

Q. Were the Waes going into all those headquarters, or were they going into one or more? A. Going into all of them, sir.

Q. Now, what sort of jobs were they taking over at that time? A. Clerical jobs.

Q. In March of 1943, do you recall any conversation you had with Samuel Bayer? A. I do, sir.

Q. Where did that conversation take place? A. In my home.

Q. Will you tell us the substance of that conversation? A. Mr. Bayer told me that his brother had met quite a few officers from the First Fighter Command, that they had become very friendly, and one officer, Colonel Jacobson, had recommended that the boys be transferred to work for him over in the Fighter Command, that it was
833 a good assignment and looked good for a while.

Q. Did he say anything else to you? A. Well, he asked me what I thought of that recommendation of the Colonel's over there. I told Mr. Bayer that I thought it was a very poor deal to get into, get involved in, and I did not think anybody could promise anybody where they could be because they never knew the next day where they would be themselves.

Q. Had he said something about somebody promising him where people would be? A. Yes, sir.

Q. What did he say? A. He said Colonel Jacobson had promised him that it was a good assignment for about a year.

Mr. Robb: I did not get that.

834 Mr. Wallace: Will you read the answer?

(Answer read.)

Q. Did you have any other discussion with Samuel Bayer at that time, that you recall? A. No, sir.

Q. Do you recall whether there was any mention of rumors in that conversation? A. I believe Mr. Bayer mentioned to me that one of—one of his points mentioned was that he had heard the rumor the Waes were coming

to Mitchel Field; that that was the reason he was interested in getting the boys transferred to the Fighter Command.

Q. Do you recall whether there was any mention of any other rumors in that conversation? A. No, I do not, sir.

Q. Captain Kogan, I refer you to this——

Mr. Robb: Just a minute. If the Court please, we object to this. If Mr. Wallace wants to impeach his own witness, there is a certain way he can do it.

Mr. Wallace: I am not trying to impeach him.

The Court: Let me see it.

Mr. Wallace: Your Honor, I would like to be heard in this matter. The witness says he doesn't recall. 836

The Court: I understand.

Mr. Wallace: I am merely trying to refresh his recollection, not trying to impeach him at all. In that connection I think I would be entitled to show the witness anything, if it would refresh his recollection.

(Sidebar discussion out of hearing of the jury between the Court and Mr. Wallace.)

The Court: I will not permit you to read it, but I will permit you to show it to the witness and ask him if that refreshes his recollection. Do you wish to except?

Mr. Robb: No, sir.

837

Q. Captain, will you look——

Mr. Robb: May I see it too, your Honor?

Mr. Wallace: Surely.

Q. Captain, will you look at this piece of paper, and I direct your attention to the middle of the page, and after reading the part I am pointing to, tell me, yes or no,

whether that refreshes your recollection. A. That refreshes my memory all right, but——

Q. Just one moment. It does refresh your recollection? A. Yes.

Mr. Keenan: I insist. I think the witness ought to be permitted to answer the question.

The Court: I am going to permit him to answer further, after he says it refreshes his recollection. He says it does. Do you wish to show him anything else?

Mr. Wallace: No.

839 Mr. Keenan: Could we know what has been shown to him?

The Court: Yes.

Mr. Wallace: Surely.

The Court: All right. You said it did refresh your recollection, and then you started to add something to it. Go ahead and say whatever you wanted to say.

The Witness: That did not come on that visit, though.

Q. Didn't come on that visit? A. No, sir.

Q. Did you have a subsequent visit or talk, conversation, with Samuel Bayer about Martin Bayer? A. That came later, late that summer, I believe, sir. At that time—first I had a telephone conversation with Mr. Bayer, and Mr.
840 Bayer called me and asked me if I knew of an investigation going on at the Fighter Command, to which I told him, since I had no connection with the Fighter Command, I knew of no investigation.

A few days later Mr. Bayer came to my house again and told me that quite a bit of trouble was going on over at the Fighter Command and he asked me at that time if I felt that there was going to be any consequences of this investigation. I told Mr. Bayer at that time that there

were many wild rumors going around the Field as to entertainment and gifts and stuff of that nature, and that I thought the best thing he could do was to leave well enough be.

Q. Is that what you said, "entertainment, gifts and things of that nature," or were your remarks more ample? A. Well, I don't quite understand you.

Q. Can you give us the conversation as best you can remember it?

Mr. Keenan: If your Honor please, I will object to this witness giving a statement of what he said at an unnamed—undesignated period of time, other than at some time later, concerning a highly volatile subject matter, rumors, in a criminal prosecution. I object to it. 842

The Court: Can you fix the time of the conversation you are talking about, Captain?

The Witness: I would say it was about August, 1943.

The Court: The conversation was with the defendant Samuel Bayer?

The Witness: Yes, sir.

The Court: All right, go on and state——

Mr. Keenan: Exception.

Mr. Robb: If the Court please——

The Court (continuing): ——what you said to him and what he said to you at that time. 843

Mr. Robb: If the Court please, may I interpose an objection at this point upon the ground that the witness has been asked a question and I think he has answered it fully. Apparently the answer did not suit my friend Mr. Wallace, who apparently now is undertaking to further cross-examine the witness. I don't think he should be allowed to do that.

The Court: I don't think he is cross-examining. Overruled. Exception may be noted.

Mr. Robb: Noted.

Mr. Wallace: Will you read—I think I will put another question.

The Court: All right.

Q. Can you remember where this conversation took place to which you were just referring? A. At my home, sir.

Q. When did it take place? A. I would say, as near as I can remember, August, 1943.

Q. Who was present? A. In my home, sir, or at the
845 conversation?

Q. Who was present, first of all, in your home? A. Mrs. Bayer, my wife, and Mr. Bayer's secretary, Mrs. Solomon.

Q. Was this a general conversation in which all these people were involved? A. No, sir.

Q. Was there a conversation just between you and Mr. Bayer? A. Just between Mr. Bayer and myself.

Q. Who made the statement about entertainment and gifts, you or Mr. Bayer? A. I did, sir.

Q. What did Mr. Bayer say, if anything, when you made that statement? A. I don't recall Mr. Bayer denying it or affirming it or saying anything about it.

Q. Was there any mention of uniforms in that conversation? A. Yes, sir; Mr. Bayer, in referring to this investi-
846 gation, referred to a Captain Engelhardt, who, he told me, had pressed a complaint about the uniforms. It seems Captain Engelhardt got a bill for a uniform and he complained about it. That is the story that was told to me by Mr. Bayer.

Q. Did he say whom Captain Engelhardt complained to about getting a bill? A. No, sir, he did not.

Q. When was the next time that you heard from Mr. Bayer? A. I would say about September, 1943—late September.

Q. Was this a conversation you had on the phone or in person? A. He came to my home after a telephone conversation. He asked me if he could come over.

Q. Just a minute. You first had a telephone conversation? A. That's right.

Q. Will you tell us what that telephone conversation was? A. Mr. Bayer told me that his son Martin and his nephew Melvin had been transferred from Mitchel Field and that he had just come back from leaving Martin at Bradley Field.

Q. Did he say where Melvin Usdan had been transferred to? A. To Westover Field.

Q. What else did he say? What else did he have to say on the telephone? A. Nothing that I can point out. 818

Q. Did he say he wanted to meet you? A. Oh, yes, he said he wanted to see me at my home.

Q. How long thereafter did he come to your home? Was it the same day or the same evening? A. I would say it was a few days later.

Q. Did he come alone? A. No, he came with his son Robert.

Q. Did you have a conversation with him at your home? A. I did, sir.

Q. Will you tell us what that conversation was?

Mr. Keenan: May we have the date of it fixed as nearly as possible?

The Court: When was it? 819

The Witness: I would say this was around September, 1943—late September, 1943.

A. Mr. Bayer told me at that time that Martin was in an alerted unit for overseas at Bradley Field, the Aviation Engineers, and he asked my opinion, if I thought there would be any trouble if the boys—that boy, his son there, was transferred away from there. I tried to tell Mr. Bayer

at that time that I thought there would be very serious consequences, and Mr. Bayer cried and——

Q. What did he say? A. Well, the gist of what he said was he wanted him out of that alerted unit for overseas into another unit.

Q. Did he say what kind of a unit he wanted him into? A. I don't get what you mean, Mr. Wallace.

Q. Did he say he wanted him into a unit that was not going overseas?

Mr. Keenan: I think that is wrong.

The Court: I sustain the objection to that.

851 Q. Can you recall anything else that was said at that conversation? A. No, I do not, sir.

Q. Did Robert Bayer have anything to say to Samuel Bayer at that time? A. He did, sir.

Q. What did he say? A. He told his father he thought he was making a mistake being involved in any further trouble with his other son.

Q. Was there any explanation of what this other trouble was?

Mr. Keenan: I object and ask that counsel be cautioned to ask for conversations from the witness, so we get the testimony from the witness.

The Court: That is offensive to me. I sustain that

852 objection.

Q. Do you recall anything else that was said at this conversation? A. I cannot recall.

Q. Do you recall anything else that you said in that conversation? A. Other than what I have said, I cannot. Other than what I have said, I cannot.

Q. I refer you to this page——

Mr. Keenan: I think it is a plain effort to impeach the witness.

The Court: I don't—let me see—I don't know yet what he has.

Mr. Keenan: I am sorry.

Mr. Wallace: Referring to this paragraph (indicating).

The Court: I think you have covered that already. I think the witness in his testimony covered that.

Have you much more direct examination?

Mr. Wallace: Yes, your Honor, I have.

The Court: I think we had better quit. I had hoped that possibly we could have finished his direct examination this afternoon, but inasmuch as there will be cross-examination, I think it is a very good point to stop at right now.

Mr. Robb: If the Court please, might the witness be instructed not to discuss his testimony with anybody?

The Court: I am going to. There are two or three things I want to say. I will do that first.

Captain, I want you to be here to resume the stand first thing tomorrow morning, which is going to be at 10 o'clock.

The Witness: Right, sir.

The Court: Ladies and gentlemen and counsel, tomorrow I am going home in the afternoon. Consequently, there will be no court in this case after lunchtime. We will adjourn tomorrow afternoon at one. Inasmuch as there will be no court in the afternoon and you will be excused at lunchtime, I am going to ask you to be here at 10 o'clock in the morning, instead of 10.30, and you may make your plans accordingly.

Captain, I have already told you to come back, and I will tell you further, that between now and then do not discuss this case with anyone or permit anyone to

discuss it with you. You will resume the stand and finish your testimony without discussing it with either side.

We will take a recess. Court will adjourn until 10 o'clock tomorrow morning.

(Adjourned to October 5, 1945, at 10 A. M.)

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New York, October 5, 1945,
10 A. M.

857 TRIAL RESUMED.

EDWARD M. KOGAN resumed the stand.

Mr. McGohey: Do you want to go up now?

Mr. Keenan: Yes.

(Discussion at the bench out of hearing of the jury.)

*Direct examination (continued) by Mr. Wallace.*

Q. Captain Kogan, I think that when we had suspended yesterday afternoon you had told us about a conversation had in your apartment at which Samuel Bayer, Robert Bayer and yourself were present? A. That is right, sir.

Q. Have you told us all that you remember about that
858 conversation? A. I believe I did, sir.

Q. As I recall your testimony, that conversation took place some time in September, wasn't it? A. That's right, sir.

Q. Of 1943? A. That's right, sir.

Q. You will have to speak louder, Captain. A. That is right, sir.

Q. In the succeeding months of 1943 and 1944 did you occasionally see Samuel Bayer? A. I did, sir.

Q. Did you visit in his home and he visit in your home? A. I would say yes, sir.

Q. Did you go out socially at times? A. We did, sir.

Q. By the way, were you ever the recipient of any gifts from Samuel Bayer? A. Myself, sir?

Q. Yes. A. No, sir.

Q. Any members of your family? A. My children.

Q. During those succeeding months, after this conversation, do you recall whether there ever was any mention of Major Radovich?

Mr. Robb: May we have the date of that, Mr. Wallace?

860

Mr. Wallace: I first want to see whether there was ever any mention, and then I will try to fix the date, if there was.

A. You mean during the entire period I knew Mr. Bayer?

Q. In the months after September, 1943. A. Nothing more than casual reference. I mean nothing specific was ever mentioned.

Q. Do you recall when there were any references to him? A. No, sir.

Q. Do you know: just how did he refer to him, Major Radovich? A. Walter, Rad.

Q. Captain Kogan, do you recall when the Women's Army Corps first came into Mitchel Field? A. I believe it was in the summer of 1943.

861

Q. Do you recall which headquarters they first took over? A. I really don't know that, Mr. Wallace.

Q. Did they take over all the headquarters at the same time or did they take over one headquarters and then take over another headquarters? A. I think the First Air Force received the first contingent of WACs.

Q. The headquarters— A. Headquarters——

Q. —of the First Air Corps? A. —of the First Air Corps.

Q. Do you know when the base headquarters were taken over by the WACs? A. As I remember it, I think that fall, base headquarters started getting WACs.

Q. Do you recall——

Mr. Keenan: In the fall of 1943?

The Witness: In the fall of 1943.

Q. Do you know when the WACs took over the headquarters of the First Fighter Command? A. I would say around the same time.

863

Mr. Robb: Around when?

The Witness: About the same time.

Q. Did they ever take over any of the clerical duties of the medical detachment at the base? A. I believe they have WACs there now.

Q. When did they take that over? A. I really don't know that.

Q. Was it subsequent to taking over clerical duties in the other commands at Mitchel Field?

Mr. Keenan: I object. The witness has said he did not keep track of the WACs, when they went in and out. He answered the question two or three times.

864

The Court: I did not hear the question.

Mr. Keenan: I withdraw the objection.

A. I couldn't tell you that, Mr. Wallace; I don't know.

Mr. Wallace: That is all.

*Cross-examination by Mr. Keenan.*

Q. Captain Kogan, you have stated that Samuel Bayer gave gifts to your children. Did he provide any uniforms for them? A. For my children?

Q. Yes. A. No, sir.

Q. How many children have you? A. Two.

Q. How old are they? A. My youngest is a year and my oldest is three and a half years.

Q. The gifts were gifts of substance, of money, something of that nature? Could you describe them? A. Articles of clothing or play toys.

Q. Play toys. Did Mrs. Bayer come out to your home? 866
A. Yes.

Q. Did she know Mrs. Kogan? A. Very well, sir.

Q. Without going into details, Captain, were those gifts of any monetary value? Did they run up into any money? A. No.

Q. These toys, were they very expensive mechanical toys, or ordinary toys that would please a child of a year or a year and a half of age? A. I would say they were just of moderate value; nothing——

Q. You say— A. Nothing really expensive. Just gifts of wearing apparel and ordinary baby play toys.

Q. Baby play toys. Were you asked to do anything in particular for the little baby play toys that were given to your infant children? A. No, sir.

Q. Did you understand that there was an implied invi- 867
tation on that account to affect your judgment in what you were doing in the Army? A. No, sir.

Q. Did you take them seriously at all, those little gifts, in any way? A. Well, they were gifts of friendship. I mean at that time we were friendly.

Q. Did you think that someone was trying to corrupt you with those gifts? A. No, sir.

Q. By the way, when Mr. Bayer first met you, you were an enlisted man? A. I was, sir.

Q. And you had the important but still humble duties of an enlisted man to perform at that time? A. I was Base Sergeant Major, Mitchel Field.

Q. May I ask you, did you have anything to do about transferring men from one position to another outside of the Air Force? A. I did, sir.

Q. What was your duty in that regard? A. Well, everybody that was shipped in and out of Mitchel Field went over my desk.

Q. Everybody that was shipped in and out of Mitchel Field went over your desk, and did you have anything to do with transferring these boys, particularly? A. I was
869 no longer at Base Headquarters.

Q. You weren't at Base Headquarters when they were transferred? A. I was in a different command.

Q. You did not have anything to do with that? A. Not a thing.

Q. Will you tell us something about the duties of the clerks out there at Mitchel Field? Were they the type of duties that required the use of typewriters? Tell us a little something about it, if you know. A. There were all types of clerks. What particular type of clerk?

Q. Do you know what type of clerk these boys were? We are centering around Martin Bayer and Melvin Usdan, the son and nephew—a son and a nephew of Samuel Bayer. What did they do? A. While they were at the base I recall they were file clerks.

870 Q. What did that mean? A. They filed all correspondence and kept up all the 201 files on the officers and enlisted men assigned to the base.

Q. We noticed in this file that on one transfer there were twelve different endorsements. Would that indicate that there was a good deal of paper work in the Army to you? A. Yes, sir.

Q. They call that red tape for a good many years back—haven't they, captain, Army red tape? A. Army red tape.

Q. One of the things that has to go on in an army with a lot of records to be kept? A. That's right.

Q. And they have to have them kept and preserved, don't they? A. That is right.

Q. And somebody has to do that work? A. (No answer.)

Q. Now, the men that were clerks, did they have, as far as you could observe, an easy time? Did they work a given number of hours in a day or did they go out and sun themselves in the course of the day? Give us some notion about what a clerk did.

Mr. McGohey: I object to this line of questioning.

The Court: I sustain the objection. 872

Q. I will ask you about how much physical exercise these clerks took, if you can tell us?

Mr. McGohey: I object to that, if your Honor please.

The Court: I will let him answer that.

Mr. McGohey: If he knows.

The Court: Yes. Well, he should know.

The Witness: Would you mind repeating the question?

Mr. McGohey: I suggest that the question ought to be narrowed to the two clerks we are talking about here.

Mr. Keenan: All right. I would like to comply with every wish of the United States Attorney, if I can. 873

Q. Now, the two clerks we are speaking about, the two enlisted men, do you know how much exercise they took, Captain, out there? A. No, sir.

Q. What I am trying to get at is, what the nature of their duties was, whether or not they would be fit for overseas service?

Mr. McGohey: If your Honor please, I suggest that the Captain has said he did not know what they were doing.

The Court: Let him finish his question.

Q. I would like to know whatever light you can throw on that subject by answering the question? Do you know what opportunities those men had to get out on the field and walk around?

Mr. McGohey: I object to this, your Honor. The question is in the form of a summation.

875 Mr. Keenan: I will withdraw it and say:

Q. Can you tell us about the opportunities for exercise of these two men in the course of their duties?

Mr. McGohey: If he knows.

The Court: If you know.

A. I don't know. I wasn't at the base headquarters at that time; I was at a different command headquarters altogether.

Q. But it was on the same field, wasn't it? A. It was on the same field but quite a ways away from base headquarters.

Q. I see. You weren't in direct command over these men
876 at any time? A. No, sir. At no time did I have any jurisdiction over them at all.

Q. At no time would you ever have jurisdiction over them. You had social visits with Samuel Bayer, did you? A. I did, sir.

Q. His wife and your wife? A. I did.

Q. And sometimes Miss Solomon, the girl in his office? A. I did, sir.

Q. She came out there with Mrs. Bayer? A. Very often.

Q. It was a social friendship between your families? A. That is right, sir.

Q. They manifested interest in your children to some extent, kindly interest of visitors? A. I would say yes.

Q. Would Sam Bayer—did you notice any attention he paid to the children particularly? A. He was very fond of both my children.

Q. Since these gifts have become a subject matter of inquiry, did you give any gifts to the Bayers of any type? A. No, I never gave Mr. Bayer any gift.

Q. Or your wife? A. No, no more than just having them for dinner, something like that.

Q. You tried to hold your own the best you could in 878
the Army on that score, is that right? A. That is right. I couldn't afford it.

*Cross-examination by Mr. Robb.*

Q. Captain Kogan, you said that you knew by sight Mr. Radovich, Major Radovich, is that right? A. That is right, sir.

Q. Do you recall whether you had ever seen him before this case started? A. I saw Major Radovich and met him for the first time two months ago.

Q. Two months ago? A. That is right, sir.

Q. Up to that time you had never seen him in your life, is that right? A. Never spoke to him, never knew of him.

Q. Captain, you also testified there was some casual 879
mention made of the Major by Mr. Samuel Bayer. I suppose Mr. Sam Bayer mentioned both him and other officers, didn't he, in a friendly way? A. He did.

Q. He would ask somebody at Mitchel Field if he knew somebody else at Mitchel Field, isn't that about the way it was? A. I would say along those lines.

Q. Sort of one of these games of playing, "Do you know So-and-So?" isn't that about it? A. That is about it, sir.

880 Q. In other words, if you find some fellow that is stationed somewhere and he knows somebody else who is there, you say, "Do you know Joe Doakes?" Isn't that about the way it was? A. Well, Mr. Bayer referred to Major Radovich as the boys' squadron commander.

Mr. Robb: Yes. That is all. Thank you.
Mr. McGohey: No questions.
The Court: Stand aside. Call the next witness.

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881 GERALD J. FLYNN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Mr. Flynn, by whom are you employed? A. The Federal Bureau of Investigation.

Q. What is your title? A. Special agent.

Q. How long have you been so employed? A. Since November 10th, 1941.

Q. Now, in the course of your duties as an agent were you assigned as an investigator in the case now on trial? A. Yes, sir.

Q. And I call your attention particularly to the month
882 of February, 1945. Were you present at the office of Mr. Wallace on the fourth floor of this building when the defendant Samuel Bayer gave some statement to Mr. Wallace? A. Yes, sir.

Q. And can you tell us who else was present in the room at that time? A. Special Agent Jacob Brown, also Special Agent of the Federal Bureau of Investigation, Mr. Keenan.

Q. Is that Mr. Keenan who sits at the counsel table here? A. At the counsel table. And I believe Mr. Levy was also present at that time.

Q. Of course Samuel Bayer was present? A. Yes, sir.

Q. And Mr. Wallace? A. Yes, sir.

Q. And do you recall whether during any part of that session I was present? A. Yes, sir. Just about—shortly after the interview of Samuel Bayer began you entered the room.

Q. Was there a stenographer present? A. Yes, sir.

Q. And there were notes taken? A. Yes, sir.

Q. Now, will you tell us in substance what Samuel Bayer stated to Mr. Wallace at that time?

Mr. Keenan: Your Honor, I object, and I would like to be heard on some legal propositions involved in this matter. 884

The Court: The jury will retire.

(Jury retired from the courtroom.)

The Court: I should like first to hear, Mr. McGohey, the Government's theory.

Mr. McGohey: Sir?

The Court: I should like first to hear the Government's theory as to the admissibility of this evidence.

Mr. McGohey: If your Honor please, I think that—

The Court: First let me ask you, do you contend that they were statements made during the conspiracy——

Mr. McGohey: No, your Honor.

Mr. Keenan: Wait a minute. Then, if that is true, I would like to have the United States Attorney state 885 what the theory is at this time of when the conspiracy ended.

The Court: I am not going to inquire into that.

Mr. Keenan: You are not going to?

The Court: No, sir.

Mr. Keenan: In any event, he states——

The Court: That is for the jury. But I am asking him now his theory as to the admissibility of this testimony.

Mr. Keenan: I beg your pardon.

Mr. McGohey: I think these statements are admissible as admissions by the defendant Samuel Bayer, and I might as well state here to your Honor frankly now that I intend to offer also statements, evidence of statements made by the defendant Elias Bayer and also the defendant Radovich.

The Court: When?

Mr. McGohey: When made?

The Court: Yes.

Mr. McGohey: The statement of Elias Bayer was made under the same circumstances as that of Samuel
887 Bayer, namely, downstairs in the office, in the presence of those whom the agent has testified were present when Sam Bayer made them, and that was in February, 1945.

The Court: What about the defendant Radovich?

Mr. McGohey: In the presence of their own counsel. Now, the defendant Radovich made a statement to Agent Flynn and Agent Brown first, some time in——

The Court: When was it?

The Witness: September, 1944.

Mr. McGohey: September, 1944. And then later there was a second statement——

The Witness: That was made about March 15th and 17th.

888 Mr. McGohey: The statement of September was made by Radovich down at Mitchel Field; the statement that was made later and signed by him—both statements were signed by him—was made in March, 1945, in this building, up in the office of the Federal Bureau of Investigation.

Now I claim that those statements are admissions by each defendant. I do not claim that the admissions of Sam Bayer are admissions against Radovich, and I assume that the Court would so instruct the jury,

by the same token, that the admissions of Radovich would be admissible only against himself and not against Bayer, under a proper instruction.

The Court: All right, sir. Now I will hear you, Mr. Keenan.

Mr. Keenan: Yes. I want to address myself first--

The Court: Let me ask——

Mr. Keenan: I am sorry.

The Court: You asked this witness to state the substance.

Mr. McGohey: Yes, sir.

The Court: If there are notes, if it was taken down verbatim, shouldn't it be introduced that way, if it is introduced at all?

Mr. McGohey: I will be very glad to. I have them here. I will be very glad to.

The Court: I am not suggesting that as any personal preference, but I mean as a matter of law. If statements were taken down in writing, would that not be the way to introduce them? I am not so sure about that.

Mr. McGohey: Well, I don't think, your Honor, that there is any valid objection to the agent testifying, or anybody else who was present.

The Court: I am inclined to agree with you there.

Mr. McGohey: He is testifying from his recollection of what he heard.

Mr. Ansell: I am sure the District Attorney will repeat his last statement. I didn't——

Mr. McGohey: What I said was, General, that I didn't think there was any valid ground for objection to the agent testifying as contrasted with the idea of putting in the written statement, because the agent certainly is qualified to testify to what he heard; he was present during the interview.

892 *Proceedings.*

Mr. Ansell: If your Honor please, I also feel like asking Mr. McGohey this: I am sure that in his statement he referred to these statements which he is about to include now as admissions.

May I ask you, sir, as to whether you are distinguishing between admissions and confessions in your use of that term?

Mr. McGohey: I am offering these as admissions.

The Court: All right, sir, I will hear you, Mr. Keenan.

Mr. Keenan: I am going to first address myself to the proposition of the discretion of the Court in the conduct of a trial from the standpoint of applying the 893 rules of practicability and not letting prejudicial matter enter into a cause involving the violation of serious criminal statutes. For example, it is going to be the theory of the United States Attorney, as he disclosed in his argument, that he intends to use the testimony of Samuel Bayer in proof of this conspiracy—because, after all, that is the charge before the Court, before the jury; it is not a substantive offense, and it is not an offense of an individual, it is a conspiracy—and he is going to attempt to ask this Court to permit a statement made by Samuel Bayer of a good deal of length, going into great detail, to be introduced in the trial of a cause where Samuel Bayer—where Elias Bayer, whom I represent, is on trial, and of course 894 Radovich, for whom I have no right to speak at all, and I do not expect to, but I assume that something will be heard from that side of the table as a practical matter, in behalf of Elias Bayer, to permit a statement going into considerable detail, as I know this will, because it would seem to me to be hideous to attempt to take a part of an alleged confession or admission and isolate it from its context, and take one part and leave out another, and then add a third, and

leave out a fourth, and so on; from the standpoint of common, ordinary decency and fairness that still prevails in our courts in this country, and ask solemnly your Honor to admonish the jury and say, "Now, that part of the testimony that has to do with the admission of Elias Bayer, of Samuel Bayer, the jury will accept that only as proof, if it believe it, or such part as it believes, of the guilt of Samuel Bayer, but none of it or nothing that is said in that recitation can in any manner or fashion be considered by this jury in determining the guilt of Elias Bayer."

Now, when he talks about the admissions of Elias Bayer, which is coming—your Honor wants us, I know, to discuss this in a practical fashion—then there will be a long statement, and I still say it would be hideous and grossly unfair on these most important matters, when even the language of a single phrase or a word might make all the difference between liberty and loss of it, and destruction of a man's reputation and all that goes with it, to say that a man's memory is to be taken on something that happened six or seven months ago, and he gets up on the witness stand, without a note, when we have a stenographic record of every single word that was said; but on that man's verbal recollection of what he recollects this jury of twelve people are asked to retain in their minds just that part that this witness spoke of as binding upon this particular defendant, and then he proceeds from that to the discussion of what was said by another defendant. And I don't know whether they intend to ultimately offer statements that were made before the court-martial out at Mitchel Field or not; they fall, some of it, within the same category. That I don't know. But I assume that if there is any logic, those would be admissible too, under the same theory. And

then the jury would be instructed that they will just take what Sam Bayer said out at Mitchel Field as reported by this gentleman (indicating witness), or by the stenographic record, which they also have available, and they will consider just what he said, talking about Captain Kogan or talking about Lieutenant Roeser, or talking about exactly what was said in the handling of these uniforms and so forth, a long statement that we know goes on. But none of that must be considered by the jury in any manner or fashion against Elias Bayer, who, as I stated, and perhaps I should make an apology for it, I don't know why he is even in this courtroom as far as any evi- 899 dence is thus far concerned against him. But the jury must consider nothing against Elias Bayer in what is said by this witness, so repeated, about Samuel Bayer.

Now, then Elias Bayer's statement will be given, presumably, and then the jury will be instructed that nothing that this witness says as coming from the lips of Elias Bayer in any manner or fashion may be taken into consideration by any members of the jury in their deliberations in determining the guilt of Samuel Bayer. And then, lo and behold, we will have a confession—I don't care whether it is called an admission or confession, your Honor; we are not engaged in a game of shuttlecock in this courtroom; we are engaged 900 in a very serious business, of course—I beg pardon for even adverting to it, of course everyone knows it—but when it comes to these niceties of expression, whether he made it as an admission or whether it is a confession, it sounds very reminiscent of Alice in Wonderland and Tweedledum and Tweedledee. But whatever——

Mr. Robb: Mr. Keenan, if the Court please, yesterday your Honor allowed Mr. Brown to come into the

court for a particular purpose, namely, to help Mr. McGohey with certain accounting records. Now I see Mr. Brown has come back in the courtroom during the testimony of Mr. Flynn. I don't think he ought to be here.

The Court: Is he going to testify?

Mr. McGohey: He probably will testify. I didn't know that he had come in. I assume that he came in because he thought that with the jury not being here this was legal argument and that he——

The Court: He might step out.

Mr. McGohey: Yes.

The Court: All right, sir, proceed. 902

Mr. Keenan: Now, well, I believe——

The Court: What have you to say to this proposition? You addressed yourself very ably to the possible detriment or prejudice which might ensue to the other defendants by the admission of the statement of Sam Bayer, but, on the other hand, if the Government has in its possession evidence of great weight as to the guilt or innocence of the defendant Samuel Bayer, is it not unfair to the Government to exclude that which is highly material, which may be highly material as to Samuel Bayer, because it might help someone else?

Mr. Keenan: I am glad you asked that question, because I think that is a very fair one and ought to be answered. That is the reason why we have Judges 903
in the courtrooms and why we have the right to severances in trials, no other reason, your Honor. Because I never knew of a better illustration that could be used by a professor in a law school in discussing the matter of criminal law and severances than the precise instance we have here.

If there is evidence admissible against Samuel Bayer, and I don't think it is—I want to come to that

in a moment, my reason for it; I am just approaching one phase——

The Court: While you are discussing it, tell me how I can sever a conspiracy.

Mr. Keenan: Your Honor, if you can't, and it is going to be prejudicial to this jury, to any one of the three of them, the defendants, then I come back to that good old Anglo-Saxon doctrine: better that a hundred men go free than one innocent man be convicted. And I say to your Honor with all the respect that I am able to command that it becomes an utter absurdity to tell this jury: You can recall what one
905 man says as only against him, but it must not be considered or influence you against the others. Your Honor, that is just hypocrisy, that is just plain ordinary insolence to the intelligence, no matter where it comes from or how. We all know that if there is a rule of evidence that is prejudicial and therefore inadmissible to permit—for a jury to consider statements made by co-defendants at a certain time against others, then I say to your Honor the preservation of that bulwark of liberty and freedom is of more importance than punishing one particular offense of this nature: that we are getting into, your Honor, the philosophy of the law—and I defer to the Court on that and I beg to be forgiven for expressing my views, and I have had some experience, too, in these days of
906 even making some of the Federal laws—and I don't say it in a boastful way, but studied the philosophy of it for a good many years, and I say to your Honor that I feel so strongly in this case it is more important, particularly in this day when civilization—and I don't try to be dramatic with this, but it is true—it is shocking today, but the United States of America is the only country where we can find the safeguards of liberty which are so important. We give up a

little in this country for our freedom, but it is worth having when we get through.

I know, if I can be permitted to state, I wanted to write a letter to tell the Director of the Federal Bureau of Investigation how proud I was of ever having anything to do with this lady, Mrs. Tracy, who spoke up voluntarily and said, "I would rather not sit on this jury, I have a son in the F. B. I." That doesn't happen in foreign countries, your Honor; that only happens in the United States of America.

But here we have the same fundamental points that are more important to protect the foundations of our liberty than to obtain the conviction of two or three 908
individuals in this case. I say if that balance comes, that there has to be a decision made.

Of course we must go to the realities, as your Honor pointed out to me. You said to me as counsel before this court if the Government does have important evidence against Samuel Bayer, why shouldn't the Government have the right to present that to the jury? The answer is plain. Because if you do there is no way under the sun of preventing the jury from taking that into consideration in finding other individuals guilty under the law. And the law says that that should not be done. In other words, the law says that if you let that statement in against Samuel Bayer, it is not admissible against the other two defendants. 909
I am interested only in one.

The Court: Let me ask you another question.

Mr. Keenan: That is not all I wanted to say. That is just one point.

The Court: I want to ask you this while I think of it, though I do not desire to have you argue it either way, because it is not material. I just wanted to ask you, will you concede or not—I guess it is all right.

Mr. Keenan: My answer, your Honor, would be in the negative; when I am representing defendants I won't concede anything.

The Court: That is just the thought that occurred to me and prevented me from asking the question.

Mr. Keenan: Before we get to that, I haven't said all I want to on that subject matter, but I think, with great respect for this Court and for the learned United States Attorney, that certainly there is a great deal to think about in what I have said. I am not just talking idly. If it comes to a point where we might attempt to become facetious, and we cannot do
911 that—but how could a jury isolate and separate these things? I couldn't do it without the attendance of my secretary down here. And a jury that makes no notes at all, to go through days of trial where these various admissions or confessions are coming in, and to say: You may consider that goes to X but not Y, it almost gets into a problem in algebra. But let us pass it for a moment.

We come now to the subject matter of the corpus delecti of a conspiracy. I don't know too much about the corpus delecti subject. I assume that it means the offense itself, the essence of the offense. You have got to show that there was a conspiracy. As I understand it, there must be a showing that there is a conspiracy before this would be admissible, before
912 these statements would be admissible against anyone.

The Court: It is my recollection, certainly, that a conspiracy cannot be proven by an admission of one party after the termination of the conspiracy.

Mr. Keenan: Your Honor stated it precisely.

Mr. Ansell: If Mr. Keenan would pardon me for a moment, your Honor, and I don't want to trespass upon what the United States Attorney may reply, or Mr. Keenan——

Mr. Keenan: I would be very glad to yield.

Mr. Ansell: Oh, no, no. Just a moment. I do not think I actually understood the statement made by the District Attorney when he was proposing these admissions of his. Would it be inappropriate or improper for me now to ask the United States Attorney whether or not he is proceeding in this way on the theory that he has actually proved the conspiracy, corpus delecti? I wanted to know if that was the District Attorney's theory at this time.

Mr. Keenan: Might I state that I understand, if your Honor please, and General Ansell, if the proposition of law is correct, as I believe it is, as stated 914
by his Honor, that a conspiracy cannot be proven by any statement made by one of the alleged conspirators.

The Court: By way of admission after the termination of the conspiracy.

Mr. Keenan: After the termination of the conspiracy. Now, on that I would like to address myself. I think if that is true, your Honor, and I believe that is a sound statement of law——

Mr. Ansell: I hate to butt in, if I could use the language of the street. I really wanted to know, and I don't want to be informed of it if it is not appropriate, your Honor, I wanted to know what the theory is at this instant of the United States Attorney, in order that we may address ourselves probably more 915
intelligently to that, as to whether he has actually proved the conspiracy at this point.

Mr. Keenan: And if so, what it is.

The Court: I don't want an argument at great length. I think that will come up more appropriately later about the conspiracy and what the essence of it is.

Mr. Keenan: Might I make a suggestion at this time?

The Court: Yes.

Mr. Keenan: How can we intelligently argue this point as to whether or not this is admissible if it—let us assume for the purpose of argument—it would be inadmissible if it came after the date of the conspiracy, these admissions?

The Court: The United States Attorney has stated that he does not consider these statements as statements made in furtherance of the conspiracy. Therefore they are inadmissible as evidence of the conspiracy or evidence to be considered as evidence against the other conspirators.

917 Mr. Keenan: Then I am asking, does he concede the statements were made after the termination of the conspiracy?

The Court: I am not going to require him to answer that. I think the question of when the conspiracy terminated is for the jury. Whether or not a conspiracy, that is, a prima facie conspiracy, has now been proven, is very material to me.

Mr. Keenan: Your Honor, how can we find out if a conspiracy has terminated unless we find out what the claim really is at the time of trial? We are halfway through the prosecution's case, or a quarter of the way through, I take it, and I don't know yet what the charge is as to conspiracy. It is alleged in the indictment, I am aware, that it is a violation——

918 The Court: It continued until July 2nd, 1945.

Mr. Keenan: All right. Then I say to your Honor that there is no evidence in this case to support that allegation in the indictment whatsoever. They may have some evidence, and if they have, I say we ought to postpone the consideration of the admissibility of those admissions or confessions until they have at least completed that part of their case. Because, your

Honor, there is no difficulty in their doing it, and they are purposely refraining from doing it.

The Court: Here is the situation as I see it. The Government tenders these statements as statements admissible against the party making them, inadmissible as to the others. The question of whether or not the evidence has proven in a prima facie way a conspiracy is material for me to know. I think I have got to determine it.

Mr. Keenan: Before we come to that point——

The Court: I have some ideas about it. The question I was about to address to you was, would you concede that there is evidence, prima facie evidence, 920
of conspiracy, and I realize that I should not ask that.

Mr. Keenan: My answer to that would be more than a pro forma denial. But before we get into that, your Honor, if I understood your Honor's statement, it is that a statement of a conspirator or alleged conspirator made after the termination of a conspiracy is not admissible to prove the conspiracy.

The Court: Is not sufficient to prove a conspiracy.

Mr. Keenan: Oh.

The Court: Certainly that.

Mr. Keenan: Not sufficient to prove it——

The Court: In other words, proof of the conspiracy could not be based and founded on it.

Mr. McGohey: On that alone.

The Court: What you quoted me may be the law; 921
I am not saying it is.

Mr. Keenan: I misunderstood your Honor.

The Court: Maybe I put it that way.

Mr. Keenan: I did not hear the words too well. But I would think that your Honor's latter remark would be towards the competency rather than the admissibility. You say it is not sufficient to prove it.

I don't think it is competent to prove it at all if it is made after the——

The Court: I am inclined to go that far, but I am not making any special——

Mr. Keenan: But then, your Honor, if that is true, I don't see why in this courtroom the United States Attorney would not be willing and anxious to say, "Yes, here is what we contend, the conspiracy started at this date and ended at this date," because if there is a continuation the United States Attorney is still standing on the proposition in his indictment, that there was a conspiracy that continued right up to
923 the 12th day of July, 1945, long after Radovich was in custody, some seven or eight months after he was in custody, and long after the investigation had started, and after the releases had been given in Time Magazine from the publicity department of the United States Attorney's Office of the Southern District of New York, that after——

The Court: I don't think it follows necessarily that the arrest of the defendant terminates a conspiracy. It is certainly a deterring factor, but I don't think it follows.

Mr. Keenan: Well, your Honor, living in a real world, and still getting away from Alice in Wonderland, we would have to have a good reason to believe that the parties ended the conspiracy when it had been
924 bruited around in Time Magazine, which is published all over the world. The so-called confessions were quoted, and they say, after the confessions——

The Court: That is a very deterrent factor, but I think it is for the jury to say——

Mr. Keenan: That is the only——

Mr. Robb: Your Honor——

The Court: We are getting off into some very interesting questions but we are getting off the track. Go ahead with your argument and I will hear you, sir.

Mr. Keenan: It is claimed in this case in accordance with the language of the indictment that these—no, I want to ask the question whether or not the Government claims that these statements that were made by Samuel Bayer, now offered, were made in the furtherance of the conspiracy?

The Court: He already said he did not.

Mr. Keenan: Made in the furtherance of the conspiracy.

The Court: He already stated that he did not so contend.

Mr. Keenan: The United States Attorney has answered that he is not offering this as a part of proof 926
that these statements were made in the furtherance of the conspiracy, and therefore we address ourselves to the question of whether or not the confession or the admission of one of the co-conspirators, alleged made in the absence of others, is admissible at all. I would like, your Honor—I am caught a little bit by surprise because I hadn't thought this would come up until next week, from the conference we had before, and I was in the process of getting some authorities together in the minimum time I have, with digesting evidence and the like, and I haven't the citations in the form that I would like to hand them to your Honor.

The Court: I don't think the citations would do me much good. You put your finger on my problem 927
and that is whether in the discretion of the Court the admission should be admitted as against one man, as against possible prejudice to the other. That calls for an exercise of discretion.

Mr. Keenan: I think I have said all I care to on that point. I say it is perfectly apparent, I say it with the greatest respect—we had a good deal about the practicability of the judicial process which is on

trial in every trial that ever takes place in any court-room, that to ask any member of this jury or all of them to accept evidence that your Honor would release what would be of a horrible prejudicial nature if it were taken into consideration at all, if it were admissible against other defendants. I don't see that your Honor has any real vital problem in deciding that one fact, to wit, is it practical to submit this statement to the jury and ask the jury to consider it only against Samuel Bayer and not against Elias Bayer, or Radovich, as the case may be? And the converse, is it possible, dealing in realities and actualities—and I am
929 happy to say that there is at least much of a concert of understanding among everybody, all professional men engaged in this trial, that we have all had actual experience in life to deal with realities and to face them as they are; we are here to give people a trial and we are here to obey and enforce these laws no matter how difficult they are to be enforced; but, your Honor, among the laws that we enforce are those laws of evidence and laws that are protective of our whole judicial process of giving a fair trial in a court-room

Now, it may not be fair, your Honor, to the Government to keep out admissions of this nature—perhaps they should be admissible against all the defendants on some theory or other—but the cold fact is that it
930 is definitely and well settled anywhere, there is no controversy on this point, that an admission of a co-conspirator after the conspiracy is ended isn't offered as part of the conspiracy itself, and isn't admissible against the other co-defendants. That is as clear as the driven snow.

Then I say to your Honor, it is just as clear that it becomes nothing more than a farce as a practical matter to say to a jury in a case of this nature: you

may consider this statement as binding upon Samuel Bayer but not his brother, when the law makes no distinction between them being strangers and brothers, or strangers and blood, and then to ask the jury, if Major Radovich's statement comes before them, in which he makes damaging statements that he would get money—we will assume that for the moment—and have some reference to some conference and the accumulation of the proof from the releases that are given out by the Government; to think that a jury could hear Radovich's statement read to them, and say: "You consider that now as against Radovich but you must not consider it against Samuel Bayer or Elias 932
Bayer." Your Honor, that is a farce. Far better to be frank and say: "We are going to toss that rule of evidence out the window because it is not fair to the Government; I am not going to be hypercritical and charge this jury and tell them to do something that I couldn't do or the nine Justices of the Supreme Court couldn't do if the problem were put up to them and I think they would be candid enough to admit it."

So I say to your Honor I don't think we have to go any further. There are some very keen questions of law, if I can use the expression, that we get into afterwards, but on the question of the discretion of this Court to permit any of this evidence, and I fortunately for the purpose of arguing have a nominal defendant, Elias Bayer, I can put it up to this Court; but the 933
same thing applies to other co-defendants.

The Court: Why do you refer to Elias Bayer as a nominal defendant?

Mr. Keenan: Because I honestly believe him to be that. I don't think there is any evidence in this case to show that he was a participant in any kind of conspiracy to defraud anybody or anything at any time.

That is my honest judgment. But, I say, I do represent Elias Bayer, and certainly the evidence is very thin against him. That I don't think is a vital assumption for the time being, but whatever it is, I don't need to argue that to your Honor. I can say to your Honor that if there is overwhelming evidence against Elias Bayer, then let them rest upon that evidence and let them not introduce before this jury statements of other co-defendants that are of such nature that, under the circumstances, this Court or any court in the land I think would be bound in good conscience and in the exercise of mental functions to say: "I
935 realize it would be nothing short of farcical to ask these jurors to set aside in their considerations these statements against these other defendants."

I can't overemphasize that, your Honor, and I don't want to be offensive, but I feel very strongly about it and I perhaps am too emphatic in the feeling and expression of my own views. I don't mean to be offensive, but I think it is very clear and perhaps I had just better drop it, by saying that is too clear for further argument on my part, that that is not practical and that it would be no more than striking a severe body blow, a body blow to the administration of justice in the country to say: We will keep a straight face—say to that jury, you will consider this statement made by Samuel Bayer only against him; now, Major Radovich will say that he got $5,000 from so-and-so, and
936 you will not consider that statement excepting as against Major Radovich. Your Honor, it would take twelve secretaries and you would have to put these jurors through a course of legal training and through so many activities that to trained minds sometimes are not able to employ to the full fruition in performing that function. And these jurors come from various walks of life.

The Court: You will concede that judges when they try cases without jurors frequently have to exclude from their consideration inadmissible testimony and decide the case on what is admissible.

Mr. Keenan: Your Honor, I would rather give you my answer to that at some other time when we are not in a courtroom, about how officially they do it. All I know is that judges are supposed to be omniscient, but I have had something to do with making them at one time or another, and I know they are human beings, and I have great respect for them, particularly all those in this country, and I still think they are human beings and I don't think they have reached 938 any stage of performing mental miracles either.

I don't think a judge could do it, your Honor. All that is aside the question. I know a jury couldn't. I feel on very strong ground in saying that to ask any jury to do that would be asking the impossible, even not in the age of atom bombs.

I say plainly, and I say it with great respect, that if they have a case and can prove conspiracy—when we talk about prima facie proof, here we get then, on another subject matter—but I think that if the Court is to make a finding the Court must make a finding on the points suggested, the same as a jury has to make a finding, and that must be by evidence so clear and convincing that it leaves no doubt in his mind as to any essential element of the conspiracy. 939

Now, I am going to say that on any other type of crime than conspiracy—of course, if this was a substantive charge, and there were substantive charges here against these men and they were nolled, and I haven't seen anything that we have got that was consideration from the Government yet; they were nolled because the Government thought it was to their best interest to nolle them; if there was a substantive

charge of bribery, yes, I haven't any doubt that the statement of Sam Bayer would be admissible. And, your Honor, it is not doing any harm to this Government because we all know in this courtroom the real charge is that Samuel Bayer bribed Radovich with the assistance of Elias Bayer, and perhaps some other matters. Time and again we have to say, piously, this is not the offense of bribery being charged or conspiracy to bribe, but, your Honor, it is liable to leak out in spots here and there.

And, regardless of the technicalities of the law that require your Honor to make that ruling, I think under
941 the language of the indictment, nevertheless, when we are talking about something that is in your Honor's mind, when he is using discretion as a judge, when your Honor might say to me, "Well, Mr. Keenan, you don't expect me, representing the United States Government on this bench, if there is a heinous crime committed, that I am going to let it go unpunished," and I say that your Honor would have no other alternative than that—we might have a closer question than we have, and perhaps then we would have to weaken some of these fundamental bulwarks that I spoke of, of liberty, that I really believe in, no matter which side of the table I happen to be on. But I say no such dilemma faces us at all. If the Government wants to get Sam Bayer for bribery, why doesn't it
942 go out and get him? It has indicted him already and it has dismissed that indictment. Why? There is no harm being done. But I think your Honor should say, with great respect, and a court should say under this situation: "Well, I am here to exercise my discretion and I am not going to charge this jury to do something that I know a jury can't do." Because I feel it would be an abuse of discretion to ask any jury to see Major Radovich in this courtroom and

have him talked about and described, a recital of his heroic deeds that occurred, and then have a confession come from him about something that Sam Bayer gave him, and then say to the jury: You can consider that against Radovich, too, just as though he never walked into the courtroom, as though you never heard that statement at all. That is the way the mind of this jury must be under the theory of our law.

And it is very important whenever that is broken down then something of real importance happens, and I say to your Honor it is for such reason, with all of the firmness that I can use, and all the sincerity at my command, that I regard my function in this case today 944
as of equal importance with all the years I spent, accumulated, in the Department of Justice, because justice is on trial in every case we have, and if there was any other way of getting it, that would be different. And your Honor knows from his own long experience of law before he graced the bench the old saying: "Hard cases make bad law." But here hard cases make very bad abuses of discretion at times. I know your Honor will give this his most earnest consideration and put aside any feelings that mortals have and have to have—we are all human at all times —but here in this case I say as a proposition you cannot let in the testimony of a witness as a concession or an admission of Walter Radovich before this jury and tell the jury not to consider that in determining 945
the guilt or innocence of Samuel Bayer in the same trial without making a mockery and a farce of the judicial process.

Mr. Robb: We join in all that has been said by Mr. Keenan. We think that this case is a very good example of the evils of the practice which has been condemned several times by the Supreme Court and by the conferences of the Senior Circuit Judges of joining

together in a conspiracy catch-all indictment defendants who could have been indicted separately for some substantive offense.

In this particular case we think it would be no more possible to separate in the minds of the jury these statements than it would be to put a drop of ink in a glass of milk and keep it on one side or the other.

Now, of course, I am aware of the general rule that where you have two or more joint defendants, the mere fact that evidence against one may mention some other one, does not give the other man any right to object to it and keep it out just because it happens
947 to him. And so ordinarily where you have two or more joint defendants, if you have some statement by one it goes in against him. But, if the Court please, we submit that there must be some discretion of the Court. Here in this case we have a most glaring example of the irreparable prejudice which would come to these other defendants from the statement made by Samuel Bayer that could not be cured by an instruction. So much for that.

We also urge upon your Honor most earnestly this point. Before any statement or confession can come in, there must have been established by the Government at least some prima facie showing of the crime charged. They must lay the foundation. And we can't do it, of course, by means of the confession. That
948 would be pulling yourself up by the bootstraps.

Mr. Keenan: I would like to address myself for a moment to the question which your Honor has in mind.

The Court: I would be glad to hear from you because I came to the view that a conspiracy has been proved.

Mr. Robb: I would like to address myself to that.

The Court: I would like to hear that.

Mr. Robb: What have they shown? They have shown that these boys, Bayer and Usdan—I call them "these boys" for short—were stationed out at Mitchel Field and they were moved several times; they were moved into the organization at one time commanded by Major Radovich. The evidence has shown that they were moved in there by Colonel Jacobson, not by Major Radovich. Colonel Boebel testified to that, so we can lay that aside. It is shown that they were moved out of there up here to Windsor Locks, Connecticut. And they were moved down to North Carolina and then they were moved up to Wilmington. And Miss Goertz testified that she was asked to do that by 950
Major Radovich.

It has also been shown, if the Court please, that the Bayers knew Major Radovich, were friendly with him, that he was at their house on parties; in other words, that they have shown some association between Major Radovich and the Bayers. Now, they have also shown an association between the Bayers and the other officers. They have shown some gifts. They have shown they were friendly. But, if the Court please, where have they shown anything that was corrupt? The essence of this conspiracy is the corruption, and where is there any evidence in the evidence to date of corruption?

The Court: How can you justify the transfer of these boys from the alerting unit to the Goldsboro 951
unit, and immediately transferred?

Mr. Robb: Miss Goertz testified that there were other people transferred out in the same way and transferred in there; and Colonel Boebel testified that he ordered Major Radovich in effect to move them out. And, furthermore, the evidence is, if the Court please, that if the boys had wanted to go out, all they had to do was to say so. There wasn't any bribe necessary; there wasn't any corruption necessary.

The Court: I will not debate the thing with you. I will listen to you.

Mr. Robb: So we submit, if the Court please, that certainly taking it at its utmost and its best, it would take a very strong and I think vivid imagination to conjure out of the evidence so far produced anything which could be said to be any substantial evidence of corruption, anything that could be said to establish any conspiracy.

Supposing at this point, if the Court please, the Government rested without putting in anything more? Certainly I don't think you would have to think more
953 as to whether or not they made out a case; they have shown association, yes, but they have also shown association between the Bayers and many other officers; they have shown other transfers with which our client did not have a thing in the world to do with, if the Court please. And I understand it is not even contended that those transfers were corrupt.

The Court: That is not to be held against these boys, of course.

Mr. Robb: No. Miss Goertz testified that the boys were transferred as more or less of a routine matter; other boys were transferred in the same way. And where, if the Court please, has there been any evidence of corruption, certainly on the part of this defendant Radovich, or on the part of the defendant Elias Bayer?
954 He, if the Court please, has hardly been mentioned.

Like Mr. Keenan I haven't had the opportunity to check on the cases in this matter. One case, however, which I think might perhaps throw some light on the matter for your Honor is the case of Forte v. United States in 94 Fed. (2d) 276, 137 A. L. R. 1120, which discusses in some detail the quantum proof required to support a confession. I do not know that it goes

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to the particular point we are now considering, namely, the quantum of proof which must be introduced before you hear any confession.

We submit, if the Court please, most earnestly that the foundation heretofore laid by the Government for the admission of this statement is certainly insubstantial, vague and nebulous and should not be enough to support the statement. On those two grounds, if the Court please, we object to this particular statement.

The Court: Have you any other evidence you could proceed with at this time?

Mr. McGohey: Not at this time, your Honor. I am prepared to go on now with these——

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The Court: Pardon?

Mr. McGohey: My preparation called for putting the admissions in at this time.

Now, I should like to say only one word, your Honor, with respect to this matter of discretion. It has been testified to here by the witness that these statements were made—talking now about the statements by the Bayers—these statements were made by Samuel Bayer and by Elias Bayer in the company of their counsel; they were made on the same day, one right after the other.

The Court: But not one in the presence of the other?

Mr. McGohey: No.

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Mr. Keenan: And isolated at the demand—at the direction of the United States Attorney they were not permitted to be there at the same time.

The Court: It doesn't make any difference who demanded it.

Mr. McGohey: I wonder if I could have the time to make my argument without interruption.

Mr. Keenan: I am very sorry. I profusely apologize.

Mr. McGohey: They were made on the same day, with Mr. Keenan and Mr. Levy there throughout each of the examinations, and as the written record will show no attempt whatever to prevent Mr. Keenan or Mr. Levy from making any statement on the record at all, and the written record shows that.

They were brought in at the request of the defendant, presumably, at least the request came to me from his attorney.

Now, this business of putting in the admissions of one man and instructing the jury that the admissions are to be considered by the jury only against the man
959 who made them, there is nothing new in that, your Honor. This is not the first conspiracy case that has ever been tried and certainly it is not the first case where it has ever been done.

The Court: I know. I have done it a hundred times.

Mr. McGohey: It is not a long case. It is not a case with fifty or sixty defendants. Why, your Honor, I argued an appeal here last year of a case that took seven and a half months to try in this courtroom; there were seventy-five defendants named in the indictment, thirteen of them went to trial, eleven of them were convicted and five appealed, and one of the strongest arguments made in that case—that is the case of United States v. Ames, right in this circuit—was that all of these admissions and all of these admissions
960 by the various co-conspirators—it was an enormous mail fraud case; I had nothing to do with the trial of it—prejudiced everybody. And our Circuit Court went into that very particularly. And the whole basis of the affirmance goes to the question to what extent any of the individual defendants on trial, or the appellants, were prejudiced by them, and the Circuit Court held this, in substance: That when men go into a conspiracy they run the risk of that very thing.

One of the things claimed about in that case was that seventy-five people were dragged in in a great big dragnet, and I argued, and the Court sustained us, that when you go into a conspiracy that is the chance you take.

We didn't take these men in or dragoon them into making any statement. They were walked in here by their counsel. And I don't think it is beyond the ability of your Honor, and I know it isn't—and I have looked over that jury and I think they are reasonably intelligent people, and I think that is all they have to be to have it explained to them: That what Sam Bayer says he did does not prove that Radovich did something and does not prove that Elias did it, and, by the same token, if Radovich says he took money from Bayer that does not prove that Bayer gave it to him. 962

But the jury will have before them—and what is more reasonable, your Honor, than the jury have the very highest of testimony, the testimony of the defendants themselves, each saying what he did in that case? This statement is complete by the Bayers. They make some denials, they admit they did this and they say they didn't do that. They were given the fullest opportunity to each state his position. And they were represented by the same counsel.

Now, Mr. Keenan said we ought to be realistic. I think we should, your Honor. And, in connection with being realistic, I suggest this: Is it realistic to assume that before the two persons represented by the same attorney come down to talk to a prosecutor about their actions, that they haven't had conferences? Why, of course, they had. Mr. Keenan or any other lawyer worth his certificate would certainly never bring clients in without having canvassed the whole story with them. That was his duty to them. And I am sure 963

that Mr. Keenan performed that duty fully and completely and well.

Now, there is something realistic to consider. These men were not being taken in a vacuum, one man in New Jersey and the other man in the State of Washington. They were right here.

Now, as far as the defendant Radovich is concerned the testimony will show here, I am prepared to prove, that this man gave his statement willingly when he gave it the first time, and that between the first time he gave his statement and the second time that he gave his statement—as a matter of fact, within a day
965 or two after he made the first statement—he called the agent on the telephone——

Mr. Robb: I hate to interrupt, but I thought that this concerned only the statement of Sam Bayer.

Mr. McGohey: You have argued the question of Radovich.

Mr. Robb: No.

Mr. Ansell: We have not.

Mr. Robb: Oh, no, I haven't even got to that.

Mr. McGohey: Well, in connection with that, your Honor, we will be prepared to take that up later, if that is so. I will confine myself to the Bayers, your Honor. The statement is here. The stenographer that took the statement——

The Court: The same question arises as to all three.

966 Mr. Robb: Yes. I have some little different questions as to our client Radovich when we come to it.

The Court: I would like to hear you fully on all of them and not piecemeal.

Suppose you suspend——

Mr. McGohey: Yes, I would be glad to.

The Court: —and let me hear you.

Mr. Robb: Frankly I am not prepared to argue that yet because we haven't got the evidence as to the

circumstances on which the statement was made. I had assumed when we got to that point we would practically have a hearing on that particular statement.

Mr. McGohey: Well, could we——

Mr. Ansell: Pardon me. Go ahead, Mr. Robb, I am sorry to interrupt you, Mr. McGohey.

Mr. McGohey: That is quite all right.

Mr. Ansell: I am sorry to interrupt both of you gentlemen and sorry to impose upon your Honor also. I do not like arguments ad hominem, but the truth of the matter is, your Honor, that this statement which we have never seen or heard of so far as I know—— 968

The Court: Which one are you referring to?

Mr. Ansell: The statement that Mr. McGohey is about to introduce now, the statement of one of the Bayers, Sam Bayer. Mr. McGohey, I thought rather skittishly, and I am not using the term in any criticism of him, called it an admission.

Now, there are admissions as such and there are confessions also, and their admission is governed by an entirely different rule. I said I did not like argument ad hominem and I don't, but we came down here this morning, your Honor, not anticipating this. We have a statement made here apparently taken down in shorthand, transcribed, and I think Mr. McGohey said it was signed, but, whether or not it is in writing we have never seen it, haven't the slightest idea what it is about; and the practical argument, if I could make it without offending anybody, is I think that we are entitled to see that. I think this hearing is precipitate. I wish it might be deferred. I wish that we all might be prepared on it. 969

Mr. Keenan: General Ansell, would you permit me to interrupt for a moment?

Would it be possible to ask the United States Attorney to proceed with some other part of his cause so that we could have—we know as a matter of fact we are going to adjourn——

The Court: I made the same inquiry. He said he has not anything else ready to proceed with.

Mr. McGohey: I respectfully submit that the question of how I am going to put my case in is a matter for my judgment. I don't believe defense counsel has any right to ask that.

Mr. Ansell: I did not intend to.

Mr. McGohey: I am not talking about you gentlemen.

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Mr. Keenan: I only intended it as a practical matter, so that we could get some authority.

The Court: Yes. I would like to give it some thought and examine the statement, and I am going to take time to do it.

Mr. McGohey: I submit that you certainly should on a question of this kind. I do not quarrel with that, your Honor, but I do not think I am fairly to be criticized because I was prepared to do something and a legal argument comes up.

The Court: Oh, no.

Mr. Ansell: You have been very fair.

Mr. Robb: If the Court please, might I say one thing more about your Honor's suggestion that we

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argue now the statements of the defendant Radovich. They were made at different times and different places and under I think quite different circumstances than those of this particular statement. Therefore we would like at the proper time to examine the agent on this statement and perhaps put on some testimony there.

The Court: I would think the same principles apply unless you contended that there was duress applied.

Mr. Robb: Of course, that might well develop.

The Court: That presents a different question. If the same principles which we discussed here this morning——

Mr. Robb: That is true, but there also are other considerations, so that at this time I regret that I am not prepared to argue that, because I am not ready.

The Court: You may go ahead. I will defer the determination of the Radovich statement and you go ahead, Mr. McGohey, and finish, if you haven't already finished, the statement which you now present.

Mr. McGohey: You mean my argument?

The Court: Yes.

Mr. McGohey: I think, your Honor, that with respect to the statement about the Bayers I don't have anything further to say. 974

The Court: Will you let me have the statement?

Mr. McGohey: Yes, indeed.

I might say this to your Honor. I understood Mr. Keenan's argument, one part of his argument, to be a criticism of putting these what we call admissions in by the oral testimony of the agent and said that parts might be put in and parts might be left out. The Government is perfectly willing to offer that full transcript of the statement of each, of Samuel Bayer or Elias Bayer.

The Court: I recall very definitely where the precise point went to our Supreme Court in Virginia within the last year about whether the commonwealth, it was then, being in possession of a written statement, could proceed by the oral testimony of the sheriff rather than putting in the written statement. And the Court held that it was entirely proper for the Government to proceed, the Commonwealth to proceed, as you now propose to proceed, that is, to put the testimony in by the testimony of a person who heard the admissions made without putting—— 975

Mr. McGohey: I am quite satisfied, your Honor, that that is perfectly sound.

The Court: And from the looks of it I think your course is the same practical one.

I will take a recess now while I examine the papers.

(Recess.)

(The jury returned into the courtroom.)

The Court: Ladies and gentlemen of the jury, a situation has developed which makes it impossible to proceed further today with the taking of evidence, so I am going to adjourn you now until next week. It has also been agreed by counsel for all parties and
977 the Court that when we adjourn today we will adjourn until Tuesday morning. We will not have a session in this trial on Monday. So we will now adjourn until Tuesday morning at 10.30.

And for your information I would like to say, further, that if we have not then concluded the case we will not sit on next Friday which is Columbus Day. We will adjourn for the holiday.

So, so far as we can see now, we will continue the trial of this case Tuesday, Wednesday and Thursday, and, of course, it is hoped by all parties that we may complete the case by then, but if we haven't we will then adjourn it over until Monday; we will not have a session on Friday. I say that to you now so that you may make your plans accordingly.

978 Now, let me repeat to you briefly the admonition I gave you when we started. This is somewhat of a considerable interval between now and Tuesday, and be very careful during that time not only not to discuss the case amongst yourselves, but more particularly do not discuss it with anyone else nor permit anyone to discuss it in the slightest detail with you.

All right. The Court will adjourn now until Tuesday morning.

(Adjourned to October 9, 1945, at 10:30 A. M.)

New York, October 9, 1945, 10:30 A. M.

TRIAL RESUMED.

(The following proceedings were had without the presence of the jury:)

The Court: Gentlemen, the question which the Court has before it is the action which should be taken upon the defendants' objection to the introduction of evidence of a statement or statements made by Samuel Bayer, one of the defendants. I heard you gentlemen fairly fully on Friday. If you have anything which was not presented on Friday, I will be glad to hear you.

980 Mr. Keenan: Your Honor, I would like to call the Court's attention to a few authorities that were not referred to, particularly the case of Forte v. United States, that was decided in the Circuit Court of Appeals for the District of Columbia and which made a rather exhaustive analysis of the entire matter of admissions and confessions and the philosophy behind the law—why they would constitute, if they do, exceptions to the hearsay rule.

In the Forte case it is clearly set forth that there is a necessity of establishing the corpus delicti independently of the confessions.

The Court: I am thoroughly in accord with that.

Mr. Keenan: And the quantum of proof required is set forth, too, as being substantial evidence which is of tremendous importance in analyzing the admissibility of these 981 confessions. Of course, that is what they are, if they are anything.

Now, in turn, the same distinguished jurist, Stevens, speaking for the Court on both occasions, in the Gypsum case, has set forth a definition of substantial evidence which, while that deals with civil litigation, nevertheless treats the tests to be applied to the quantums in criminal as well as civil; and, of course, it would require no argument to

convince the Court that the civil requirements would be at least—that the criminal requirement would be at least as substantial or more so than civil.

Now, therefore, your Honor, I am not going to burden this Court with many citations—they are set forth in these two cases—but they establish very clearly two things, first, as your Honor says: I think the law is well recognized, independent of the confession, that there must be independent proof, not, your Honor, of the commission of the offense as I understand it, to be candid with the Court, for it would be to our advantage to say that of the entire conspiracy, but only, it is my belief as a lawyer and an officer
983 of this Court, of the corpus delicti, that there must be proof of the corpus delicti. And I say to your Honor, from the careful analysis that we have made in this case, that there is no proof arising to the standard of the quantum required clearly by the law of substantial evidence of the corpus delicti in this case.

Now to come to that conclusion, your Honor, and may I say with great respect to the Court that I don't think under the law, I do not think under the law that it is the privilege even of the Court to lump both matters together and leave it to the jury in the manner and fashion that is sometimes permitted on other occasions, but I think it is an issue of fact to be determined by this Court.

The Court: I don't understand you. Lump what together?

984 Mr. Keenan: Lump it together by saying, "I don't know whether there is or there isn't, the jury will find whether there is substantial evidence." I think that this Court has the duty of making that finding.

Now we come to that, too, your Honor, I have the right to suggest at this time our entire theory of the defense against admission of this type of evidence as it is presented, and I assume when the Federal Bureau of Investigation agent is on the stand I have the right to assume that they

are going to attempt to prove it by parol evidence from him. I think, your Honor, if we are to be heard, we ought to be heard at this time on it.

I think in any event before we come to the question of admissibility, and I am talking now about admissibility of these confessions—I am interested in the Bayer one for the moment—that we have to come to the philosophy of what these confessions are and why they are supposed to be received, and it is very clear and it is this: that, what possible better evidence could there be on the proof of any fact concerning a crime than that coming from the lips of the man who was supposed to be the perpetrator of it? The theory being, if the man is in his right mind at the time he made the statement and knew what he was doing, it is the best evidence possible. And we are in a court of justice to determine not by fantastic rules but by real solid rules, what is and what is not good evidence, and that certainly is excellent evidence, as appears. Why? Of course we come dangerously close to the violation and the question of whether we are moving in on the encroachment of the amendments to the Constitution that provide a man shall not give testimony against himself, but leaving that aside——

The Court: Shall not be required to give.

Mr. Keenan: Shall not be required, yes, your Honor. But we come to something far deeper and that is that this is hearsay, and like every other piece of evidence that comes within the category of hearsay, it must be purified from the contamination of hearsay or they won't let it in. That is the whole philosophy of the admissibility of this evidence. First of all, you get the general rule; all hearsay is out. That is an unquestionable rule of evidence. But there are exceptions. We will not burden the Court to attempt to manifest our own erudition by naming them, if we could, but one of them is confession. In my preliminary argument I said I don't care whether it is called

admission against interest or confession. But why? Because when a man knows that he is giving a statement that is against his own interest and he is a sane man, why in the name of common sense would he ever tell it if it wasn't true, period. All right. Then it becomes of paramount importance to find out the background of what happened, or how he happened to make the statement.

I am going to tell your Honor, and there is no jury here now, as I recall what the facts were in the case. These men were under arrest. They came to me and they told me their story and I listened to it. I might state to your Honor that this is the first criminal trial that I have participated in since I left the Department of Justice in
989 1939, and I listened to it with great care because I sensed a very important matter at the first instance. And after hearing all their story I became convinced that if it was true, it came within the category of those offenses that I dedicated some few years of my life to try to prevent, to wit, extortion in the United States of America. And that is what I believed it to be under their testimony.

So I said to them, I am going to the United States Attorney, and if this is extortion and if the initiative for this money business came from Radovich, I don't believe a crime has been committed and I don't believe the United States Attorney will want to prosecute it; but when you were confronted by the representatives of the Intelligence group of the Army you denied it, denied everything, and
990 the United States Attorney never has had an opportunity to pass upon your side of the picture. Now I am going to bring you down, I am going to ask the United States Attorney if he will listen.

And I went down myself. I have no memorandum taken of it. And I talked to Mr. McGohey, I talked to Mr. Wallace, and I put it up to them. And they said, well, there was a divergence of views between Mr. McGohey and Mr. Wallace. Mr. Wallace said, I don't think it makes any dif-

ference where the initiative comes from in this case, I think it is a crime anyway. And Mr. McGohey said, if I recall, and I want to take no advantage of this situation, Mr. McGohey said, I would be inclined to agree with you, Mr. Keenan, that if this was not as we have understood it, but if—I told him the story in substance as I recalled it—if it is a matter of extortion and if the suggestion came from Radovich rather than these people corrupting him, and making suggestions they would give him this money if he would do thus and so, I would be inclined to believe that there should not be a prosecution, in substance.

Now I came back and told that to my clients. And under that understanding, because I haven't reached the age of abject idiocy to bring my clients in to have them tell a story which would put them in the penitentiary if true—and I want to draw a distinction between two things which are easily confused or might be: one is that the mere fact that I was going down to tell this story to Mr. McGohey or the United States Attorney meant immunity; certainly not, nothing of that kind. But there was a very distinct understanding, and the only reason I brought them down, and the only sane reason I could bring them to Mr. McGohey would be that if their story was true they had not committed an offense against the United States of America. That was my advice to them, that was my belief then, and for whatever it amounts to it is my belief today.

Now, under those circumstances, they came down and they made their statement. No coercion, none whatsoever, no promises other than an understanding that I had with Mr. McGohey—and I think that he would not say no to it—that if the story was borne out that they were the victims of extortion and chicanery rather than they initiated the bribery, there should not be a prosecution against them in this case.

Now, your Honor, I think I have known Mr. McGohey long enough, and I am telling everything as though I were

under oath, and would take an oath to it on the witness stand if the occasion called for it; that is my distinct understanding of what the facts were with reference to these men coming down and making these statements.

Under the circumstances, from the sheer standpoint of fairness, your Honor, to take a part of that statement and disjoin it from the continued story in the eyes of the jury and get some man who was not in the room, to my own knowledge, at the beginning and at the end, or at the beginning all the way through of this statement, and let him give, under those circumstances, what he recalls to be language precise, and might change the difference of an
995 expression, even, and then leave out the rest of it, I can't believe that anyone is serious in making that suggested proffer of evidence, a suggestion of fair people. I have always been able, your Honor, to take care of myself in a court room—I have that much conceit and I am not asking odds of anyone—but I do say that plain fairness would require, under those circumstances, that the entire story go in, if any of it went in, to prevent distortion. But beyond that I say that the law clearly requires that the background be examined before your Honor permit any testimony to come from a witness in the case when we are forewarned and forearmed of what the facts and circumstances were leading up to this.

Now, the authorities—and I confess, your Honor, when I was in the Department of Justice and had the honor to
996 head the criminal division, I never was very much interested in inducements. We never gave anybody anything by way of putting another man in jail by telling on him. We did not believe in that type of prosecution. During the time I was there, 1933 to 1936, as head of this division, we had none of that.

I have looked at the law since and it is very clear, following the Wilson case, that if a confession occurs by rea-

son of inducement then the law clearly says that it is inadmissible as an admission or a confession.

And the Supreme Court goes far enough to say there is no yardstick or no quantum of inducement, any inducement——

The Court: Do you contend that there was an inducement?

Mr. Keenan: I am stating what the facts are, your Honor. And I say the law draws the conclusion therefrom that there was that inducement. Yes, your Honor. As a matter of law applied to the facts I think we cannot escape that conclusion. And, of course, I will want to bring out these facts on a voir dire before any testimony with reference to a confession is permitted. 998

Now I would want to make it very clear if I were asked under oath whether or not the precise point between Mr. McGohey and myself and Mr. Wallace was ever brought up, as to whether or not this evidence would be used in case we were not able to convince Mr. McGohey of the truth of the statement, I would not be able to answer it; I perhaps should be. But I would state that I am not able to answer that question. They may be on the other side. I have no recollection of it. I might state that I was optimistic, that I believed that I was representing people, and I think the evidence in this case as we go farther will bear me out on that, with some more information I have here that is very comforting since, that we were the victims of the cupidity of someone else. To come back to the precise point I am stating to your Honor, that these are the facts that I believe will be brought out as I recall them. I had a colleague, Mr. Levy, with me—I have never discussed this feature with him that I am talking of this morning now, and I don't know what his recollection would be—I believe I know what it would be—but I say, applying the facts of the giving of this testimony to the law as it exists, it does draw it within the orbit of non-admissible testimony. That is my answer to your Honor's question. 999

It is one of those things that happens in life in dealing with costs that come along, and I am giving my own best recollection of it, but my mind is rather clear on it, what I am stating, and I am stating to your Honor that in any event, I think that that is a proper matter for inquiry before any of this testimony with reference to Bayer's admissions made or confessions so-called—and I am using that always with parenthesis around the word "confession" because I don't believe it is a confession; the whole purport of my argument is that when you take the background under which Mr. Bayer went down and gave his story, it does not constitute an admission against interest at all. The theory is that a man will not make a statement that is
1001 against his own interest unless it is true. In this case we didn't consider it [redacted] against interest, and not because of any consideration, because I make it clear that we were asking for no mercy or consideration whatsoever—let the chips fall where they may; that is very, very clear. And, your Honor, it is not like the situation, nor will the United States Attorney contend it for a moment on this, I am sure, he will never contend that I brought my people down to him and said, "Here, there has been a violation of the law, but when you hear that there has been a violation of the law under the circumstances you won't want to prosecute it." That was not my position and it won't be so contended.

My statement was that under the facts you have never had a chance to hear them, and when you hear the whole
1002 story—that is what I said to him, the whole story—you won't, in my opinion, find that a crime was committed, and I don't believe that, therefore, you will want to proceed with any indictment, because this was after arrest but before indictment.

Now I don't care to argue that any more. As an officer of this Court I just want to bring those facts to the Court's attention. I suggest that they ought to be developed on the

voir dire before the Court passes on the subject of the admission.

The Court: How can that be done?

Mr. Keenan: It can be done by a voir dire examination right now.

The Court: Of whom?

Mr. Keenan: Of any witnesses that the Government wished to put on, any witnesses we wish to put on.

The Court: As I understood it, you were relying here upon facts within the knowledge of the United States Attorney. The witness who has been called would not know what the circumstances——

Mr. Keenan: I certainly don't intend to have him come into a room, conveniently or otherwise, and I am sure that he would not, in ignorance of those facts, and I am sure it wasn't. I am sure he met Mr. McGohey—I know something about the F.B.I., and they don't stumble into a room: "What is this man, Keenan or Jones or Smith, doing here?" I don't intend to have him give this statement if I can to the jury and then cross-examine him afterwards, after they have heard the whole story about how it comes in. I would say the orderly procedure would be, let him go forward with Mr. Flynn on the witness stand and I will ask the right to interrupt him and cross-examine, to suggest a voir dire examination on this subject matter that I am raising. 1004

The Court: If your questions go only to the admissibility, why wouldn't it be proper to let you examine him along that line now in the absence of the jury. 1005

Mr. Keenan: I think that is the proper thing.

The Court: Call him. Come up. You have been sworn.

GERALD J. FLYNN resumed the stand.

*Preliminary cross-examination by Mr. Keenan.*

Q. Mr. Flynn, I think the record will show we have asked permission to ask you some questions in cross-examination at this time. How long have you been with the F.B.I., did you state? A. Since November 10, 1941.

Q. 1941? A. Right.

Q. What is your age? A. I am thirty-four.

Q. Thirty-four. What was your business before you came with the F.B.I., or your business or profession? A. I was a lawyer. I worked with an insurance company. I
1007 was a reporter. And that takes in about all of it.

Q. What law school did you attend? A. New York Law School.

Q. Did you graduate? A. Yes.

Q. Were you admitted to the bar? A. Yes, sir.

Q. When were you admitted to the bar? A. 1938.

Q. Have you done some practicing in New York City here? A. Some.

Mr. Robb: I can't hear Mr. Flynn back here.

The Witness: Some.

Q. Are you married, Mr. Flynn? A. Yes, sir.

Q. When were you married?

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The Court: I don't see how——

Mr. McGohey: I object, your Honor. I don't see the relevancy of this question.

Mr. Keenan: All right. I will find out otherwise, if I want to; anyway.

Q. Now, when did you start to work on the Bayer case? A. September of 1944.

Q. And did you work pretty continuously on it after that? A. Yes, sir, with some interruptions.

Q. You had an associate, Mr. Brown? A. Yes, sir.

Q. And he worked, too, on it? A. Yes, sir.

Q. Is Mr. Brown a lawyer? A. No, he is an accountant.

Q. He is an accountant. Now, you were present in the office, one of the offices of the United States Attorney when Samuel Bayer was there? A. Yes, sir.

Q. When was that? A. That was in the early part of February of this year, I think February 7th or thereabouts.

Q. Did you make some notes on it? A. No, I did not make any notes.

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Mr. Ansell: I didn't hear the answer.

The Witness: No, I did not make any.

Mr. McGohey: Will you please try to keep your voice up so that General Ansell and the defendant over on the right there can hear you?

Q. How did you happen to meet Mr. Bayer there? Can you tell us how you happened to go down there? A. I was told by Mr. Wallace that you were bringing both of the Bayers into his office in order to have them tell their part of the story.

Q. Do you know what time of day it was? A. Yes, sir.

Q. What time of day was it? A. It was approximately 10 o'clock.

Q. And were you in the office when Bayer came in, or 1011
did you come in after Bayer was in the office? A. I came into the office after Samuel Bayer was in the office; I was in the office before Elias Bayer came into the office.

Q. Mr. Samuel Bayer was talking and giving answers to Mr. Wallace's questions when you came in, wasn't he? A. I don't think he was talking at the time I came in. I believe that he had already begun, though.

Q. He had been interrogated? A. Yes, I believe I came in just after the inquiry started.

Q. Do you know when the inquiry started? A. I presume—I was told that it started just a few minutes before I came in.

Q. Who told you that? A. I believe Mr. Wallace said, "We just started" as I came into the room.

Q. Was there a stenographer taking the record? A. Yes, sir.

Q. You don't know the facts and circumstances yourself of how Mr. Bayer happened to come there, do you, of your own knowledge? A. No, sir.

Q. Except from what someone told you? A. That is right.

1013 Q. Were you present when Major Radovich's statement was taken? A. I took the statement from Major Radovich.

Q. Did he give a statement that was signed? A. Yes, sir.

Q. You have that statement? A. Yes, sir.

Q. Were you present at the court-martial when the witnesses were called there?

The Court: Aren't you getting away from the question on the Bayer statement now?

Mr. Keenan: I just want to ask him if he was there at that time, your Honor. I don't know, perhaps that was given afterwards. I will withdraw that question.

Mr. McGohey: I don't think any of this line of questioning about Major Radovich is relevant to what
1014 Mr. Keenan was trying to prove here.

Mr. Keenan: All right.

Q. So that of your own knowledge you don't know how Mr. Bayer happened to be there? A. I don't know what arrangements were made before Mr. Bayer came into the office of my own knowledge.

Q. Do you know or were you told by Mr. Wallace that some arrangements were made that I was to be there with him? A. Yes, sir.

Q. Did you talk to Mr. McGohey about it? A. No, I did not talk to Mr. McGohey.

Q. So that what the arrangements were or what understanding was reached, if any, you wouldn't know of your own knowledge? A. Of my own knowledge, no.

Mr. Keenan: I think, your Honor, this witness can't give us any light upon the pertinent subject matter.

The Court: The way I see to get into the record the matter which I understand you have in your mind is a statement from Mr. McGohey. As I understand, you are relying or making a contention as to the understanding you and Mr. McGohey had.

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Mr. Keenan: And your Honor's idea is that the only way that could be proved would be testimony from Mr. McGohey?

Mr. McGohey: I did not understand your Honor to say that.

The Court: I did not say so.

Mr. Keenan: I wondered. I thought you meant that.

The Court: I did not say so, no, sir.

Mr. Keenan: Do you think that it would have to be from Mr. McGohey and Mr. Wallace and Mr. Levy and myself?

The Court: Well, there is no evidence in the record.

Mr. Keenan: No, but, your Honor——.

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The Court: All I have is your statement. Now, if Mr. McGohey wants to state his side of that, I don't see any other way to get it except from him.

Mr. Keenan: I would like to have him, if he would.

The Court: Do you wish to make any statement?

Mr. McGohey: Yes, your Honor, I will.

The Court: All right, I will hear you.

Mr. McGohey: Will you excuse me just a second?

The Court: You don't wish to ask this witness any questions?

Mr. Keenan: No more at this time, unless there is something further comes up after the statement.

Mr. McGohey: Your Honor, as I understand, what has been suggested now is that I make a statement giving my contention with respect to the matters that Mr. Keenan has covered in his statement and his argument to the Court this morning.

The Court: It is a little narrower than that. There is a very unusual situation being presented to me. But, as I understand it, Mr. Keenan stated certain background leading up to the Samuel Bayer and Elias Bayer statements.

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Mr. McGohey: Yes, sir.

The Court: And makes the contention to the Court that it should be inferred from his statement of the background that these statements were not voluntary in that they were induced. Now will you confine yourself to that?

Mr. Keenan: Your Honor, I would like to correct that, that it is not a contention. We do not say that the statement was not voluntary; we say it was not only voluntary but anxiously given, but that there was an inducement to so give.

The Court: Isn't the statement which is given pursuant to an inducement not a voluntary statement?

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Mr. Keenan: Counsel at the trial table agree with your Honor. I don't happen to believe that. I don't want to raise the point any more than saying I think the law and the philosophy clearly use the expressions "coercion" and "inducement,"-but I want to be sure that there is nothing of the first part in it, that it was inducement, that it was given under the inducement theory.

The Court: There is a little difference there between legal terminology and ordinary understandable English.

Mr. Keenan: All right, whatever it may be——

The Court: Of course, from a layman's standpoint a statement which is given pursuant to an inducement is not only voluntary, it is more than voluntary, but it is not voluntary, not freely given, which the law requires as I think it is generally comprehended in the word "voluntary" as used in the law.

Mr. Keenan: With that understanding of the term, I will not have anything further to say about it.

Mr. Ansell: If your Honor please, and with permission of Government counsel and Mr. Keenan, as your Honor must perceive, we are on the outside of this inquiry, but nevertheless— 1022

The Court: You are on the outside in a sense, and in a sense you are not at all on the outside.

Mr. Ansell: Exactly, sir.

The Court: You are interested.

Mr. Ansell: We can be hooked, if you will pardon the term, by this admission of this so-called confession, or whatever it was. Now, my own view is, and without reflecting upon counsel—of course not—a record ought to be made of what is going on here; if there were inducements, if there was anything that militated against a freedom of mind upon the part of this man Bayer, I don't think we are making a record with respect to that by counsel's argument to the Court. I think that that issue ought to be tried out by your Honor, and I say it with all respect to the gentleman. Voir dire is mentioned. It seems to me that we ought to have testimony under oath here with respect to the question whether or not this man Bayer, when he made the statement, did have freedom of mind or not. That is the meaning of "voluntary." 1023

This talk that we are engaging in here, it seems to me, does not make the record of which I could avail myself probably hereafter. Will your Honor pardon me for trespassing thus far?

The Court: That is all right. All right. Have you anything to say in pursuance to that suggestion?

Mr. Keenan: It is a somewhat unsual situation, your Honor, but I do think that under the facts and the circumstances of this case I have no objection to facing the issue exactly as it is and taking an oath on the witness stand and giving my testimony, and subjecting myself to examination from the learned
1025 District Attorney and assistants, and General Ansell and the Court. I am making a statement, and I am an officer of the court, but I am willing to put myself under oath and subject myself to any examination or any questions. Of course, your Honor would ask any questions anyway.

The Court: It is not for me to suggest how you conduct your case.

Mr. Keenan: No, that is right. I want to say that I am not through conducting my case yet. I thought it might be the wise thing to see what Mr. McGohey's understanding is. We might not have to take any testimony in the case. So I would rather we go along the way we were.

The Court: All right, sir.
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Mr. Keenan: And then see what happens.

The Court: Then let me hear from you, Mr. McGohey, along the line I suggested.

Mr. McGohey: Now, your Honor, these defendants Bayer were arrested some time in September, I think it was, 1944.

Mr. Keenan: You are wrong about that, Mr. McGohey. It was about November.

Mr. McGohey: November. I will accept the correction. In any event, your Honor, they were arrested on a complaint charging them with the crime of conspiracy——

The Court: Were they admitted to bail?

Mr. McGohey: Yes.

The Court: Promptly?

Mr. McGohey: Yes. Bail was made the day of arraignment. At that time they were represented by the man who is, as far as I know, still the attorney of record, Mr. Conrad Cohen. And then some time in December Mr. Keenan called me and stated that he was retained, as I understood it, as counsel in the case, 1028 and asked if he might come to see me.

He came to my office, and Mr. Wallace was there. I think Mr. Wallace was there on every occasion that we ever had any conference about this case, except possibly once or twice, maybe once or twice.

Mr. Keenan: I think the District Attorney made it a point to call Mr. Wallace before we started discussing it. That is my recollection.

Mr. McGohey: I think that is so, because Mr. Wallace was the man who conducted the original investigation.

Mr. Keenan: That is right.

Mr. McGohey: In any event, it is a fact, as Mr. Keenan states, that in December he said he had discussed this matter with his clients, that he believed 1029 that they were the victims of extortion, and he asked if he might bring them down and have them state their story fully and subject to any examination which the District Attorney wished to make. And if my recollection is fully clear—I had no note on it either—I have a recollection that Mr. Keenan said he would even be willing to let his clients be examined without him being present, but of course he would prefer to

be present, and I said to him that if the examination was held it would be in his presence. And we talked about it for some considerable time, I would think probably an hour, that afternoon.

Now, it is undoubtedly true that throughout that discussion Mr. Keenan argued and stressed to me that it was his belief that his clients were the victims of a vicious extortion by Major Radovich, and he said that he was fully convinced that if I could hear their story, told in their own way, and free from any of the nervous tension that might accompany a man in more formal surroundings, that I would be convinced that they had been the victims of extortion.

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But there was never, as I recall it, any statement made that the men had not committed any crime. My recollection is very clear on this, your Honor, and I am relying entirely on my recollection that what Mr. Keenan said was this: these men are now charged with conspiracy, and it is possible, as a matter of law, that the payment of money to an officer under the circumstances which happened in this case might support the charge of conspiracy, but you ought to, as a fair District Attorney, you ought to take into consideration all of the facts and circumstances surrounding it; that it is our claim, meaning the defendants' claim, that they had been extorted under very vicious conditions, namely, that the boys were being

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forced into an outfit immediately to be sent overseas and that under that threat the money was extorted.

Now, I said to Mr. Keenan substantially this, that I didn't believe from what I knew of the facts in this case which had been developed by the investigation up to that time, I did not believe that the evidence sustained the contention that there had been an extortion. I said that to Mr. Keenan then. I have said that continuously. I said, however, "If your clients wish

to come in and you can be with them and any associates you want can be with them, and submit to our questioning, I have no objection to it." I would do that in any case, your Honor. I will give any defendant that wants to come in under those circumstances and tell his story a chance to do so.

I never urged Mr. Keenan to bring them in. I never made the slightest kind of promise as to what would happen or what would not happen. All I agreed with Mr. Keenan was to listen to them. Now, as a matter of fact, at the time we discussed this I said to Mr. Keenan, "I don't know whether I personally will be free at the time they come in to hear their story, 1034
but I shall try when the arrangement is made, when the date is made, to arrange my affairs so that I will be free."

Now, it happened that Mr. Wallace was going into a trial that took five or six weeks, so that it wasn't until February that he was free of his engagement, sufficiently free, to fix the date for this hearing or this conference; and on the day that they were to come in he informed me of it, and I was tied up at the time and didn't get in until some time part way through—I don't recall now whether it was halfway through or a quarter of the way through, but the minutes would show when I came into the conference.

But I can't conceive of any statement, your Honor, that was made more voluntarily than these were. I 1035
never talked to the Bayers from the day I saw them at their arraignment until the day I saw them in Mr. Wallace's room some time in February, whatever date that statement was made. There was no inducement of any kind, there was no urging of any kind. And when the statements were taken, and the transcript can also show that, it was explained to each of these men clearly that they were making the statement

voluntarily, they were making it after consulting with their attorney, that their attorney was present in the room, and he was throughout the whole questioning of both defendants, and that they understood that anything that they there stated, any statement there made, could be used against them. The transcript of their questioning clearly shows that.

Now, I do not for the life of me, your Honor, see how anybody seriously can argue that those facts lay a basis for which anybody could infer an inducement, which I understand to be Mr. Keenan's argument, because he is not claiming that I made any formal
1037 offer or offered any inducement; he says that those facts are such that they would support an inference of inducement.

I understood that that was your point, Mr. Keenan. But certainly, your Honor, there was at no time anything connected with this hearing or this questioning or these statements or admissions which came as a result of any action on the part of the United States Attorney. I was merely acquiescing in the request of counsel throughout.

Mr. Keenan: May I ask Mr. McGohey before he sits down, because I know he is a very fair man, if he will not advert to that very point of the subject matter I brought up, about a divergence of views between himself and Mr. Wallace, as to whether or not
1038 the facts, as I have stated, would constitute an offense in any event? Because I am very sure that I did not imagine that; that was brought right from the start. And, furthermore, I have attempted to make my position clear, and when Mr. McGohey said he doesn't see how anybody under the sun could make any such contention, let him turn around in his chair and let him take a good look at me, because I am making it, that under the law there was clearly what is tantamount

to such an inducement, and I don't want—I beg to have the absence of a play upon words, on "voluntary" —let it be established clearly, these men were not coerced into coming, they came because I suggested it. Consequently I was there before the questions were asked, during all the time the questions were asked and afterwards, and I do say there was more than an implication—there was to me—what amounted to a direct statement, that if it was extortion, and if their story was true, that there would not be a prosecution. That was my understanding.

Mr. McGohey: Well, your Honor, I must ask leave at this time to interrupt Mr. Keenan——

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The Court: One at a time.

Mr. Keenan: I hoped, too, that that would not be a violent assumption, that it would take place in the office of any United States Attorney throughout this country, that if people were victims and subjected to extortion, under this law they would not be prosecuted. I would not think that I was doing anything more than paying a compliment to the District Attorney instead of riling him up by that statement.

The Court: Have you anything further?

Mr. McGohey: I have the very definite statement to make, your Honor, that the discussion, as far as my recollection is concerned, never got to that point. I agreed with Mr. Keenan that Mr. Keenan could bring in his client and let them have a full hearing. It is true that Mr. Keenan pointed out to me that in his belief it was his firm belief that these men had been the victims of extortion. And it is true that Mr. Keenan argued to me that in the performance of the duty of my high office, and in the fullest observance of my oath, that if he was able to convince me, or, rather, if his clients were able to convince me that they had been the victims of extortion, that he believed

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I as an officer of the Court should not prosecute them. That undoubtedly was argued. But I insist, your Honor, that I never made any commitment. I hope I am a good enough lawyer that I won't make a commitment until I know what I am making a commitment about.

Mr. Keenan: Your Honor——

Mr. McGohey: May I be allowed to finish, sir.

Mr. Keenan: All right.

Mr. McGohey: I definitely made no such commitment, your Honor. And as far as the divergence of views between Mr. Wallace and me, for whatever weight that might have, I am not aware that at any 1043 time there was any divergence of views between Mr. Wallace and me. There was at no time that I recollect that Mr. Wallace suggested that we ought not to allow these defendants to come in and make such statement that they wanted to make in the presence of their attorney as to what prosecution was going to follow. I never made a commitment.

Mr. Keenan: I would like to have this go on the record because I want to state frankly that whatever ruling is made I want to preserve my rights so that there will be a proper appeal, so I think I would have to ask permission to take the witness stand and reiterate my statement so that it would be a matter of testimony rather than a statement.

1044 The Court: No. I have th idea. Let it be ordered that the Court treats the statement by Mr. Keenan and Mr. McGohey as sworn testimony, and it is ordered that it be incorporated in the record of this case.

Mr. Keenan: Thank you, your Honor.

The Court: Now, have you finished with what you have to say?

Mr. Keenan: I just want to add this one thing, the statement—it is hoped that I still remain in the

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category of acceptable lawyers—that, just as Mr. McGohey said, he never would give his statement of what he would do until he heard the evidence. I didn't ask for any commitment from him as to what he would do. I tried to make that plain. There is a distinction, your Honor, between a man making a commitment of what he is going to do as to prosecuting or not and his making a statement as to his belief as to whether or not he should prosecute a case if it is extortion instead of bribery. And the divergence of views between Mr. McGohey and Mr. Wallace was not as to whether or not these people should be permitted to come in and give their statement. Anyone 1046
who knew Mr. Wallace long enough would know that he never would object to anybody making a voluntary statement against himself at any time. But the divergence of views, and I challenge his statement to the contrary, and I am not making up that statement in this courtroom, there was a divergence of views upon the legal effect of this testimony if it was as I had sketched it out. Let that be denied.

The Court: All right, gentlemen. I rule that there was no inducement offered such as to render the statement inadmissible. All right. Now, do you gentlemen wish to be heard?

Mr. Keenan: May I have an exception to your Honor's ruling?

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The Court: Yes. On the matter of the admissibility of this statement further than you were on Friday?

Mr. Ansell: Not for the reason that constitutes the basis of your Honor's ruling. I think there are other grounds.

The Court: Precisely. That does not finally solve my problem. That is just one phase. As to the general question of its admissibility, of the admissibility

of the statement, if you wish to be heard, I will hear you.

Mr. Ansell: Yes. I have forgotten, your Honor, how far my side, if I can call it such, had proceeded with your Honor on Friday.

The Court: Well, I will state what is in my mind generally. I think I must take the statement which is about to be referred to and about which evidence is offered, as having been made either after the termination of the alleged conspiracy or not pursuant thereto. Possibly both. Therefore, the general rule is that the statement would be inadmissible as against
1049 other defendants, that is, defendants other than the person making the statement. Also, the general rule that any confession or statement against or admission against interest is admissible as to the person making it. Now we are that far.

Mr. Ansell: Yes, your Honor.

The Court: Where does that leave me in the particular situation here presented?

Mr. Ansell: That accords with my thought as to what occurred. Now, your Honor, may I be heard, if you please, upon the ground against the admissibility of this statement, upon the ground that there has been no conspiracy proved so far in this case?

The Court: All right.

Mr. Ansell: And then I want to go further, and I
1050 hope I might be brief, but it is difficult for a lawyer at a critical stage of the case to be very brief, that there has been no evidence of an overt act here.

Over the week-end, if your Honor please, we have endeavored as best we could to summarize the testimony already taken in this case in order that we ourselves might be honestly advised, and that we might with equal honesty present the questions that we are going to present to your Honor.

I say with considerable assurance—your Honor, of course, will remember that I am an advocate in this—that there was no substantial evidence of any group agreement. The evidence shows that Radovich was seen only twice. The first time was when Mr. Elias Bayer took him to get a uniform with some other officer. I remember Colonel Vidal and another was there. Your Honor I am sure will remember. The second time was when Major Radovich and other officers attended a birthday party of Elias Bayer. The Government witnesses consisting of at least some if not, most of the officers who were present upon the two occasions where Radovich was present, testified that 1052
there was nothing wrong, they saw nothing wrong, they heard nothing wrong.

I was impressed with a remark, if it registered correctly with me, made by your Honor—a question whether there might not be found in the matter of the transfer of these men into the Commando group, and then, after a few days out of the Commando group, as to whether there might not be found some evidence of a group agreement or understanding. I may not be relating your Honor's statement correctly.

The Court: I made such a query, sir, and it is still very pertinent in my mind.

Mr. Ansell: I thought it was. I wanted to say, your Honor, that the evidence was that this Commando group to which these men were transferred was a 1053
suicide group. I myself never knew of but one before, but they had a lot of them in this war. A suicide group which men joined through volunteering or giving their consent, and in such a group they could go back, withdraw from the group whenever they pleased, probably before the group left this country. About that I don't know. It was testified to by Miss Goertz that people were transferred into this group. I got

the idea, daily; and frequently, maybe just as frequently, people were transferred out of this group. It was her testimony that there was no evidence of anything wrong that she knew anything about. Then why were they transferred out so soon?

Colonel Boebel was on the witness stand—he was the adjutant of this Commando group, an officer who impressed me as of rare intelligence and soldierly qualities; Colonel Boebel testified that when he saw these men down there at Goldsboro he recognized them as men of whom he had not formed a good impression as to their soldierly qualities when he knew them up here at Mitchel Field. And he asked Radovich, as I remember, what these two men were doing there, and Radovich said, as I remember his testimony, that he had transferred them at the request of Colonel Jacobson. Whereupon Colonel Boebel said in effect: I don't want them here.

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Now a statement like that in the Army—I think that many of us have served in the Army, your Honor, Mr. McGohey, and I even longer—the statement of the commanding officer, the adjutant in charge, to the effect that "I want a thing done" is tantamount to an order that it be done. I think it is true that Colonel Boebel ordered Radovich to transfer those men out and that he did so. I am quite aware, of course, that throughout human life there are things which we may regard as suspicion, but when you begin to talk evidence you are in an entirely different field, and suspicion does not enter the requirements. They were transferred in and, under the circumstances related, they were transferred out. I think it would be going far afield, I think it would be wrong, I think it would lead to the conviction of the innocent, for us to spell out of the plain testimony so far adduced that there was the slightest evidence of corruption.

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I come down to the evidence of overt acts. There are, I think, eight charged here. The overt act in a Federal indictment of this kind is of the utmost importance; it is a statutory requirement. Of these eight overt acts, your Honor, I can't discover from the summary and study of the evidence made any attempt to prove any but the first, fifth and sixth—first, fifth and sixth.

In the first one—your Honor doubtless has the indictment before you—it had to do with a conversation in April, 1943, that Eli Bayer—I suppose that is Mr. Elias Bayer—had with Harold Busch. Harold Busch's testimony, and indeed all the testimony I find upon 1058
the substance of that overt act I have in my summary here, Harold Busch testified that he was a partner in the Buss Company, a brother-in-law of Bayer; I know Vidal, Jacobson, Roeser, Engelhardt and Radovich. They were introduced at my shop by Elias Bayer. Elias brought in Radovich and told me to make him a uniform. I think he brought others in at that time. He brought four or five or more. Elias said that Radovich would pay for the uniform. I made uniforms for Radovich and other officers. Plymouth Dress paid for them. In July or August, 1944, Sam Bayer asked me how I had entered the payment on my books and I told him that the books showed the uniforms were paid for by Plymouth. He asked me to change the books to show that the uniforms were paid for by the 1059
men themselves, and I made the changes. Sam was with me when I made the changes. I am friendly with Sam Bayer. My business is a small business.

"The first time I was brought to the District Attorney's office by the F.B.I., I was held for ten and a half hours. No questions raised when Elias said Radovich would pay for the uniform. Summer uniform $35, Winter uniform $45. Our business was not large, and when I didn't receive money from Radovich I got

in touch with Plymouth and asked them to pay because I needed the money. I asked them to pay because they brought the officers in. But Radovich brought back his uniform. A bill for the uniform was in each package. The price was wholesale. This price was given to people who are recommended. Now, Radovich, being an odd size, we had to peddle out his uniform in pieces. I expected the officers to pay for these uniforms. Engelhardt did not take his uniform."

So far as I am able to state now, that is all the evidence with respect to overt act one.

I will direct your Honor's attention to overt acts 5 and 6, since they may be taken together, at least so far 1061 as the evidence touches upon them. Your Honor will observe that it is said that Bayer, Sam Bayer, had a telephone conversation with one Joseph Busch and about August, 1943, the same month, defendant Sam Bayer entered a taxicab outside the Hotel Governor Clinton, in New York. Joseph Busch testified, according to my summary, as follows:

Uniform manufacturer, I. Buss Company. Brother-in-law of Sam Bayer. Major Morris Saffron is a customer. In 1943 Major Saffron, Sam Bayer and I had lunch in a restaurant near 39 Whitehall Street, where Major Saffron was stationed. Saffron asked how Sam's boys were and how my son was, and that was all there was to that. In August, 1943, I met 1062 Sam Bayer and Major Saffron at the Governor Clinton Hotel. Previously Sam had called me and said the boys were being transferred and asked if I would call Major Saffron and see if he would do something for me or find out what happened over there. I made an appointment with Major Saffron for that evening at the Governor Clinton.

I met Sam and Major Saffron at the Governor Clinton, and Fabbricatore was with Major Saffron.

Bayer waited outside. Saffron, Fabbricatore and I went up to the balcony where Saffron and Fabbricatore talked about five minutes out of my presence. Then Fabbricatore and Saffron left the hotel and in a few minutes Saffron came back, and he and I walked outside and met Bayer. The three of us took a cab at Bayer's suggestion, drove around about 15 minutes. Bayer asked Saffron, "If there is anything that could be done for him about the boys," and Saffron said, "Nothing". Saffron said there was a rumor around the field that Bayer had spent a lot of money. Then we separated at the Pennsylvania Station, and that was that.

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I presume no two human beings ever exactly agree; that is impossible, because it cannot be reduced to mathematical terms and measures. I feel it my duty to say that this record from my point of view contains no evidence of any overt act. The other five overt acts charged in this bill are not even touched upon.

I wanted to invite your Honor's attention upon the question of proof of conspiracy and the relationship of the admissibility of confessions with reference to it to the case of Tingle v. United States, 38 Fed. (2d) 573. Of course, it constitutes authority, but it seems to me to constitute reasonable, persuasive and positive authority upon this point. My attention is struck at this moment by the fact that there was nothing in the confessions which indicated conspiracy and nothing in the independent testimony other than that of persons at the warehouse of the employer. Of course, this was one of those whiskey cases, whiskey in a warehouse, and the owner of the warehouse was undergoing indictment. Knowledge without some evidence of participation is not enough. It must be remembered that appellants introduced no witnesses. The evidence was unconflicting and was that of the Government alone,

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and in such case when the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value.

With respect as to how far, if this admission should be admitted, Radoyich would be bound or prejudicially affected by it, I wish to make the further arguiment: When did this conspiracy assume existence? When did it end? Of course, as a mere matter of garnishment it is said that it ended with the filing of the indictment. That is meaningless. When did it end in fact? It seems to me that this conspiracy, if it existed, ended when it was proved to be either a success or
1067 failure. It ended, in military language, also the language of logic, when the objective of that conspiracy was attained or failed of attainment. The object of this conspiracy as charged was to effect the transfer of these boys. That with other elements is the gist of this conspiracy.

I am quite unable to see how it can be said that after these boys were transferred, as proved by the Government here, and finally found as a result of those transfers a safe haven, that being the object of the conspiracy, the conspiracy then and there ended.

In the Logan case, your Honor, a case that I had to study for a particular reason assiduously in law school days, Justice Gray was talking about that very subject. It is an interesting case, a long opinion, went
1068 into all sorts of constitutional law; and coming down to the very question involved in this case he said—I had it here, I haven't got it now—near the end of the case he said that conspiracy must have ended when this development of riot and murder and all took place which was charged to be the object of the conspiracy, and declarations made thereafter by any defendant having reference to a passed fact or admission or transaction cannot be said to have been made in fur-

therance of the conspiracy. That is, the admission made after the conspiracy could not relate back.

I suppose I have taken up a lot of time, your Honor. It is of great interest to me and of critical importance to my clients.

The Court: Gentlemen, I have heard the arguments of counsel with great interest. On the first proposition asserted by the distinguished counsel who has just resumed his seat, I find myself unable to agree. It is not for me finally to determine whether or not a conspiracy has been proven or not, but, as Mr. Keenan suggested, it is incumbent upon me now to determine, as the Court, whether or not the evidence is sufficient 1070
to prove a conspiracy, and as to that question I have no doubt. I do not feel any hesitancy about coming to that conclusion at all.

Now as to the question of the admissibility of the statement which is tendered, I am going to admit, I think that under the circumstances which I have previously related it does not constitute admissible testimony as against others alleged to be conspirators other than the person making the statement, and I am going to so limit it in my statement to the jury. But as to the person making the statement I am going to admit it.

Mr. Keenan: Your Honor, may I ask if the Court in determining that point passed upon the issue of fact of what occurred in the conversations between the 1071
District Attorney and myself, or whether the Court took, as I understood it, that—conceding that what I said was true, it would not constitute what your Honor thought in the law raised the presumption or created an inducement in the law?

The Court: I found no serious conflict betwixt you and the United States Attorney. There are some dif-

ferences, possibly, in the inferences which each of you drew from a conversation which it is agreed took place. I find upon neither your statement or the United States Attorney's statement is there anything which would render this testimony inadmissible.

Mr. Keenan: Even though such statements be considered as being under oath?

The Court: That is true.

Mr. Keenan: Thank you, your Honor.

The Court: And you gentlemen, of course, may except if you desire.

Now I want to take a short recess, gentlemen. Are you ready to go ahead in ten minutes?

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Mr. Keenan: May I ask your Honor whether you have used the expression that you are going to admit the statement? Does that mean that you are going to permit this witness to give a recitation of some parts of it as he recalls, or the statement in its entirety?

The Court: I am going to permit the witness to testify to statements made in his presence. If counsel at the conclusion of his testimony, any counsel, don't think he has testified as to all the statement which is admissible and material, I will permit you to interrogate him and bring that out. If you are still not satisfied, I will consider any further requests you have to make.

Mr. Robb: May I have an exception to your Honor's ruling and on the statement, if your Honor please?

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The Court: Yes, sir.

Mr. Keenan: And we want an exception, too, your Honor.

The Court: Yes, exceptions may be noted.

Mr. McGohey: If your Honor please, with respect to the statement, the Government is prepared to put in the full statement, either as transcribed by the stenographer——

The Court: I would not permit the Government to put in the full statement for the reason that the statements which I have read are prolix and contain a substantial amount of matter which is immaterial and irrelevant. If at the conclusion of this witness' testimony defendants, or any of them, wish to introduce the full text of the statement, I will consider that when we get to it.

Mr. Keenan: Could we have the record show, your Honor, what statements your Honor examined, that you referred to?

The Court: I have examined statements made by Samuel Bayer, Elias Bayer and the defendant Radovich. 1076 If you wish the dates, the District Attorney can give them to you.

Will you be ready to proceed in ten minutes?

Mr. McGohey: Yes, I think so.

Mr. Robb: If the Court please, we have not seen those statements to which your Honor referred as those which you had examined. May we have copies of those?

The Court: I don't think it necessary to require the Government to produce the statements. You are not taken by surprise. Your associate counsel, Mr. Keenan, was present throughout the taking of his clients' statements; you were present at the court-martial trial of your client, and I don't understand that there is anything to take any of you by surprise. 1077

Mr. Robb: It occurs to me that if the Court examined them counsel should also have them.

The Court: It does not so occur to me. I examined them for the purpose of determining whether or not I should admit evidence with relation to them. There are many instances when the Court may properly——

Mr. Robb: I bow to your Honor's ruling. May I have an exception to your Honor's ruling?

Mr. Keenan: May I have an exception to your Honor's reference, with great respect, both to your Honor and to the distinguished General Ansell and his colleague, that we are associate counsel. We are not associate counsel.

The Court: The Court used that word inadvertently and retracts it. I understand——

Mr. Keenan: Nor have I any knowledge of what was contained in the Radovich statement, nor have I ever seen it, nor have I been tendered a copy of the
1079 statement that was made back some time in January or February of this year. And I was present only at a part of the court-martial and was respectfully requested to leave during other parts of the proceeding, through no fault of my own.

The Court: I assumed that.

Mr. Keenan: And I am caught by surprise in that I do not claim, and I say this seriously, your Honor, that I have any unusual memory and I do not purport to remember everything that is in the statement accurately, and since I assume that your Honor is referring to a stenographic statement that was purported to have been taken down by competent reporters and transcribed, and it was of considerable length, I take
1080 exception to your Honor's failing to require us to get a copy and, with the greatest respect to this Court, to this Court examining those without counsel—without myself having the right to inspect them or knowing what is in them, or testing their accurateness with even my own memory. And I take exception to your Honor taking any consideration in passing upon any phase of this case instruments so delivered to your Honor.

The Court: Very well.

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Mr. Ansell: If your Honor please, and with the utmost respect for your Honor, and this is not a formality, I doubt that his Honor should have read this statement of Bayer, I doubt that your Honor should have read the statement of Radovich, and while for the moment I don't remember the scope of our exception, may we have an exception to that?

The Court: Certainly, sir.

I do want to repeat that the use of the word "associate" was entirely inadvertent. I definitely understand that you, Mr. Keenan, represent the defendants Bayer, and you gentlemen, General Ansell and Mr. Robb——

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Mr. Keenan: And I would like to have the record show that it is recognized that there is a distinct divergence of interest, as your Honor will understand, between counsel.

The Court: Yes. My use of the word "associate" was inadvertent and had reference to your physical contact and social contact.

Mr. Keenan: Since the jury is not here, we withdraw any claim that there is any error in that.

The Court: The Court will take a ten-minute recess.

(Short recess.)

(The jury entered the court room.)

Mr. McGohey: Your Honor, I should like to ask at this time to ask permission to withdraw the witness, please, and ask your Honor's permission to put another witness on the stand who has just come into New York last night. That is Colonel Jacobson. He is suffering from an illness of some kind. I believe his testimony will be quite short.

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The Court: All right, sir, call him.

Mr. McGohey: Colonel Jacobson.

1084 *Alfred H. Jacobson—For Government—Direct.*

Mr. Ansell: Before proceeding with that witness, your Honor, may we approach the bench, counsel for all parties?

The Court: Yes, sir.

(The following proceedings took place at the bench, without the hearing of the jury:)

Mr. Ansell: If your Honor please, we want to move for the withdrawal of a juror and a mistrial in this case grounded upon the fact that your Honor has read the statement of Sam Bayer.

The Court: All three defendants.

Mr. Ansell: Of all three defendants.

1085 The Court: All right, sir. Motion overruled.

Mr. Ansell: Thank you, sir.

Mr. Robb: Exception.

Mr. Keenan: We take an exception on the same ground.

The Court: Very well.

Mr. Keenan: We join in the same motion.

The Court: That is all right.

(The following proceedings took place within the presence of the jury:)

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ALFRED H. JACOBSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

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*Direct examination by Mr. McGohey.*

Q. Colonel Jacobson, where do you live at the present time? A. In Albany, New York.

Q. You are an officer of the United States Army, are you not? A. I am.

Q. What is your present duty status? A. Terminal leave, pending retirement.

Q. How long have you been an officer of the United States Army? A. Since 1932.

Q. Did you enter on active duty at that time? A. In 1933 I entered on active duty.

Q. Have you been on active duty continuously since 1933? A. I came on active duty under the emergency in 1940, September 25, 1940.

Q. In the year 1943 were you assigned to duty at Mitchel Field? A. I beg your pardon, sir, I didn't hear the question.

Q. (Read.) A. Yes, I was.

Q. About when did you come to Mitchel Field, Colonel? A. September 25, 1940.

Q. You remained there until when? A. Until June, 1943. 1088

Q. Do you know the defendant Samuel Bayer? A. I do.

Q. Do you see him in the court room? A. I do.

Q. Is he one of the gentlemen sitting here (indicating)? A. Yes. He is the gentleman on the right.

Q. Do you know the defendant Elias Bayer? A. I do.

Q. Do you see him here? A. Yes, sir. He is the gentleman on the left.

Q. Sitting over here (indicating)? A. Yes, sir.

Q. Do you know the defendant Major Radovich? A. I do.

Q. Do you see him in the courtroom? A. I did when I came in. He is sitting at the table there (indicating).

Q. Over here on the right? A. Yes.

Q. Will you tell us when you first met the defendant Elias Bayer? A. After the first of the year 1943.

Q. Where did you meet him, Colonel? A. The first time 1089
I met him was in the—to the best of my recollection it was in the entrance to the Madison Square Garden, at a fight, I believe.

Q. Would you try to keep your voice up a little louder, Colonel? It is difficult for the last juror and for counsel to hear you. A. I am sorry.

Mr. McGohey: Would the stenographer read that answer, please.

(Answer read.)

Q. Were you introduced to him by anybody, Colonel? A. Yes. By Colonel Vidal and Captain Roeser.

Q. Was it after the fight, did you say? A. I believe so, yes, sir.

Q. Did you spend any time with him that evening after you met him? A. I don't remember whether I did or not.

Q. Do you recall whether you went out any place together? A. I don't think the first night that I met him that I did. I am not certain about that.

1091 Q. Thereafter did you see Elias Bayer from time to time? A. Yes, sir, I did.

Q. Did you attend social affairs with him? A. Yes. I became very friendly with him.

Mr. Ansell: Couldn't he talk a little louder?

Mr. McGohey: General, it would help you if you took a seat up here at my table.

Mr. Ansell: I don't think that answers it very well.

Mr. McGohey: I have asked the witness to please keep his voice up loud enough so that all the gentlemen here at the counsel table can hear him.

The Witness: Yes, I will.

1092 Q. It is very important, Colonel.

Mr. McGohey: Will you read the answer.

(Answer read.)

Q. Did you visit at his home? A. Only on one occasion.

Q. Do you recall who was there besides Elias Bayer? A. I believe his sister or—his niece. His niece.

Q. Anybody else? A. Not at his home, no.

Q. Do you know if he had an apartment in New York? A. Yes, he did.

Q. Did you ever visit him at that apartment? A. Yes, I did.

Q. Did you ever attend social affairs at the apartment? A. Yes, I did.

Q. Can you describe when was the first time you attended a social affair at his apartment? A. Shortly after I met Mr. Bayer.

Q. Can you tell us who was at that affair? Please keep your voice up, Colonel. A. Well, there was Colonel Vidal, Captain Roeser and Mr. Goldstein—and Mr. Goldstein. I don't think anyone else was there at that time.

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Q. Were there any other officers from Mitchel Field other than those you mentioned there? A. No, sir.

Q. Was Samuel Bayer there? A. No, sir.

Q. When was the first time you m t Samuel Bayer? A. At his place of business.

Q. I say when, Colonel? A. When? Several—oh, I think it was six weeks or two months after I met Mr. Elias Bayer.

Q. Some time in the spring——.

Mr. Keenan: I didn't hear the answer.

(Answer read.)

Q. Were you introduced to him by anybody? A. By Mr. Elias Bayer.

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Q. Do you know a uniform company in New York known as the I. Buss Uniform Company? A. Yes, I do.

Q. Did you ever order a uniform from that company? A. I did.

Q. Were you introduced to the I. Buss Uniform Company by anybody? A. By Mr. Bayer, Mr. Elias Bayer.

Q. Which Mr. Bayer? A. Mr. Elias Bayer.

1096 *Alfred H. Jacobson—For Government—Direct.*

Q. Did you ever have any conversation with Samuel Bayer about ordering a uniform from the I. Buss Company? A. No, I didn't.

Q. Did you get a uniform from the I. Buss Company? A. I did.

Q. Did you pay for it? A. No, sir.

Q. Do you know who did pay for it? A. I was told by a Mr. Buss that——

Mr. Keenan: I object.

The Court: Objection sustained.

Mr. Ansell: I didn't get the answer.

The Court: Objection sustained.

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Q. Well, subsequent to receiving your uniform, did you have any conversation with either Elias Bayer or Samuel Bayer about that? Will you please keep your voice up, Colonel.

Mr. Keenan: Your Honor, I don't like to repeat objections, but I think we ought to separate which one he talked to, because I want to save my exception as to the man that was absent.

The Court: He is being asked if he had any conversation with either one.

All right, go ahead.

The Witness: I am sorry, I have to have the question read. I have forgotten what you asked me.

1098

Q. I asked you if after you received your uniform from I. Buss Uniform Company, after that did you have a conversation with either Samuel Bayer or Elias Bayer about the receipt of that uniform? A. Yes, I did.

Q. Well, now, you had a conversation? A. Yes.

Q. With whom of those two men? A. With both of them.

Q. They were both present during the conversation? A. Both present.

Q. Will you tell us what was said? A. Well, I had found that the uniform had been paid for and I thanked them for it.

Q. What, if anything, did either of them say? A. They said——

Mr. Keenan: Just a minute. Did both of them say it at the same time? I would like to know what the conversation is. We are getting a little loose around the courtroom, and I would like to know what——.

Mr. McGohey: I object to that. I think the statement is that they were both present at the conversation.

Mr. Keenan: Yes, but they both couldn't have made the statement at the one time. 1100

Mr. McGohey: I didn't ask that.

The Court: You don't have to comment on that.

What did either or both of them say and, if so, which one? You said you thanked him. What did they say? And specify which one.

The Witness: Well, I don't remember which one said it, but they said, "Well, that's all right, the Busses are indebted to us, they are relatives, and they are indebted to me."

Q. When you were at Mitchel Field in 1943, to what unit were you assigned, Colonel? A. The First Fighter Command.

Q. Were you with the First Fighter Command during 1101
all of 1943? A. No. Yes, during all—yes. I am sorry. During 1943.

Q. All of 1943? A. Yes, I was.

Q. Did you know two enlisted men in the First Fighter Command, one named Private Martin Bayer and the other Private Melvin Usdan? A. I did.

Q. Do you know when they first came into the First Fighter Command? A. I do.

Q. When was that? A. That was during the spring of 1943 they joined the Fighter Command.

Q. Now, at the time that they came into the Fighter Command, who was the commander of the First Fighter Command?

Mr. McGohey: Well, I withdraw the question.

A. General——

Mr. McGohey: I withdraw the question, if your Honor please.

1103 Q. When they came into the First Fighter Command, do you know to what unit of the First Fighter Command they were assigned? A. They were assigned to the Operations Section, Fighter Command. They were, of course, members of the Headquarters and Headquarters Squadron.

Q. Do you know who at that time was the commanding officer of the Headquarters Squadron of the First Fighter Command? A. It was either an officer by the name of Jones, Charles D. Jones, Lieutenant-Colonel Charles D. Jones or Major Radovich. I don't remember which.

Q. Was Major Radovich a member of the First Fighter Command? A. Yes, he was.

Q. Was he a member of the Headquarters Squadron of that Command? A. Oh, yes. We all were. Everybody in
1104 the First Fighter Command.

Q. Do you recall whether or not in the year 1943 the Women's Army Corps came in and were assigned to duties at Mitchel Field? A. Yes, they were.

Q. Do you recall approximately when in the spring of 1943 that occurred?

Mr. Keenan: I object to the leading form of the question, your Honor.

The Court: Objection overruled.
Mr. Keenan: Exception.

A. That was during the month of April, I think—no, it wasn't either. I don't remember——

Q. Well, can you tell us— A. April, I believe it was. Yes, I believe it was in the month of April.

Q. Well, now, can you fix any more definitely the time when the two privates, Bayer and Usdan, were transferred into the First Fighter Command? A. I do not know the date. It was in April, I believe.

Q. Well, can you tell us whether it was at or about the time that the Women's Army Corps was coming in to take 1106
over duties? A. Oh, yes. It was just prior to their assignment to the field at base headquarters, where the—Bayer and Usdan, Privates Bayer and Usdan were then assigned.

Q. You mean Bayer and Usdan were assigned to the base before they were transferred to the First Fighter Command? A. That is right.

Q. Do you know what duties the Women's Army Corps were assigned to when they came in? A. Clerical duties.

Q. Do you know what classification these two soldiers, Bayer and Usdan, had? A. They were clerks.

Q. Were they transferred as clerks into the First Fighter Command? A. Yes, they were.

Q. Now you are married, are you not, Colonel? A. I
am, yes. 1107

Q. Were you married in the spring of 1943? A. Yes.

Q. Did you ever introduce your wife to Major Radovich —withdraw that—to Samuel Bayer? A. Yes.

Q. And did you meet Mrs. Bayer? A. Yes, I did.

Q. Did you go out with them socially? A. On one occasion, yes.

Q. When was that, Colonel? A. In the spring of 1943.

Q. Was it around the time of your birthday? A. It was, yes.

Q. Will you tell us when your birthday is? A. April 21st.

Q. It was on or about that time that you— A. It was, yes.

Q. Will you tell us where you went that evening? A. To the Waldorf Roof.

Q. Was that the Starlight Roof of the Waldorf Hotel? A. Yes.

Q. They were present, yourself and your wife; is that correct? A. Yes, that is correct.

Q. And Mr. Samuel Bayer and his wife? A. That is right.

1109 Q. Was there anybody else present? A. No; there was not.

Q. Now, before you went to the hotel that night did you meet Mr. Bayer? A. I did.

Q. That is, Mr. Samuel Bayer? A. That is right.

Q. Where did you meet him? A. At a gas station on 21st Street, I think it is, to the best of my recollection.

Q. Do you know where that gas station is located with respect to Mr. Bayer's office? A. It is diagonally opposite.

Q. Across the street from it? A. That is right.

Q. When you met Mr. Bayer there, will you tell us what happened? A. Well, I parked my car in—we got a cab and went to——

Q. Would you keep your voice up, please? A. I parked

1110 my car and we got in a cab and went to the hotel.

Q. Did you park the car yourself? A. I did.

Q. Did you have the keys for your car? A. I did, yes, sir.

Q. Did you give them to anybody? A. Yes, sir, I gave them to Mr. Bayer.

Q. And had he asked for them? A. Yes.

Q. Then, as I understand it, you got in a cab and went to the hotel? A. That is right.

Q. Now, when you left the hotel that night, did the four of you leave the hotel together? A. Yes, we did.

Q. Where did you go after you left the hotel? A. We got into a cab and dropped Mr. and Mrs. Bayer at another hotel, they were staying for the night, and then I went back to the gas station.

Q. Now, in the meantime had you received back your keys from Samuel Bayer, the keys for your car? A. No. They were left at the gas station.

Q. They were left at the gas station? A. Yes.

Q. All right. Now, you got back to the gas station, and then what happened? A. I got in my car and drove out, started to drive back to Mitchel Field. Then I noticed the car was driving——

Q. Would you keep your voice up? A. I noticed the car 1112
was driving oddly, and I got out and I looked at it, and there were new tires on the car, four new tires.

Q. Four new tires? A. Yes. And they had been—prior to that I hadn't been coming into town, and the reason for it was I didn't have—that is, I was asked why I didn't come in more often, and I explained the reason I couldn't come in was that my tires were bad. And I got out at this time—

Mr. Robb: May we find out who is talking in this conversation?

The Court: Whom are you talking about?

The Witness: Oh, I had talked to Mr. Bayer.

Mr. Robb: Which Mr. Bayer?

The Court: Which one?

The Witness: I do not really remember. I know I 1113
talked to one of the Mr. Bayers. And that, then, as I say, I got out of the car and examined it and found the new tires on the car, four new tires.

Q. Had you purchased those tires? A. No, I did not.

Q. Did you pay for them? A. No, I didn't.

Q. Subsequent to that evening when you got the four new tires on your car, did you have a conversation with Samuel Bayer with respect to those tires? A. No.

1114 *Alfred H. Jacobson—For Government—Direct.*

Q. Did you have a conversation with Elias Bayer with respect to those tires? A. No.

Q. At no time after you received those tires were they ever mentioned by the Bayers? A. Well, the next day I called him up and said——

Q. You called whom up, Colonel? A. I called up the office of Sam Bayer.

Q. Whom did you talk to there? A. I believe it was Mr. Sam Bayer, in fact I am sure it was.

Q. What was the conversation, the substance of it? A. Well, I said——

1115 Mr. Keenan: Your Honor, I assume all of these conversations being taken in the absence of others will not be binding unless in some way or fashion——

The Court: No. I think the evidence is subject to your objection.

Mr. Keenan: I object.

Mr. Robb: We have the same objection, if the Court please.

The Court: Very well, go ahead. Relate the conversation, Colonel.

Mr. Keenan: Exception.

A. (Continuing) Well, I said, "Quite a surprise." He said, "What are you talking about?" And the sum and substance was, "What are you talking about?" And I
1116 said, "The tires. Thank you." He said something about, "Happy birthday," or something like that.

Q. Would you keep your voice up? I have difficulty hearing you myself back here.

Mr. Ansell: May the stenographer, if the Court please, read that back?

(Answer read.)

Q. Now, Colonel, I think you said you left Mitchel Field some time in June of 1943, is that correct? A. Yes, sir, I did.

Q. And were you transferred from Mitchel Field? A. I was, to the command of the Albany——

Q. Will you keep your voice up now? A. I was transferred to the command of the Albany Air Region.

Q. And where was your place of duty? A. Albany, New York.

Q. In the City of Albany? A. Yes, sir.

Q. You remained there for how long, Colonel? A. Until December, 1943.

Q. December, 1943. Now, between the time you left 1118
Mitchel Field in June and December, 1943, did you have conversations with Samuel Bayer at any time? A. Yes, I did.

Q. You came to New York from time to time during that period, did you not? A. Yes, that is right.

Q. On any of your visits to New York from Albany during that period did you see Samuel Bayer? A. Yes, sir, I did.

Q. Did you go out with him socially? A. No.

Q. Did you see Elias Bayer? A. I did.

Q. Did you go out with him socially? A. Yes, I did.

Q. Now I direct your attention particularly to the early fall, specifically, some time in September, 1943, and I ask you, did you have a telephone conversation with Samuel Bayer? A. Yes, I did. 1119

Q. And who made that call, Colonel, you or Mr. Bayer? A. Mr. Bayer.

Q. And will you tell us what Mr. Bayer said to you and what you said to him? A. Well, he called me on this occasion. He was very excited, very upset. From the tone of voice at least I gathered that.

Q. Would you keep your voice up, please, Colonel? A. And he said that the boys were alerted and they were in a

hot outfit and that they were going overseas, and asked me whether or not I could do anything for them.

Q. What did you say, Colonel? A. I said no, I couldn't. I didn't know any way that the—that, as far as I had observed he had been a very indulgent parent, he had done everything in the world for these boys and it was their time to go, and that he would be doing them more harm to hold them or bother them than he could in keeping them back, and that they would just have to go, that I was out, that I knew no one and no way and that there was nothing that could be done and nothing should be done.

Q. Did he say anything to you after you said that to him?
1121 A. Yes. He said that he was—that it pleased him to hear me say that he had been a good father and he had been indulgent with them, and talked a little while longer and the phone cut off, and Mrs. Bayer came on and said, "Sam has fainted, I'll call you back."

Q. And thereafter did you get a call from Elias Bayer? A. Yes, I did.

Q. How long after this first telephone conversation? A. The next day or several days later.

Q. And what did Elias Bayer say to you in that phone conversation? A. He said that Sam was sick, he was pretty bad off, he was very much upset, and the boys' going had him very worried. He said, "Positively nothing can be done?" I said, "No, nothing."

Q. Colonel, in September, 1944, were you stationed at
1122 Mitchel Field? A. No, I was not. In September——

Q. Were you at Mitchel Field? A. Oh, wait a minute now. September, 1944.

Q. September, 1944. A. Yes, I was.

Q. Were you assigned there to duty? A. I was a patient in a hospital.

Q. While you were a patient there did you see the defendant Major Radovich? A. I did.

Q. Where did you see him, Colonel? A. I saw him in—he came down to my room in the hospital.

Q. Was he accompanied by anybody? A. No.

Q. Was there any guard with him? A. No.

Q. Did you have a conversation with him? A. I did.

Q. Will you tell us what he said and what you said, in substance?

Mr. Keenan: I object as far as my clients are concerned, after any purported conspiracy must have come to an end, and in their absence, anyway.

The Court: I will overrule the objection.

Mr. Keenan: Exception.

1124

The Court: As to the admissibility.

The date is what? September, 1944? Do you contend, Mr. McGohey, that that is admissible as against all defendants?

Mr. McGohey: I did not get your question, your Honor.

The Court: Do you contend that that is admissible as against all defendants?

Mr. McGohey: No, your Honor. I claim it is admissible only against the defendant Radovich.

The Court: All right.

Ladies and gentlemen of the jury, I am going to permit the testimony of the statement made by the defendant Radovich but direct you not to consider it as evidence against the other defendants in any 1125
way. I am admitting it for your consideration of the case against the defendant Radovich inasmuch as he himself made the statement. I direct you not to consider it as evidence against either of the other two defendants.

Mr. Keenan: Your Honor, I object on behalf of the two defendants Bayer on the ground that your

Honor has cautioned the jury to do something which in the practical affairs of life cannot be done.

The Court: Objection overruled. Proceed.

Q. I have asked you, Colonel, to give us the substance of the conversation that you say you had with Major Radovich. A. Well, he came in, and of course we passed the time of day, and said hello; I hadn't seen him in some time.

Q. Colonel, would you please keep your voice as loud as you can? A. I am making every effort to.

Q. I appreciate that, Colonel, and I am not quarreling; I am just asking you if you will try to do that. A. We
1127 talked about his predicament; it's a hell of a situation, the way it started, and how in the world did all this happen, about this thing. He said, "I don't know, a crazy thing." He says, "I was going overseas on a very hot job and didn't expect to come back, had the wife and the baby, figured I might just as well take care of them."

Q. Now is that substantially all of what he said to you, in substance? A. Yes, that is about it.

Mr. McGohey: I have no further questions, your Honor.

The Court: All right. You may cross-examine.

*Cross-examination by Mr. Keenan.*

1128

Q. Colonel Jacobson, would you be good enough to state your age? A. 39.

Q. And would you be kind enough to tell us if your illness is a recent one or if you have been ill for some time? A. I have been hospitalized for two years.

Q. When did you come to Mitchel Field? A. I came to Mitchel Field in 1940.

Q. You stayed there until when? A. Until June, 1943.

Q. And you went from there to Albany, New York? A. I did.

Q. And how long did you stay in Albany? A. Until December, 1943.

Q. Were you hospitalized then? A. No.

Q. And then you came back to Mitchel Field? A. In '44.

Q. Where did you go from Albany? A. I went to Norfolk, took a station at Norfolk, and then I went to Seymour Johnson Field; and I was hospitalized in February, 1944.

Q. Did you say Seymour Johnson? A. Yes.

Q. Where is that? A. North Carolina.

Q. So, those were your movements from the date of the beginning of the war up to the time being? A. No, I would not say that. 1130

Q. Would you indulge me as to when you first came to Mitchel Field? A. I came there in 1940.

Q. Were there some other movements that you made, moving from one camp to another besides that? A. Oh, yes. I went to England in 1942.

Q. You went to England in 1942? A. Yes.

Q. How long were you over in England? A. I was there twelve weeks.

Q. You were in combat service there? A. I was observer in service there.

Q. What is it, please? A. I was attached to the R.A.F. and was acting as observer for air defense problems; and at that time I was and subsequently was attached to 310 Squadron R.A.F., a night fighter squadron as observer. 1131

Q. And you have told us the substance of the conversation about the tires. Were they recapped tires? A. No, they were new tires.

Q. You are sure of that? A. Well, I am reasonably sure. I am reasonably sure they were.

Q. You would know one way or the other, wouldn't you? A. Yes, they were new tires.

Q. They were new tires. Were you asked to do anything at all at the time that these tires were given to you, as you describe them? A. Oh, no. There had been on holidays and birthdays we had exchanged gifts, Mr. Elias Bayer and I; I had given him on his birthday, had given him gifts and——

The Court: I think it is a little too futile to compete with a brass band outside the court house and it is pretty near time for the dinner bell, so I am going to recess now, ladies and gentlemen, until ten minutes past two.

1133 Colonel, during the recess don't talk to anyone about this.

The Witness: No, sir.

The Court: The Court will take a recess until 2.10.

(Recess to 2.10 P. M.)

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AFTERNOON SESSION.

ALFRED H. JACOBSON, resumed the stand.

Mr. Keenan: May we have the last question and answer read, please?

(Question and answer read.)

1134

*Cross-examination (continued) by Mr. Keenan.*

Q. Do you want to finish your answer, Colonel, whatever it would be? A. Well, just that we exchanged gifts on these holidays. Mr. Bayer and I were very friendly, Mr. Elias Bayer, and I thought a great deal of him.

Q. And that friendship continued at least up until the time you left Mitchel Field to go to Albany? A. Oh, yes.

Q. And you wrote Elias a letter in June of 1943, do you recall that? A. No, I don't.

Q. Well, do you remember writing him when you got to Albany? A. I could have. I don't remember. I don't remember it.

Q. Up to the time that you left Mitchel Field to take over new duties at Albany, because that was really why you left, wasn't it— A. That is right.

Q. —to take over another squadron, Colonel? A. An air region, an air region.

Q. Another air region? A. Yes.

Q. And naturally with a new crowd, is that right? A. That is right.

1136

Q. Now, up until the time that you left for Albany at least, were you asked to do anything that you considered in any manner improper? A. No, sir.

Q. Now, I am not asking you, Colonel, at this time, whether you did anything improper, but I am asking you specifically, and I want you to give a lot of consideration to it, were you asked to do anything improper? A. No.

Q. What was the relationship, Colonel, that you had to these two privates, the Usdan boy and Martin Bayer? A. I had no relationship with them at all other than that they were in the headquarters squadron.

Q. Did you have anything to do with where they were in the course of the day or what their particular duties were? A. No, sir.

Q. Did you know what they were doing? A. Yes, I did. 1137

Q. What were they doing? A. They were clerks in the Field Fortification—in the Radar Fortification Section.

Q. Clerks in the Radar Fortification Section, is that right? A. Yes.

Q. Was that useful employment, in your opinion? A. Very, yes, sir.

Q. And I meant by my question, in the course of one day or another would you be personally acquainted with what

either one of these boys happened to be doing on a given day? A. Only in that the Radar Fortification was part of my—had been part of my duty among others, and I had a great number of them at one time, and then as the command expanded, why they became departments, and Captain Roeser was given the Fortification Section, and he had—and these boys were assigned to his Section, and in that way it came under the jurisdiction of my Section, the Operation Section, and at that time it was an unofficial title or job to be given to me of a Section, which had no place properly in the organization, but I was in charge of the responsibility of it in connection with my other duties; that
1139 is, with the whole running of that Section.

Q. And you referred to it as some kind of fortification?

Mr. McGohey: Your Honor, I object to any further questions along these lines. I think it is entirely irrelevant to any issue in this case what the Colonel was doing, or what the boys were doing, beyond what has been described.

Mr. Keenan: Well, do you claim that this man is part of a conspiracy?

The Court: Wait a minute. Please let me rule on it. I am going to overrule that objection. I do not think he has gone too far yet.

Mr. Keenan: Thank you, your Honor.

The Court: Go ahead.

1140

Q. You have spoken about fortification. A. Yes.

Q. Very briefly will you tell us what the nature of the fortification would be?

Mr. McGohey: I object to that, your Honor. It is irrelevant.

Mr. Keenan: I want to get some idea of what these boys were doing there.

Mr. McGohey: I press the objection, if your Honor please.

The Court: Overruled. Go ahead.

A. They were doing general clerical work, filing, and some typing, as I remember it, and general clerical work in this section.

Q. And were you aware of any special consideration that was given to either one of these two boys, Colonel, at any time? A. No, sir.

Q. Before you left for Albany? A. No, sir.

Q. Were they treated, as far as you could observe, like any other privates in the Army? A. They were just soldiers. 1142

Q. Pardon me? A. They were just soldiers.

Q. They were just soldiers? A. Right.

Q. And they took their orders, whatever orders were given to them? A. That is right.

Mr. Keenan: May I mark this?

(Defendants' Exhibit B marked for Identification.)

Mr. McGohey: Are you offering it?

Mr. Keenan: I want to identify it first.

Mr. McGohey: Yes.

Q. I want to know if you ever saw him, Private Martin Bayer? A. This is a picture of him. Is that what you mean? 1143

Q. Yes. Is it a fair representation and likeness of him, as you recall him? A. Yes, sir.

Mr. Keenan: I offer that in evidence, your Honor.

Mr. McGohey: I object, your Honor. It is irrelevant and immaterial to any issue in the case.

The Court: I will admit it. Overrule the objection.

(Marked Defendants' Exhibit B in evidence.)

Q. Did anyone ask you, Colonel, to take them out of the Fighter Command and put them any place else? A. No, sir.

Mr. Keenan: Now, I have referred to the subject matter of letters and I would like to mark this a defendants' exhibit.

(Marked Defendants' Exhibit C for Identification.)

Q. I will ask you to examine Defendants' Exhibit C for Identification, and ask you if you recognize that? A. (No answer.)

1145 Q. Well, I think I will shorten it and I will ask you if that is in your handwriting? A. It is, yes.

Q. And is that a letter you wrote to Elias Bayer? A. It is.

Q. And was it written on or about the date of it? A. It was.

Q. You wrote the date in and I assume it was that date? A. Yes.

Mr. Keenan: Would your Honor care to examine this?

The Court: Has the United States Attorney seen it?

Mr. McGohey: I have not seen it yet, your Honor.

Mr. Keenan: I did not know whether I should hand
1146 it first to you or the Court (handing to Mr. McGohey). Could I have the jury look at the picture while they are examining the letter?

The Court: Yes.

(Mr. Keenan hands picture to jury.)

Mr. McGohey: Your Honor, I object to it as immaterial.

The Court: Let me see it, please.

(Mr. Keenan hands letter to Court.)

Mr. Robb: Have you a copy of that, Mr. Keenan, that we can look at?

Mr. Keenan: I have no copy of it. I haven't even a typewritten copy.

(Envelope marked Defendants' Exhibit C-1 for Identification.)

Mr. Keenan: Will you let that go right with it (handing to Mr. McGohey)?

Mr. McGohey: The objection and the ruling will go to that as well as the letter.

The Court: I will admit them.

Mr. Robb: If your Honor please, could I see it before you admit it? 1148

The Court: It does not refer to your client.

Mr. Robb: It does not refer to my client?

The Court: No.

Mr. Robb: I have never seen it, your Honor.

The Court: It will be admitted.

(Defendants' Exhibits C and C-1 for Identification received in evidence.)

Q. Colonel, I call your attention to the date of Exhibit C, being June 26, 1943, and the place at which it was sent, Albany, New York, and I believe you just read that letter, did you not? A. I didn't completely read it, no; I scanned it. 1149

Q. Scanned it? A. Yes.

Q. Well, with such attention as you did give to it, I will ask you if under date of June, 1943, anything had occurred in any manner in your relations with any of the Bayers, either Samuel or Elias, to cause you to believe that any effort was being made to in any way affect your judgment as an officer of the United States Army? A. No, sir.

Q. Or to get you to affect any other officer's judgment in the United States Army on anything? A. No, sir.

Q. Is that correct? A. That is correct.

Q. And had you received the automobile tires at that time? A. Yes, I had.

Q. And the uniform? A. Yes, I had.

Q. And the automobile tires I believe you referred to as having received on or about your birthday, is that correct? A. That is right.

Q. And what kind of an automobile did you operate, Colonel, so that we can find out something about the tires of such? A. Mercury.

Q. Ford Mercury car? A. Coupe, yes.

Q. Coupe? A. Yes, club coupe.

1151 Q. And was anything said prior to the time that you received the tires, or at the time you received them, or at any time you were at Mitchel Field to hook them up in any way with anything that you expected or hoped to do? A. No, sir.

Q. Or in any way concerned with influencing your judgment as an officer? A. No, sir.

Q. Or you influencing any other officer? A. No, sir.

Q. Or let me put the batter bluntly, Colonel: Was there any effort that you could discern at that time, up to the time that you went to Albany, to get you to tamper in any way with what happened to these boys?

Mr. McGohey: I object to that question.

The Court: Sustained. You ought to ask him about

1152 it.

Mr. Keenan: I will except, your Honor.

The Court: Very well.

Q. Now, how did you happen to get the uniform? Just very briefly will you tell us about that? The distinguished United States Attorney has asked you if you got it, but he left out the details of how it happened.

Mr. McGohey: I object to this, your Honor.
The Court: The objection is sustained.
Mr. Keenan: All right.

Q. Tell us how you happened to get the uniform. Who mentioned it to you, if anyone, or how you happened to go and get it? A. Well, I mentioned it. I mentioned I needed a uniform. Summer was coming on and I had only one summer uniform that fitted at the time, and there was in fact several of us that were talking about uniforms. We all were. I mean nearly everybody around the office when the time came to go into a summer uniform.

Q. Yes. A. And Mr. Elias Bayer was present while we 1154
were talking about, and he suggested I. Buss. Well, I went down there and they said that they had never made an Army uniform before, and that they would take my order for it, and we talked about it, and they gave me a price on it, and I sent in and they made the uniform. And the first one they made didn't fit. I did not like it and I refused to accept it. And they made me another one and I accepted that uniform.

Q. As far as you were able to discern, they were not very skillful in at least their first try in making the uniform?

Mr. McGohey: I object to that, your Honor, as being immaterial and irrelevant to any issue here, what the capacity of the Buss firm was. 1155
The Court: Yes. I sustain the objection on that.

Q. Of course, Colonel, if you had thought that in any manner anyone was trying to influence you in any improper fashion, you would not have accepted it, would you?

Mr. McGohey: I object to that, your Honor.
The Court: Overruled.

Mr. McGohey: I submit that has been answered.
The Court: Overruled. Go ahead, Colonel.

A. I would in no way compromise myself. I mean it never occurred to me.

Q. You would have been angry if you thought anyone was doing that? A. I definitely would, yes, sir.

Q. And this letter of June 26, after reading that, you would have no doubt in your mind that your feeling towards the two Bayers was a very wholesome one, wasn't it? A. Well, right up until June, 1944, if I can bring this to mind, while I was at Mitchel Field, I learned while I was
1157 at the Mitchel Field Hospital or I had heard that Mr. Elias Bayer had become a father, and I had ordered a blanket, a baby blanket, and sent it down to him. I had not seen him but only once since then when he called me to have you talk to me this last year.

Q. All right. A. So that I have not had anything to say, or talk about to Mr. Bayer; in fact, actually I have not seen him since January 1—December, 1943.

Q. Now, you have referred to the fact that you saw me. On how many occasions did you see me? A. One occasion.

Q. And I went up there with Mr. Levy, the counsel? A. That is right.

Q. To talk to you? A. Yes.

Q. And I asked you about the matters pertaining to the Bayers and the charges made against them? A. Yes.
1158 Q. When was that, as you recall it, Major, or Colonel? A. I think it was in April or May of this year.

Q. Of this year? A. Yes.

Q. And I asked you what occurred between you and the Bayers, and you told me the story, is that correct? A. I did.

Q. And I just asked you to please tell me exactly what happened, and did I suggest to you anything——

Mr. McGohey: If your Honor please, I object to anything that Mr. Keenan told the witness.

Mr. Keenan: Oh, your Honor, I am not going——

The Court: He has not asked that yet.

Q. Did I suggest to you anything that your testimony should be in this case in any manner or fashion? A. No, sir.

Q. Did I tell you anything, or was I seeking information apparently from my questions? A. Well, I think you were seeking information. I mean there was no other reason for you to be there.

Q. I went out to your home, is that right? A. That is right. 1160

Q. Called you up and asked you if I might see you? A. That is right.

Q. And told you frankly, I told you that I was counsel for the Bayers? A. Yes.

Q. That they had been indicted, right? A. That is right.

Q. And some other indictment, not this, and that I wanted to get the story from you, is that right? A. That is right.

Q. And you told it to me? A. That is right.

Q. Did you ever hear any complaint about the conduct of these boys out there——

Mr. McGohey: I object to that—— 1161

Q. —at the camp?

The Court: Objection sustained.

Mr. Keenan: Exception.

May I have an offer to prove, your Honor, at this time, a very brief one?

The Court: Sir?

Mr. Keenan: May I have an offer to prove in the record?

The Court: All right. Come up, Mr. Stenographer.

(The following took place at the bench, not in the hearing of the jury:)

Mr. Keenan: I respectfully expect to prove if the witness were permitted to answer that these two soldiers were not the subject matter of any complaint at any time, and right from the beginning to the end conducted themselves as other boys and were treated in that fashion.

The Court: The question you asked was if he ever
1163 heard of any complaint.

Mr. Keenan: I expect the answer to be that he had not.

The Court: And I sustain the objection on the ground that you are asking for hearsay. I will permit you to ask him anything he knows of his own knowledge.

Mr. McGohey: And that I am going to object to as being immaterial and irrelevant to the issues.

The Court: I will overrule that.

(The following took place in the hearing of the jury:)

Q. I will ask you did you know of any complaints about the conduct of these boys?

1164

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection.

A. I knew of no complaint, no; there was no complaint.

Q. Now, just a question or two more, Colonel. When you received the call from New York from Elias Bayer and Samuel Bayer, can you fix the time of that as best

possible, the closest you can? A. My best recollection is it was in September.

Q. Of 1943? A. Of 1943.

Q. The boys then were at Westover? A. Yes.

Q. Or Bradley? A. Yes.

Q. And they were then transferred to the Airborne Engineers, is that correct? A. It is my understanding that they were medical troops attached to the Airborne Engineers.

Q. Medical troops attached to the Airborne Engineers? A. Yes.

Q. And that camp was some distance from New York City, or do you know where it was? A. Yes, it is. 1166

Q. About how far from New York City, roughly? A. Oh, 150, 175 miles, I should judge.

Q. What are you talking about now? Westover? A. Westover.

Q. Where is Bradley Field? A. It is north of Westover.

Q. What State is it in?

Mr. McGohey: I object to this, your Honor.

The Court: It is already in evidence. One is in Massachusetts and one is in Connecticut.

The Witness: Connecticut.

Mr. Keenan: Your Honor, I am awfully sorry, but I did not remember that. 1167

Q. By the way, Colonel, is there a file that is allotted to each enlisted man, a file 201? A. Each military person has a 201 file.

Q. And what is that? Will you tell us about it? A. The entire——

Mr. McGohey: I object to this, your Honor, as immaterial and irrelevant to any of the issues in the case.

The Court: I will permit the question.

A. (Continuing) The entire paper record of the man.

Q. That is an Army term. Very briefly, the entire paper record of the man means what? A. Well, it is the record of the service and all of the official communications concerning that particular person, military person.

Q. Including commendations if there are any? A. Commendations, disciplinary actions, transfers.

1169 Q. Disciplinary actions, transfers? A. Promotions.

Q. And gives the data concerning the same? A. About that man.

Q. Where does that file ordinarily stay? A. In the headquarters.

Q. Do you know where Martin Bayer is now? A. No, I don't.

Q. Well, where would that 201 file be with reference to him? Suppose he were in Burma but in the United States Army, where would the file 201 be of Martin Bayer? Would it be in Burma where he was, or would it be in Mitchel Field, or Washington? I am seeking information from you.

Mr. McGohey: If the witness knows.

1170

A. No, that is right. I have been away from things for two years, and my last—now, this is two years old, and my last recollection of it was that it stayed in the office, and only the file or the record which is the part that has left here now——

Q. Yes. A. —showing the consolidated happening to that person goes forward, but the individual sheets are kept, if I remember correctly, at the last station.

Q. Last station in the United States? A. Well, every time a transfer—well, the ordinary things that happen are left there. The consolidated files go forward. It makes it easier, as some of those things are less bulky. Take a man that has got a lot of things, good or bad, and he has a very long length of service, there is a 201 file, and you just don't pass all those papers on, but you have a consolidated record and that will go on.

Q. I am seeking information from you to try to find out how to get hold of such a file of a man's experience and everything else.

Mr. McGohey: I move to strike that out. 1172

The Court: Well, he does not know. He does not know.

Q. I think we were talking about the approximate time when you got this telephone call from the Bayers, and I asked you where the boys were, and I think you said they were with the Airborne Engineers at Westover Field. A. Yes.

Q. What was the conversation you had with Samuel Bayer, briefly? A. Well, he was very much upset about the boys leaving, and that they were—that they were in an alerted outfit, and that they were due to go overseas, and was there anything that could be done to keep them from going over and to transfer them out.

Q. Did he state in his conversation how long they had 1173 been at Westover Field? A. Oh, no.

Q. Do you know whether they were there as a matter of days, or weeks, or months? A. No, I do not.

Q. That wasn't discussed? A. No.

Q. I believe you fixed the time as best you could as some time in September, is that right? A. Yes, sir.

Q. Of 1943? A. Yes, sir.

Q. Now, you told us, I believe, that Mr. Bayer was agitated, excited? A. Yes, sir.

Q. And you also told us something about Samuel Bayer fainting? A. Yes, sir.

Q. Did I so understand you? A. Yes, you did.

Q. How do you know that? A. Because the conversation broke abruptly, and Elias came on the phone, Elias came on the phone and said "Sam has fainted; Sam has collapsed." I don't know which word he used.

Q. Did you hear any noise, or commotion on the phone, or couldn't you? A. No, I couldn't. The conversation was cut.

1175 Q. It terminated suddenly, did it? A. Yes.

Q. Abruptly? A. Yes, it did.

Q. As though something like that might have happened? A. Oh, yes. He was very agitated; he was very excited.

Q. Was he, Colonel, at what you might call the breaking point just before he ended the conversation? A. I am not a judge of that.

Q. Well, I realize that, but I would like to have you give the best and honest opinion. A. He was very agitated. I had known him as a sickly man.

Q. Who? A. Mr. Sam Bayer.

Q. An excitable person? A. Well, I wouldn't say excitable, no.

Q. Sickly? A. Yes.

1176 Mr. McGohey: I can't hear the witness.

Q. When you told him that you could not do anything about it, were you offered any inducement at that time, such as if you could do it they would make it worth your while, or something of that nature? A. Oh, no, sir.

Q. Nothing of that nature at all? A. No, sir.

Q. Had you ever received requests from other people with reference to transfers, or movements of troops, or soldiers?

Mr. McGohey: I object.

Q. (Continuing) Or can you tell us——

Mr. McGohey: Pardon me. I object, your Honor.

The Court: I sustain that objection.

Q. Is it a fact that it was more or less common that as you would meet the parents of different children in the Army, for them to ask you if they could be transferred 1178 from one outfit to the other?

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection. You may answer.

A. I never met many of the parents. No, I never saw many of them.

Q. Your answer to the question, then, Colonel, is no, from your observation, is that right? A. That is right.

Q. That was a novel experience for you? A. That is right.

Q. But you are certain that nobody offered you any inducement of any kind at any time up to the present to do 1179 anything in your conduct other than to be conscientious and faithful in your duty?

The Court: You asked that question.

Mr. Keenan: I mean up to the present time.

The Court: You asked that question.

Mr. Keenan: Have I?

The Court: Yes.

1180 *Alfred H. Jacobson—For Government—Cross.*

Mr. Keenan: I do not care to be offensive. That is all.

The Court: Have you any questions?

Mr. Robb: Yes, I have a few.

*Cross-examination by Mr. Robb.*

Q. Colonel, just for the record, you have never seen me before, have you? A. No, I have not.

Q. You have not ever seen my associate over here either, have you, General Ansell? A. No, I haven't.

Q. Colonel, I wonder if you would help me get some dates straight. Is it your testimony that you met the Bayers
1181 first around about January of 1943? A. Yes.

Q. Am I right in that? A. That is right.

Q. And it was along in about April that you got these uniforms, am I correct in that? A. This is all to the best of my recollection.

Q. I understand that perfectly, Colonel. A. There has been a lot that has happened since.

Mr. Keenan: Your Honor, I have forgotten a very important question. I wonder if I might ask it now?

Mr. Robb: Go right ahead.

The Court: All right.

Mr. Keenan: Very important, and I apologize.

The Court: All right.

1182

*By Mr. Keenan.*

Q. Colonel Jacobson, did you have anything to do with the transfer of either one of these two boys from the Airborne Engineers to the Commando Unit? A. Oh, I know nothing about that, no.

Q. So that if anyone made the statement that it was done as a favor to you he is mistaken about it? A. Oh, yes. I did not know anything about this at all.

Mr. Keenan: That is all. I am sorry. Thank you.
The Court: All right, Mr. Robb.

*By Mr. Robb.*

Q. Now, Colonel, when did you first commence to go out and associate with the Bayers, or either of them? A. Right after I met them.

Q. Maybe a week or two afterwards? A. It was about a week after. I think in fact it was the next fight, the next Friday night.

Q. Did you used to make it a practice to go to the fights with them every Friday night? A. I had practically before I knew them. 1184

Q. After you met them you would go along as their guest, Colonel? A. That is right.

Q. And were there other officers who were with you on those occasions? A. Yes, there was.

Q. Colonel Vidal? A. That is right.

Q. And Captain Roeser? A. That is right.

Q. He was then Captain? A. No, he was Lieutenant.

Q. Lieutenant? A. Lieutenant.

Q. Now, Colonel, how long after you first made the acquaintance of the Bayers was it that you first saw the defendant Major Radovich, with the Bayers? What I am getting at is how long after you met them was it that you met him with them? A. Oh, I don't know. I would say it was some time—I only saw him with them once. 1185

Q. When was that, Colonel? A. At Mr. Elias Bayer's birthday party. Major Radovich had Mrs. Radovich and I had Mrs. Jacobson, and we were all there.

Q. Will you give us the approximate date of that? A. Well, I don't remember it, really I don't.

Q. Some time after you had met them? A. Oh, yes, it was.

Q. Colonel, getting back— A. Whenever his birthday was, some great length of time. I would say just now some time between there in June and January, and it was about the middle of that time, we will say, somewhere along there.

Q. Now, Colonel, getting back to my question, it was some time after you met them that you met him, is that right, that you met Major Radovich? A. That is right.

Q. Could you try and fix that time when he met them with respect to their transfer into the Headquarters Squaddon that you told us about? A. I don't clearly understand the question.

Q. Well, Colonel, you told us these boys were transferred, the Bayer and the Usdan boys were transferred into the 1187
Headquarters Squadron; do you remember that? A. That is right.

Q. Now, isn't it true, Colonel, that it was not until after that had taken place that the Bayers even met Major Radovich? A. Oh, yes, that is right.

Q. That is correct, isn't it? A. That is correct; that is correct.

Q. In other words, at the time that transfer took place. Major Radovich did not even know the Bayers? A. To my knowledge, no.

Q. And he did not have anything to do with that transfer? A. Oh, no, no.

Q. As a matter of fact, Colonel, that transfer was arranged, was it not, by Colonel Vidal? A. Well, by Colonel 1188
Vidal and myself.

Q. I see. Will you tell us about that, Colonel. A. Yes, surely. I came into the office one morning and Colonel Vidal told me that one of the Bayer brothers had called him to tell him that the two privates there were being transferred to a pool due to the fact that the WACs were coming in to take over the clerical duties in the Base Headquarters, and that was—they were the first ones to receive the WAC contingent. At that time—I got to trace this

back and give some background to it. At that time we were then expanding——

Q. By "we" you mean what? A. The Fighter Command.

Q. Yes? A. Was expanding.

Q. Yes, sir. A. We were growing bigger all the time, and we were very shy of clerical help from officers right down to privates, and, in fact, we had established quite a liaison with Camp Upton through our personnel section to obtain draftees that were qualified for these various jobs. Our personnel officer, known as the A1 Command, spent a great deal of time out there establishing this contact, and he proselyted for this clerical help.

Well, knowing this at this time of the case even our little 1190
office there, the operations setup, was expanding. Now, these two men became available——

Q. By "these two men" you mean the Bayer boy and the Usdan boy? A. The Bayer boy and the Usdan boy. He said, "Let us get them."

Q. Who said that, Vidal? A. Yes. He said, "Let us get them and any others that are there."

Q. "Get them and any others that are there"? A. Yes, "that are there," and he turned to me and he said, "You call Boebel."

Q. Colonel Vidal said that? A. He is probably a Colonel now. He was my Squadron Adjutant first, and then when I went up to Base Headquarters I brought him up as an assistant, and when I left there to go to the Fighter Command he became Base Adjutant. 1191

"You call Dick Boebel and see whether you can get—whether or not you can get him."

I called Dick Boebel—this is Captain Boebel, and I asked him whether these men were available for—whether they were available for transfer, and what their status was.

He said that they were to be transferred soon into a pool; that they were moving them all out, and that they had been ordered to send them into a pool. I do not know whether

the pool was down there, or a pool some place out of Mitchel Field, some of our fields down there, or whether they were being sent into a pool for reassignment.

And then he said "Ask him whether they were available." "Yes. Let me check with him personally and find out how the TO was."

Q. How the what was? A. The TO, Total Organization. And Colonel Vidal reached over, hit the teletalk, which is the intercommunication system, and asked personally whether there was space and, of course, they said yes, there is a great deal. He said, "We are getting two men from Base Headquarters and was it O.K.," because finally they
1193 have to approve all transfers.

Q. Yes? A. Personally nobody has to accept it in their department. They run it. They run it. That was about 10 or 10.30, and at 12 o'clock they had reported for duty.

Q. Now, Mr. McGohey asked you when he asked you about that transfer who was in command of the organization to which they finally went when they made that transfer, and you replied either a man named Jones, or then Captain Radovich. Now, Colonel, you did not mean that Captain Radovich had anything in the world to do with getting those men transferred, did you? A. Oh, no.

Q. Because he had not? A. No, he had nothing to do with that. As I say, I did not know him very well at that time, frankly.

Q. It just happened that he happened to be in command
1194 of the organization where they landed, isn't that it? A. That is right.

Q. Now, Colonel, I suppose you made a great many statements about this case to various investigators, investigating officers, or one thing or another, haven't you? A. Not a great many, no.

Q. You made several? A. Yes.

Q. Interviewed by some Army officers out at Mitchel Field? A. Yes.

Q. And you told them about knowing the Bayers, receiving these tires, and so on? A. Yes.

Q. And I suppose you were interviewed by the F.B.I.? A. Yes.

Q. And you also talked to Mr. McGohey? A. Yes.

Q. When did you talk to him, sir? A. Yesterday for the first time.

Q. Is that the first time? A. Yes.

Q. And, of course, you told them this story that you have told us? A. Yes.

Q. You have not been charged, or indicted, or anything, have you? A. No, I haven't.

Q. Now, Colonel, let us get down to the conversation, or 1196
your talk in the hospital with the defendant Major Radovich. That took place when? A. Well, right after he had been released from the hospital.

Q. Yes. A. Now, what the date was I am not—it was some time in September I should say.

Q. In that conversation he told you where he had been held in the hospital? A. No, I knew where he had been held because his nurse was at two wards.

Q. You talked about that with him, didn't you, sir? A. What?

Q. Wasn't there some conversation about him being held in the so-called "Nut Ward" in the hospital? A. Oh, I knew he was there, but I don't remember any conversation.

Q. You knew he was there? A. Yes. 1197

Q. In the psychopathic ward, or nut ward as they call it? A. Well, I don't know what they call it; it was the psychopathic ward.

Q. You were not in the nut ward, were you, Colonel? A. No.

Q. By the way, what ward were you in? A. I was in the medical section.

Q. Were you in bed when this talk took place? A. Yes.

Q. How long would you say your talk took? A. About ten minutes maybe.

Q. He just dropped in to see how you were? A. That is right.

Q. And I believe you said you asked him how he got mixed up with the Bayers? A. Something like that. There was something—I mean the exact words I don't remember.

Q. You would not pretend to say the exact words? A. No, the sum and substance is all I can think of.

Q. He did not tell you, Colonel, or you did not want to give the jury the idea that he did tell you that he had received any money, did you? He did not tell you that?

1199 A. Oh, yes, yes.

Q. He told you that there? A. Yes, he did, yes.

Q. Are you sure about that? A. Definitely, yes, sir, yes, sir.

Q. Now, Colonel, when did you first make any report of that conversation to anybody?

Mr. McGohey: I object to that, your Honor. That question was just asked. It is not material or relevant.

The Court: I think it is proper. I overrule the objection. Go ahead.

Mr. Keenan: May I ask your Honor that that last answer be stricken out in reference to my two clients, the Bayers, as having been made in their absence?

The Court: Yes. You will consider that, ladies and

1200 gentlemen, in your consideration of the case against the defendant Radovich, but not in your consideration of the case against the Bayers. Consider it for what value you conclude it has in your consideration of the case of the person who made the statement; that is, Radovich. All right, go ahead.

Mr. Robb: Would you read the question back to the Colonel, please.

Q. (Read.) A. It was shortly after that that I was questioned. There was a visit by the FBI agents, and they questioned me on this visit and asked me who I talked to in the case as I remember it, and what was said, and after that——

Q. Did you make a written statement? A. No.

Q. Which agent was it? A. I think it was—so many I have seen——

Q. Mr. Flynn? A. It may have been. I am not certain about that. It may have been Mr. Flynn.

Q. Did you tell him about that conversation? A. I am not certain. They were questioning me.

Q. Did you tell him about that conversation? A. Well, 1202
I don't know; I don't remember.

Q. You don't know? A. I don't remember. I told one of the FBI agents.

Q. When do you remember telling anybody about that conversation? A. At that time, right after that.

Q. Right after that? A. That is right.

Q. Did you tell Mr. Keenan about it when you talked to him? A. Did I tell Mr. Keenan about it?

Q. Yes. A. Oh, yes.

Q. You are sure about that? A. Yes.

Q. Positive? A. Yes.

Q. Told him all about it? A. Oh, yes.

Q. Now, on the occasion of that conversation, Major Radovich came there as your friend, did he not? A. Oh, yes. 1203

Q. And that was intended, of course, to be a friendly conversation? A. Yes and no. I don't know what it was. It was just talk.

Q. Had you asked him to come to see you? A. No.

Q. Had you sent any word to him by any nurse that you were there? A. No, no.

Q. Had you talked to the FBI before you had that conversation with him? A. Yes, several times.

Q. Pardon? A. A number of times.

Q. A number of times? A. Yes.

Q. Do you know why they came back to see you again after the conversation? A. No.

Q. You had not sent for them? A. No.

Q. You are sure? A. I don't—no, I don't—no, they were coming in there. They came in on a number of occasions.

Q. How many days after——

Mr. Keenan: Keep your voice up. I do not hear the witness, please.

A. They came in a number of occasions.

1205 Q. How many days after you had that conversation did you talk with the FBI men? A. Oh, a number of days.

Q. Can you give us an approximation? A. A number of times.

Q. Did you ever make a written statement to the FBI? A. Yes, on their first visit.

Q. Their first visit? A. That is right.

Q. Before that conversation? A. That is right.

Q. Is it your testimony that that particular conversation was never put in any written statement that you made? A. No.

Q. Is that right? A. That is right.

Q. You were never asked to make any signed statement to that effect? A. No.

1206 Q. Is that right? A. Yes.

Q. How long after that conversation did you see the FBI agents? A. I don't know. A week or so, maybe; I don't remember.

Q. A week or so? A. I mean, I am just hitting and missing there now when it comes to that time. It was two years ago, or about a year ago.

Q. Pardon me? A. About a year ago.

Q. Are you through? A. Yes.

Q. They had not asked you to see if you could pump the defendant Radovich, had they? A. Oh, no.

Q. You are sure about that? A. Definitely.

Q. By the way, you had played some cards with the Bayers, hadn't you? A. I had what?

Q. Played some cards with the Bayers? A. Yes.

Q. Win any money? A. On one occasion.

Q. Did you win any money? A. No.

Q. Are you sure about that? A. Definitely. We played gin rummy one afternoon, Elias and I, one Saturday afternoon, I believe it was, or Friday afternoon, before a fight.

Q. Never won any money from them at all? A. Never won any money. 1208

Q. Couldn't be mistaken? A. Not mistaken in the least.

Q. Do you recall making a statement to Colonel Snyder over at Mitchel Field? A. Yes, I do.

Q. In August, 1944? A. Yes.

Q. Do you think you would know a copy of it if you saw it, Colonel? I mean, look at this and tell me if that is a copy of the statement you made to Colonel Snyder (handing to witness). You do not need to read the whole statement. I wonder if you can just look at it and tell me. I mean, I do not mind if you want to read it all. A. No, I have no faith in Colonel Snyder. Now, let us have that set straight right here.

Q. Oh, you have no faith in Colonel Snyder? A. No. 1209

The Court: We are not interested in Colonel Snyder. You were asked the question as to whether that was your statement or not.

Mr. Robb: Yes.

The Witness: I don't know. I have never seen it before.

Q. Well, would you like to look at it some more, Colonel? I am sorry, I did not mean to take it away from you (hand-

ing to witness). Now, Colonel, could you say whether the document I have just shown you is a copy of the statement you made to Colonel Snyder? A. It could be. As I say, I have never seen the statement before. I have never seen the statement before. From remarks that I have heard——

The Court: No, we do not want any comment. Do you recognize the statement?

Q. Colonel Snyder was the investigating officer in the case? A. That is right.

Q. And you did in fact make a statement to him, is that
1211 right? A. That is right.

Q. Now, Colonel, did he not ask you this question and did you not make this answer: "Q. Did they offer any money"—"they" meaning the Bayers—"or give you any money for any purpose whatsoever? A. The only money I got from him was money I won playing in a card game. Q. Was that a large amount? A. No. That was fifteen or twenty dollars." Do you recall those questions and answers? A. No, I don't. It could be. I mean I don't recall it. I don't recall it.

Q. Now by "could be" you mean you could have made that answer to that question? A. I could have made that answer, yes.

Q. And if you did your testimony about not ever winning
1212 any money from the Bayers is not correct; that is right? A. That is right, sir, but subject to refreshing my memory there.

Q. Your testimony, I take it, is that you are not very clear about what you did tell Colonel Snyder, is that right?

Mr. McGohey: I object to that. He has not said that, your Honor.

Mr. Robb: I am asking him if that is his testimony.

The Court: Ask the question as to whether it is or not.

Q. Is it your testimony that you are very clear about what you did tell Colonel Snyder? A. It was a year ago, and I was in great pain at the time and under a very serious treatment.

Q. Yes. A. And I had—it was—I am not very clear about any of the questions there.

Q. Now, how long ago was it that you had this conversation with Radovich that you tell us about? A. Well, that was in—let me see, September. 1214

Q. That was over a year ago, wasn't it? A. That is right.

Q. And you were in pain, too, then, weren't you? A. Not as bad. I was taking penicillin treatment at that time.

Q. Pardon me? A. At the time that Snyder came in there I was taking penicillin treatments every three hours. They are very painful and very upsetting.

Q. At the time Snyder talked to you, you knew, didn't you, that you were also under investigation in this case? A. No, I didn't know it.

Q. You didn't know that? A. No.

Q. Didn't suspect that? A. I knew nothing about it.

Mr. McGohey: I suggest, your Honor, there is no evidence at all up to now that this man was ever under 1215 investigation in this case.

Mr. Robb: I am asking him.

The Court: All right. He asked him and he said he knew nothing about any investigation. There is no evidence that he was.

Q. By the way, Colonel, you have mentioned a Lieutenant Roeser. What was his duty? A. He was the head of the Radar fortification.

Q. Under you? A. Under Colonel Vidal.

Q. And you were under Colonel Vidal, is that right? A. That is right.

Q. You had Roeser transferred there, didn't you? A. That is right.

Q. How long before 1943 was that? A. Oh, that was the latter part of 1942, I believe.

Q. He was an old friend of yours, wasn't he? A. We were brought up together.

Q. There was not anything wrong about your having him transferred there, was there? A. Not at all. He was available for transfer to any unit in the Army.

1217 Q. Yes, sir. Colonel, the Bayers you found out are pretty well known in New York, is that right?

Mr. McGohey: I object to this, your Honor, certainly immaterial.

The Court: I sustain the objection.

Q. Did you have any conversation with the defendant Radovich about the Bayers being well known in New York? A. No.

Q. Did he tell you in this talk you had with him that he thought they were able to help his wife and daughter, and little baby? A. No.

Q. Did he tell you that they might be able to give him a job after the war? A. No.

1218 Q. Or take care of his wife and daughter if anything happened to him? A. No.

Q. Nothing like that? A. No.

Q. You knew that he had received a gift of a uniform, or something from the Bayers? A. Vaguely, yes. I did not know that he accepted it or not. There was one of them that turned it back. Now whether it was him or not——

Q. I was not speaking very accurately when I said that, Colonel. You knew that there had been some talk about his getting a uniform? A. Yes.

Q. You afterwards heard that he turned it back, isn't that right? A. Pardon?

Q. You afterwards heard he turned it back? A. There is something about that. I am not sure on that.

Q. Yes. And did he tell you about the Bayers making a present to his little baby? A. No.

Q. Never heard about that? A. No.

Q. Did he tell you about the Bayers making presents to his wife of some lingerie or dress? A. No.

Q. Or something? A. No.

Q. Never heard about that? A. No.

Q. Would you say he did not tell you that? A. No, he did not tell me that, no. 1220

Mr. Robb: Will your Honor indulge me a moment?

The Court: Yes, sir.

Q. By the way, Colonel, do you still have these tires on your car? A. No, I don't have the car or the tires.

Q. How many times did you talk to Colonel Snyder? A. Once to my recollection.

Q. What did you mean when you said you had no confidence in him?

Mr. McGohey: I object to that, your Honor.

The Court: Objection sustained.

Have you some questions on redirect?

Mr. McGohey: No, I have no further questions on redirect. 1221

Mr. Robb: If your Honor please, one question that I overlooked.

The Court: All right.

*By Mr. Robb.*

Q. Colonel, did you ask the nurse either in your ward or in the nut ward where they had Major Radovich, to ask

1222 him to come in to see you? A. No. The way I found out about him being there was through the nurse.

Q. Through the nurse? A. She said there was some chap down there being held. There was quite a story around the hospital, and she told me who it was, and I said, "Well, I know him, and I know him well."

Q. You said that? A. Yes, and the rest of it would be supposition as to how he found out.

Mr. Robb: All right.

The Court: All right. You may be excused.

1223 (Witness excused.)

The Court: We will take a short recess until 3.25 P. M.

(Short recess.)

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GERALD J. FLYNN, resumed the stand and testified further as follows:

Mr. McGohey: May I proceed, your Honor?

The Court: You may.

*Direct examination continued by Mr. McGohey.*

1224 Q. Now, Agent, when we concluded yesterday afternoon I think you had told us that you had been present in Mr. Wallace's office——

The Court: Friday.

Mr. McGohey: Sir?

The Court: Friday.

Mr. McGohey: Friday, yes, your Honor.

Q. —and that there was also there Samuel Bayer, Mr. Wallace, yourself, Agent Brown, Mr. Keenan, and Mr. Levy, and that some time during the conference I came in. Now, will you please tell us what you heard Mr. Bayer say?

Mr. Robb: If the Court please, will you instruct the jury at this time that the conversation or statement must not be used against the defendant Radovich for any purpose whatever?

The Court: Very well. Ladies and gentlemen of the jury: The witness has been asked to testify as to a statement made by the defendant Samuel Bayer upon a certain occasion, the exact date of which I do not recall. Have you fixed the date? 1226

Mr. McGohey: I think the witness fixed it as September 7, your Honor.

The Witness: February 7.

Mr. McGohey: I beg your pardon. February 7 of 1945.

The Court: All right. Now, ladies and gentlemen, under the circumstances in considering this conversation or conference, that is, inasmuch as it does not appear that these statements were made pursuant to the object of any conspiracy, and also that it would appear that they were not made during the continuance of any alleged conspiracy, I charge you that you may consider it evidence in your consideration of the charge against 1227 the defendant Samuel Bayer for the reason that this witness proposes to testify that the statements were made by the defendant Samuel Bayer, and in your consideration of the charge against the defendant Samuel Bayer you may consider any statements which this witness will testify were made by the defendant Samuel Bayer, but you should not consider any testimony as to statements made by Samuel Bayer in your con-

sideration of the charge against the other two defendants in the case.

Mr. Keenan: May I have an exception to your Honor's ruling?

The Court: Yes. You may proceed.

A. I entered the room shortly after the interview had commenced.

About the time that I entered Samuel Bayer was saying that his son Martin had been at Mitchel Field about three or four months, and at that time he was introduced to a Colonel Vidal and a then Lieutenant Roeser by his brother
1229 Elias. He later met a Colonel Jacobson, Lieutenant-Colonel Jacobson, and was introduced to him by Roeser. He gave his approval for these officers to go up to the I. Buss Uniform Company to obtain uniforms. I believe he stated that he was under the impression that Elias Bayer went up to that company with these officers.

He stated that during the conversation which he had with Colonel Jacobson he told Colonel Jacobson that his son, Martin Bayer, and his nephew Melvin Usdan, were stationed at Mitchel Field, and that they were clerks. He stated that Jacobson said that, "Well, we need clerks in our outfit, and I am going to have them transferred to my outfit."

Shortly thereafter he was introduced also by Roeser to Captain Radovich. I believe that he stated that his intro-
1230 duction to Captain Radovich came after the boys were transferred from the Base Command to the Fighter Command.

He got to know Captain Radovich rather well, and approximately two months after he had met Radovich, Radovich called him up and asked to come in and see him.

He came in and he told Sam Bayer that his company was being broken up at Mitchel Field, and that he would have to transfer the boys to Westover and to Bradley Field for overseas duty.

I think at that point he first said the State of Maine, and then he said it was Westover and Bradley Fields.

Sam Bayer stated that he asked Radovich if the boys could not remain at Mitchel Field and Radovich told him no.

He stated that the following day Radovich came into his office and told him that he had thought up an angle that he could have the boys transferred to the Medical Unit at Mitchel Field. Sam Bayer stated that he was very happy, and that he thanked Radovich, and that then Radovich asked him to speak to him alone, and when they were alone Radovich said, "I need $500. I have to send my wife back to Los Angeles."

1232

Sam Bayer told him to come in the following day and he would try to get it for him.

Well, the following day Radovich came into the office and Sam Bayer states that he gave him $400. He later changed that in his statement I think to $450.

A short time thereafter Radovich came in again and spoke to him, and told him that the transfers were going through. He then again spoke to Sam Bayer alone and told him that he needed another $500. Sam stated that he told him that he would try and get it for him, and to come back at a later date.

A short time thereafter, possibly a week, I don't recall exactly, Sam stated that Radovich came in again, and told him that the transfers had fallen through. He then told Sam Bayer that he knew who had disrupted the transfers, and that if he were given a thousand dollars he would be able to see that the transfers were effected.

1233

Sam Bayer stated that he told Radovich to come back in a few days and that he would get the money for him.

He then met Radovich in front of the Radio City Theatre, spoke to him, and he stated that it was in Radovich's car that he gave Radovich $500.

A few days later he met Radovich in Radovich's room at the St. Moritz Hotel where he gave him $400.

A short time thereafter he gave Radovich $600 in his office at 30 West 21st Street.

Now, the transfers were effected and the boys went to the Medical Unit at Mitchel Field, but stayed there only a few days when they were suddenly transferred to Westover and Bradley Fields.

Sam stated that Radovich then contacted him and told him that for $1500 he could have the boys transferred back to Mitchel Field, but that he declined the offer.

He didn't see Radovich after that for approximately
1235 three weeks or so, at which time Radovich flew in from Washington, and they dined at the McAlpin Hotel.

About a month or so thereafter Radovich telephoned Sam Bayer's office and made an appointment to see Miss Solomon and Sam Bayer at Cavanagh's Restaurant.

When he arrived he told Sam Bayer that he was being sent out on a dangerous mission to Burma, and that he had requested that the two boys come with him.

Sam stated that he pleaded with Radovich to leave the two boys at home, but that Radovich refused and told him that he would have to pay $5,000 if he wanted the boys transferred out of this unit, and that he had to make up his mind quickly.

I believe it was the following day that Mr. Bayer stated
1236 that Radovich came into his office, and he again pleaded with Radovich but to no avail. Radovich told him the money would have to be at Goldsboro, North Carolina, at a certain time, or the boys would go overseas. That conversation I believe he fixed as some time during November of 1943.

Sam Bayer stated that he gave the money to Elias Bayer and to a third party whose identity he refused to disclose, and that he was told by Elias Bayer that the money was paid to Radovich at Goldsboro, North Carolina.

In addition to that he stated that he never telephoned Colonel Jacobson; he never asked Harold Busch to change the records of the I. Buss Uniform Company.

He stated that he had paid for the uniforms of the officers whom he had sent to the I. Buss Uniform Company, but that he had never asked any of these officers to pay for those uniforms.

I believe that is my recollection of his statement without reading the transcript to refresh it.

Q. Did he say anything about any gifts that he had given to anybody? A. Yes. He had stated that he had given Radovich a bag, and that he had also let Radovich have a set of golf clubs.

1238

Q. Anything else that you recall? A. I believe he stated that the Plymouth Thread Company also paid for some monogram work which was done for Radovich at the Trousseau Monogram Company.

Q. Did he say whether or not he had ever reported any of his conversations with Radovich to anybody? A. I don't recall that he said that.

Mr. McGohey: Will your Honor excuse me for just a moment, please?

The Court: Yes, sir.

Q. Now, Agent, on that same day were you present in Mr. Wallace's room when Elias Bayer was present and made some statements? A. Yes, sir.

1239

Q. And can you tell us who was present at that time? A. You were present, Mr. Keenan, Mr. Levy, Special Agent Brown, a stenographer and myself.

Q. Was Mr. Keenan there? A. Yes, sir.

Q. Was Mr. Levy there? A. Yes, sir.

Q. Now, when was that day with respect to the statement that Mr. Samuel Bayer had made? A. Elias made his statement subsequent to the statement made by Samuel Bayer.

Q. Now will you tell us as nearly as you can what Elias Bayer said on that occasion?

The Court: Ladies and gentlemen of the jury: I repeat, as applicable to a different situation, what I said to you before; that is to say, the witness is now about to testify about certain statements made in his presence by the defendant Elias Bayer. You may consider this evidence in your consideration of the charge against the defendant Elias Bayer, but I charge you that you must not and cannot consider this evidence in relation to your consideration of the charges against
1241 the other two defendants in the case, Samuel Bayer and Radovich.

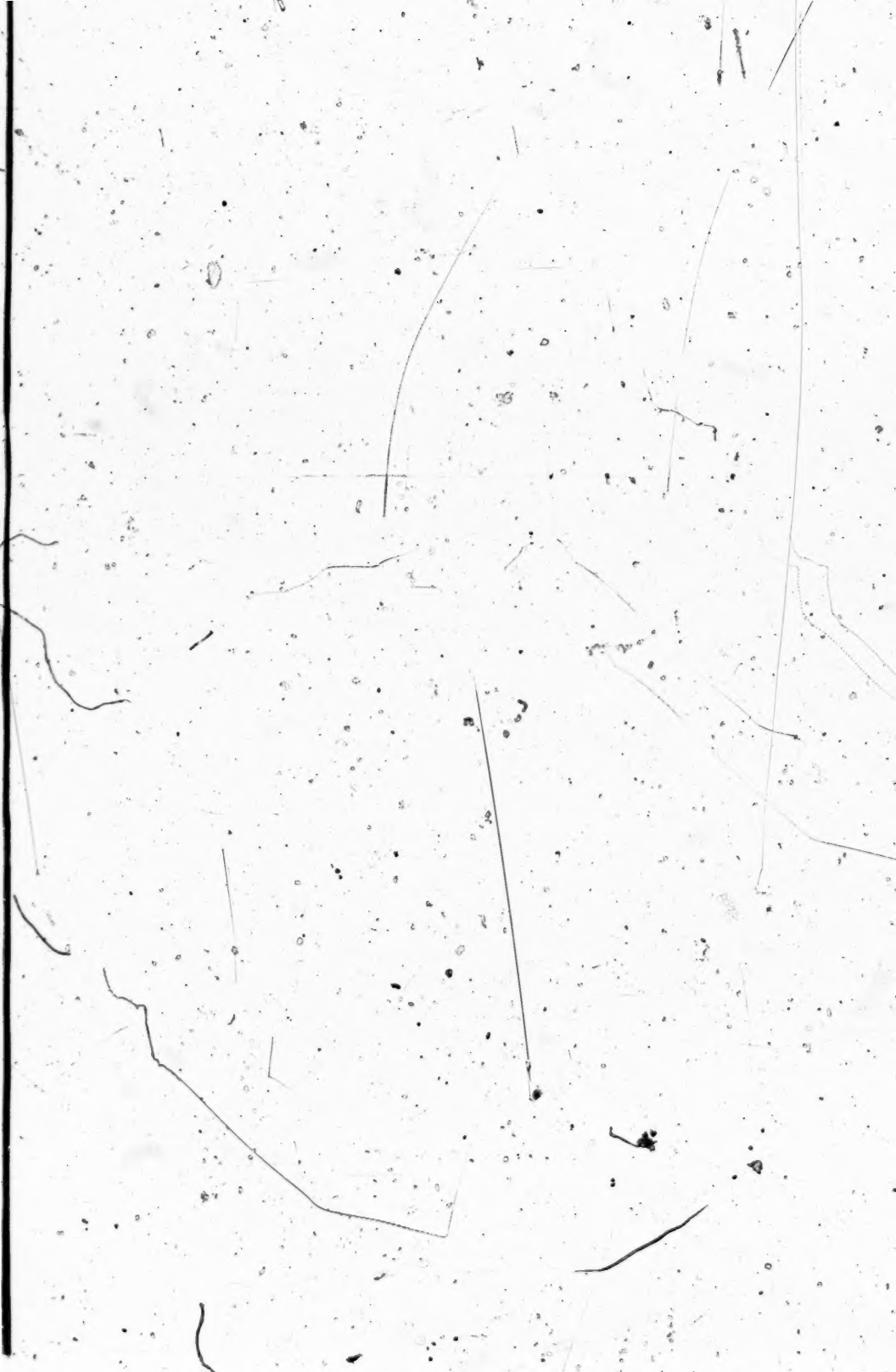
Mr. Keenan: Your Honor, I object to that instruction to the jury at this time on the ground that this testimony is coming several months after the occurrences alleged from the same agent that had to do with much of the same subject matter, and it is imposing an extra task upon this jury to ask them to consider what part of the testimony is coming in as alleged from what witness, and what came from another, and that it is prejudicial to the interests of both Bayers to have such confusion of recitation and for such reason I object, your Honor.

The Court: The objection is overruled.

Mr. Keenan: Exception.

1242 The Court: Proceed.

Q. Will you proceed to tell us what Elias Bayer said on that occasion? A. Elias Bayer stated that in the early part of 1943 he was at the Copacabana Night Club with a friend of his, whom I believe was Martin Goldstein, and that while there he met Colonel Vidal and Roeser. I believe Roeser was a Lieutenant at that time, and they were at the bar.



subsequently became dissatisfied with his uniforms and refused to take them. He asked Elias Bayer if the latter could take him to a better tailor. Elias stated that he took him to his own tailor, and that he told Radovich he did not know whether the price would be wholesale.

He also stated that during the summer of 1943 he was in Sam Bayer's office when Captain Radovich came in and told him that the boys would have to be transferred to another outfit for overseas duty inasmuch as Captain Radovich's outfit was breaking up.

He stated that he was in—that he was present when Radovich turned to Sam Bayer and said, "I would like to
1247 see you alone," and with him at the time was Miss Solomon who works in that office, and that he and Miss Solomon stepped out of the room and stood next to the door, that they heard Captain Radovich tell Samuel Bayer that he needed $500 to send his wife to California—send his wife home I believe he said.

He stated that he was present on the next meeting and also stepped out of the room with Miss Solomon and heard Captain Radovich tell Samuel Bayer that he needed $500 more.

The same situation took place when he stepped out of the room with Miss Solomon and heard Captain Radovich ask Samuel Bayer for a thousand dollars.

He said he was told by his brother, Samuel Bayer, that he had given Radovich some money.

1248 About November of 1943 he stated that he was present in the office of the Plymouth Thread Company when he heard Captain Radovich telling Samuel Bayer that he needed $5000 in order to have the boys transferred out of this unit which was scheduled for overseas duty in Burma; that he heard Captain Radovich say, "I am not getting all the money myself. I have to give one thousand five hundred dollars of this to one officer, or to one person." I don't

think he used the word "officer". "$2,000 to another person at the field, and all I have for myself is $1500."

I think he stated also that Captain Radovich told Samuel Bayer that if he had the money he wouldn't ask Samuel Bayer for the money.

Elias Bayer stated that he followed Captain Radovich down the stairs and asked him why he was doing this, why didn't he leave things alone, and that Captain Radovich told him that he couldn't help it; either the money had to be in Goldsboro by a certain time or it would be too late.

Elias Bayer stated that he went to Goldsboro in November of 1943 with an unnamed individual; that he arrived there about 4 A. M. in the morning; he pointed out Captain Radovich to this unnamed individual, and Captain Radovich and a third party went behind the station. 1250

Elias Bayer says that he was not present when the unnamed third party gave Captain Radovich the money.

He then took a cab to Raleigh, North Carolina, took a train from there to New York City.

He also stated that he had never telephoned Colonel Jacobson who stated that he had told Lieutenant Colonel Snyder——

Mr. Ansell: Pardon me. May I have that last statement read back?

The Court: Read it, please.

(Record read.)

The Court: Go right ahead. 1251

A. (Continuing) That he had told Lieutenant Colonel Snyder that he had—said he didn't know anything about these arrangements when questioned by that officer.

He stated that he had spoken to a Colonel Jones and that he had asked Colonel Jones if the latter could do anything to have the boys transferred.

He stated that he had talked to a Colonel Lipkin at the latter's home in Garden City, and that he had asked Colonel Lipkin the same questions, and that in the case of Colonel Jones, Colonel Jones said he would try but that he did nothing about it. He got the same reaction from Colonel Lipkin.

I believe that is my present recollection without the transcript.

Mr. McGohey: Will your Honor excuse me for just a moment?

The Court: Yes, sir.

1253 Q. Now, Agent, I direct your attention to the month of March of this year. Did you some time about the middle of the month of March of this year have a conversation with the defendant Radovich? A. Yes.

Q. And will you tell us where that conversation was held?

Mr. Keenan: If your Honor please, before we go into that I would like an opportunity to cross-examine this witness about his various discussions, what he heard from the Bayers, and, frankly, in this case you go on getting stories from one witness after another, or about one occurrence after another from this witness on the stand, and I will not be able to carry the

1254 thought in my mind to sufficiently examine him without a great deal of confusion.

Mr. McGohey: Your Honor, I have no objection to that if I may recall the witness and go into what he is about to testify to now concerning the defendant Radovich.

The Court: Do you wish to proceed with the cross-examination now?

Mr. Keenan: Yes, I do, your Honor, for the reasons stated.

The Court: All right.

Mr. McGohey: Then I may recall the witness for the other purpose later on?

The Court: Yes.

Mr. McGohey: Thank you, your Honor.

Mr. Ansell: If your Honor, please, I do not know what the fairest and most expeditious procedure may be, but it seems to me that the procedure upon these matters ought to be governed by the statements, or the particular statements to which the Government wishes to address themselves to, and then we will complete that and go to the next one that may be relevant.

Mr. Keenan: That is what I suggested generally 1256
on that.

Mr. McGohey: That is satisfactory to the Government.

Mr. Ansell: I thought it would be fairer to all of us.

The Court: That is all right. I think it is entirely fair.

Mr. Keenan: Your Honor, I may want, in the event that I am not apparently able to proceed sufficiently, to issue a subpoena to the United States Attorney, and ask him to produce in court the transcript of the testimony of Samuel and Elias Bayer for examination.

The Court: All right. You may take any course you choose.

Mr. McGohey: I have copies of them here that I 1257
will give Mr. Keenan right now if he wishes them, your Honor.

The Court: All right.

Mr. Keenan: Well, I have asked for them before, Mr. McGohey, and they were refused.

Mr. McGohey: Your Honor, I ask that that be stricken out.

Mr. Keenan: Well, it is true.

The Court: I will strike it out.

Mr. McGohey: I ask your Honor to direct the jury to disregard that comment by Mr. Keenan.

The Court: Ladies and gentlemen, that comment has no bearing on the case.

Do you wish copies?

Mr. Keenan: Not at the moment. I will get to that later, your Honor, if I may. I understand I may have a copy of it when I call for it now?

Mr. McGohey: Yes.

Mr. Keenan: Thank you.

Mr. McGohey: Your Honor has the originals of
1259 those.

The Court: Suppose I turn them over to you.

Mr. McGohey: Yes, sir.

The Court: All right (handing to Mr. McGohey).

Mr. McGohey: May the record show now, your Honor, that I am offering to Mr. Keenan right now the statement made by Samuel Bayer of February 7, the complete transcript of that; in fact, the original transcript of it.

Mr. Keenan: Well, may the record show that you are offering me what purports to be that, and it never has been examined by me to determine whether we will agree with his statement or not.

The Court: I do not like that kind of argument.

Mr. McGohey: Your Honor, I submit that Mr.
1260 Keenan has asked if he could have a copy of the transcript. Now, on my honor as an officer of this court and as the United States Attorney I am stating to Mr. Keenan that I am complying with his request.

The Court: I do not think such matters which are not evidence in the case, gentlemen, should be discussed in the presence of the jury. If you wish to have such arguments I will excuse the jury.

Mr. McGohey: I agree with that, your Honor, but I suggest that I did not start it.

The Court: I will excuse the jury if you wish to raise any question, Mr. Keenan.

Mr. Keenan: I don't, your Honor, but I have matter handed to me, and I did not want to concede it is a transcript. I have never seen it before.

The Court: You are not asked to concede anything.

Mr. Keenan: I thought so.

Mr. McGohey: Might I suggest that the Government did not state that there was any concession on Mr. Keenan's part.

The Court: Are you ready? 1262

Mr. Keenan: Yes, I am ready, your Honor.

*Cross-examination by Mr. Keenan.*

Q. Mr. Flynn, where do you live? A. I live in Riverdale.

Q. And how long have you been an agent of the FBI, as we call it? A. Since November 10, 1941.

Q. How old are you? A. 34.

Q. Now, you are a lawyer by profession? A. Yes, sir.

Q. And you have been admitted to the bar from the State of New York? A. Yes, sir.

Q. And have practiced law in the courts? A. To a modest degree.

Q. Yes. And have you been devoting a good deal of time to this case over the last year? A. I have devoted a 1263
substantial amount of time to the case.

Q. And you have interviewed witnesses, including Army officers and others, many of them several times, is that not true? A. That is true.

Q. And you gave your testimony in this case without referring to any notes whatsoever, is that correct, on the witness stand? A. I had no notes in my possession on the witness stand.

Q. Well, then, of course, if you didn't, you didn't refer to them then on the witness stand. A. Not while I was on the witness stand.

Q. Now, you knew, of course, when you testified that whatever statement was given by Samuel Bayer was taken in question and answer form, did you not? A. Yes, sir.

Q. And there were stenographers, young ladies, several of them, who wrote, who took down the transcript of the statement, is that right? A. Yes, sir.

Q. Perhaps as many as seven or eight of them? A. I wouldn't mention any numbers, because I don't recall how many there were there. I do agree with you, though, that
1265 there were reliefs on the statement.

Q. There were about six of them at least, were there not? I want to test your memory as with my own. A. I would say that that would be a reasonable estimate.

Q. You have told us when Elias Bayer was interrogated there was present, without reference to rank or seniority, Mr. Levy, Mr. McGohey and Mr. Wallace and myself; is that correct? A. That is partially correct.

Q. What is wrong about it? Was someone else there? A. You left out Special Agent Brown and myself, and the stenographer.

Q. You of course told us you were there. And Special Agent Brown was there; is that right? A. And Mr. McGohey.

Q. Well, I think I mentioned Mr. McGohey. A. Did you
1266 mention Mr. McGohey.

Q. Mr. McGohey was there? As a matter of fact, don't you know that Mr. McGohey wasn't there at all when Elias Bayer was interrogated? A. No. It is my present recollection that Mr. McGohey was there when Elias Bayer was interrogated.

Q. You feel reasonably certain on that point, do you? A. That is my present recollection.

Q. Well, I am asking you if you feel reasonably certain about your recollection. A. Yes.

Mr. Keenan: May I ask if this record (indicating) is supposed to show whether you were present or not, Mr. McGohey?

Mr. McGohey: I think so.

(Mr. Keenan conversed with Mr. McGohey out of the hearing of the reporter.)

Q. Mr. McGohey concedes that he was not there at all when Elias Bayer's testimony was taken, so that we won't waste time on that. Now, in view of that concession, Mr. McGohey, you will concede, would remember better than 1268 you would whether he was there or not, wouldn't he?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: I want to know, your Honor.

Mr. McGohey: The witness has answered his question. I don't think there is anything material or relevant about getting into a controversy.

Mr. Keenan: I object to the argument, your Honor.

The Court: I overrule the objection.

The Witness: Would you repeat your question?

Mr. Keenan: Suppose you read it.

(Question read.)

A. I will defer to Mr. McGohey's concession as to his 1269 presence there.

Q. All we are getting at, Mr. Flynn, is that even F.B.I. agents can be mistaken now and then, isn't that right? A. Absolutely.

Mr. McGohey: I object to that, your Honor.

The Court: Oh, it is immaterial.

Mr. McGohey: I object to the form of the observation, your Honor.

Q. Now in your recitation, and of course I have not been able to take down every word, because I don't write shorthand and I have not——

Mr. McGohey: I object to this, your Honor.

Q. And I have not been able to get every word; I have understood in substance that you draw a distinction between the testimony or the statements of Samuel and Elias Bayer in this particular: When you quoted what Samuel Bayer said about the first statement of Major Radovich with reference to the change that was taking place out at Mitchel Field eventually leading to transfer, you quoted
1271 Samuel Bayer as saying that Major Radovich told him that the men would have to be transferred out of that headquarters company, but when you quoted the statement of Elias Bayer you added the words, and I am not differentiating in the statement of Mr. Elias Bayer, that he quoted Major Radovich as saying that the boys would be transferred out to go overseas. Did you mean to make that distinction, because I tell you you did make it in your recitation? A. If I follow your question correctly, I didn't intend to make any definite distinction on the statement. It is my recollection that both of these men stated that the boys were being transferred to another outfit, and Bradley and Westover Fields were named for overseas duty.

Q. Now don't you know as a matter of fact, Mr. Flynn,
1272 that neither Samuel Bayer nor Elias Bayer at that time stated in substance that Major Radovich told them that these boys were to be transferred to either Westover or Bradley Field? A. No, I don't know that. I know that they did.

Q. You still say that your recollection is that both Samuel and Elias Bayer said that these boys would be—that Radovich had said that these boys would be transferred to

Westover Field? A. This is a different question. I am afraid I didn't follow that.

Q. I certainly don't want to be confused myself or to confuse you, Mr. Flynn. I want to go back. If I understood you correctly in your original answers to Mr. McGohey's questions, when you were first asked about what Samuel Bayer said—is that right? A. That is right.

Q. (Continuing) —when you got all through with that you were asked what Elias Bayer said; is that right? A. That is right.

Q. By the way, these two men, neither one of them was in the room when the other testified; that was true, wasn't it? A. That is true. 1274

Q. Their separation was requested by Mr. Wallace, isn't that right? A. I don't recall anything like that.

Q. Well, it was requested by Mr. Wallace or ? McGohey or yourself? A. I have no knowledge of that to my present recollection.

Mr. Robb: We can't hear the witness.

A. (Continued) I have no knowledge of that request; I don't recall the request being made in my presence.

Q. By the way, were you there at all when Samuel Bayer started to testify? A. I entered the room.

Q. When I say "there", excuse me. I mean in the room when Samuel Bayer was testifying. A. During the testimony that he gave? I was there. 1275

Q. Were you there when they first started to interrogate him? A. No.

Q. That is the question. And have you examined the record to see how many questions were asked and how many answers given before you got there? A. Yes.

Q. Could you approximate the number of questions and answers? A. Well, I would not approximate it, but if you show me the record I will show you the point that I recall coming in.

lection is that I said that—I would like to go back for a moment on your first statement——

Q. Before you do that, Mr. Flynn, and I am sure I want to give you all the fair opportunity to explain— A. Thank you.

Q. —but do you recognize it to be a fact that you did make a distinction in quoting what Sam Bayer said that Radovich told him and what Elias Bayer said about that very critical point of what Radovich said was going to happen to these boys? A. I don't recognize that I made the distinction.

Q. Now, if you did make a distinction in what you recall they said back in February, I believe it was, of this year, 1280
1945, you did not intend to make any distinction; is that correct? A. No, I don't think I consciously made a distinction there.

Q. So that if the record will show that you quote Samuel Bayer as having told a somewhat different story of what Radovich said when he first notified them that something was going to happen by way of transfer of the boys, that would have been a pure inadvertence on your part, wouldn't it? A. Well, it would have been substantial testimony of what I heard, to use your own words, in substance.

Q. No. But there would be a difference, wouldn't there, between telling Samuel Bayer that his boy was going to be transferred to another outfit and telling Samuel Bayer that his boy was going to be transferred forthwith or going to be transferred overseas; that would be different, wouldn't 1281
it? A. Well, I am not sure I understand your question. It depends upon the point of view I think that——

Q. I want to make my question very clear. A. The way I look at it——

Q. I am saying to you that there is a difference in your story, in your recitation of what Samuel Bayer and what Elias Bayer said, and I am calling your attention to the fact that you are a lawyer and you have worked with the

United States Attorney for a long time on this case, and that you undoubtedly are familiar with the indictment, and that the indictment charges that this was an effort to keep these boys from going overseas. Now, in view of that, I am asking you if you would concede it to be a substantial difference in the recitation whether Radovich used the words "transferred—period—out of my outfit" or "transferred overseas"? Wouldn't that make a very substantial difference, in your opinion?

Mr. McGohey: Your Honor, I object to all this line of questioning now as argumentative and beyond the proper realm of cross-examination.

1283 The Court: I overrule the objection to that question, without comment on the basis of your objection.

A. My present recollection is that both Samuel and Elias Bayer in making their statement in Mr. Wallace's office stated that Captain Radovich told them that his outfit was breaking up and that the boys would have to be transferred to other outfits for overseas.

Q. Now, that is what your present recollection is of what both of them stated in your presence, back, was it, in February, 1945, or March? A. That is right.

Q. February shall we call it? A. That was in February.

Q. Now you won't deny that you did make a distinction in the recitation you gave of these so-called admissions or

1284 statements of the two Bayers when you testified on that subject matter a few moments ago in answering Mr. McGohey, will you? A. Well, I would rather say that I am not conscious that I made any distinction.

Q. It is a pretty hard thing to remember just what you say yourself 15 or 20 minutes ago, isn't it, to get the reasonable accurate position of the words as they are related? A. Well, that depends upon the position that one finds themselves in when they make statements.

Q. Well, it is a hard thing to make statements when you have people pounding questions at you frequently, isn't it?

Mr. McGohey: I object to that, your Honor.

The Court: Well, I think I will sustain the objection, and call it a day.

We will take a recess now until tomorrow morning, after cautioning you not to discuss the case with anyone while you are on the stand.

Court stands adjourned until tomorrow morning at 10.30.

(Adjourned to October 10, 1945, at 10.30 A. M.)

1286

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New York, October 10, 1945, 10:30 a. m.

Trial resumed.

GERALD J. FLYNN, resumed the stand.

*Cross-examination continued by Mr. Keenan.*

Q. Mr. Flynn, when you became associated with the Federal Bureau of Investigation, you were put through a period of training, were you not? A. Yes, sir.

Q. How to analyze evidence? A. Yes, sir.

Q. And how to present it? A. Yes, sir. 1287

Q. And of course you were instructed always to present the evidence in a fair and impartial manner? A. Yes, sir.

Q. Now have you discussed with the United States Attorney and his assistant, Mr. Wallace, or either of them, the testimony that you were to give on this stand? A. Very briefly.

Q. Well, didn't they go over the transcript of the record that they had and discuss the very part of it that ought to

be referred to in your testimony, with you? A. As a matter of fact, they did not. They asked me what I was going to testify to and I told them.

Q. Oh, you were the one that decided what you would testify to, is that it? A. I did not decide it. I told them what my recollection was, and what I intended to tell.

Q. I am not referring to that. I am not talking about your recollection at all. I am asking, in the preparation of this prosecution, realizing that you were to give testimony as to these so-called admissions or statements, if you didn't discuss with the United States Attorney or his assistant what part of the statements of these two men you
1289 would refer to on the witness stand?

Mr. McGohey: I object to that, your Honor, on the ground that the question has already been answered by the witness.

The Court: I overrule the objection. You may answer.

A. I believe I will have to answer that in the same way as I did answer it, and that is that I discussed the case with the United States Attorney and I told him what my recollection was and what I expected to testify to, and apparently it met with his approval.

Q. By the way, these statements were taken from Mr. Samuel Bayer and Mr. Elias Bayer in the absence of one
1290 another, is that correct? A. That is right.

Q. And that was by design, and not by inadvertence?

Mr. McGohey: I object to that, your Honor, as calling for the witness's conclusion.

Mr. Keenan: Is there any doubt about it, Mr. McGohey? Isn't it true?

Mr. McGohey: I object to that and ask that that be stricken out. The defendant's attorney has no right to question me here, your Honor.

Mr. Keenan: I will stand on my question.

The Court: I see nothing improper in the question. In other words, was it accidental or was it planned and designed for them to be questioned separately?

Mr. McGohey: If he knows.

The Court: If you know.

A. I can't answer that. All I know is the fact that each man made the statement alone, that is, that he was in the room, and not the other man, at the time that he made that statement.

Q. Now, how long did it take to get the statement in question and answer form from Samuel Bayer? A. You mean before the transcript was prepared or the actual statement? 1292

Q. The actual statement? A. Oh, I would estimate that it took about an hour and a half.

Q. Do you have any idea of how many pages of transcript it covered? A. Approximately seventy.

Q. And how about Elias Bayer, how long did it take for his testimony? A. I think it took much less; possibly an hour or a little bit short of an hour.

Q. Now to come back again to the first question I asked you, or the early question that I asked you this morning, I want to know if there was a discussion between you and either the United States Attorney or any of his assistants as to what part of the testimony of Elias Bayer you would refer to in your recitation on the witness stand, and what part would be omitted? A. There was a discussion as to 1293 what I would testify to, but not as to what I would omit. I don't recall any such discussion. There was none.

Q. All right. Now, did you know what the purpose was of Elias and Samuel Bayer being present in the United States Attorney's office when you were there, when you heard them answering these questions? A. Yes.

Q. You knew I was there; and you knew that I had been practicing law for a good many years? A. I did.

Q. And you knew what my position had been in the Department? A. Yes, sir.

Q. Did you talk over with the United States Attorney, his assistant Mr. Wallace, or Mr. McGohey, what this proceeding was and how it came about before you listened to this statement? A. I was told by Mr. Wallace——

Q. No. I have asked you if you talked it over, first, then we can find out what was said. A. Yes.

Q. What were you told by Mr. Wallace? A. I was told by Mr. Wallace that you were going to bring both of the Bayers into the office and that they were going to tell their part of the story.

1295 Q. Is that all he told you? A. That is all.

Q. You knew, of course, that their stories could not be brought from them without their permission, didn't you? A. Naturally.

Q. And you knew that I was not there for entertainment? A. Yes, sir.

Q. Was it not discussed with you that it was the claim of the two Bayers that this was not bribery upon their part but to the contrary it was money in a fashion extorted from them? Didn't you know that when you walked in there? A. I believe I was told that that was your contention.

Q. Now you say "I believe". Is there any doubt in your mind on that? A. No. I was told that that was your contention.

1296 Q. That is right. That was my contention. A. Yes, sir.

Q. And that was my belief. Was that statement made to you? A. I recall that it was your contention.

Q. But not that it was said to be my belief? A. I don't recall that it was said to be your belief.

Q. And you paid particular attention as to whether the word "contention" or "belief" was used? A. Well, I am giving my recollection, and if I recall that it was your contention, then I am doing my best to tell you exactly what I recall.

Q. All right. Now, after the statement was given, of course that was last February, and your appearance on the witness stand, you have discussed this matter with Mr. Wallace a great deal, haven't you? A. Not following my appearance on the witness stand. I had discussed it following the time that the statement was given.

Q. That is right. Well, that is what I intended to say and I think I did say. And after February, when you listened to this statement, and up to the time of your appearing on the witness stand, you discussed it many, many times with Mr. Wallace—haven't you? A. Yes.

Q. You were present in court during the time of the proceedings when other indictments were brought up? A. I 1298
was present on some of the occasions.

Q. And just when the matter came up as to whether the case was to be set for hearing or not, you were there, weren't you? A. Yes.

Q. And Mr. Brown was with you there most of the time, wasn't he? A. No, I don't believe Mr. Brown was there.

Q. But you were there? A. I was there.

Q. And you are really in charge of this case, the investigative features, for the Federal Bureau of Investigation, aren't tyou? A. The case is assigned to me.

Q. Well, that is a term. I mean you have the supervision over the investigation here, haven't you? A. No, my work is supervised by an agent who is specially assigned to supervise it.

Q. By the way, you were present also during the court- 1299
martial proceedings, were you not? A. No, sir.

Q. You were not? A. No, sir.

Q. You weren't there at all? A. I was there before the court-martial started and was excluded.

Q. But you were out there? A. Oh, I was on the ground, yes, sir.

Q. And that is out at Mitchel Field? A. Yes, sir.

Q. You were there? A. Yes, sir.

Q. That is what I meant to ask you. And you were excluded from the court-martial, were you? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. By order of the court? A. On motion of defense counsel.

Q. What defense counsel? A. General Ansell.

Q. For defendant Radovich? A. Yes, sir.

Q. You knew, did you not, that one of the pertinent points in the case would be the question of the uniforms, and whether a request was made by the officers to the Bayers to get the uniform at a discount or otherwise, or whether there was an offer on the part of the Bayers to
1301 the officers to get these uniforms for them. You knew that, didn't you? A. I am not quite sure I understand your question.

Q. Well, I will make it very clear, or try to. If there is an issue in this case as to whether it was in the nature of extortion, or in the nature of corrupting officers or influencing their judgment, you as a trained lawyer with your criminal experience—I mean experience with criminals—would know that there would be a difference in this case with reference to the subject matter of these uniforms, as to whether or not——

Mr. McGohey: I am sorry if I interrupted you, Mr. Keenan.

1302 Q. —as to whether or not the officers asked the Bayers to get them uniforms at a discount, or whether the Bayers suggested in the first instance that they could get uniforms for the officers at a discount?

Mr. McGohey: I object to that, your Honor. I object to the form of the question, and I object to it as being argumentative.

The Court: That is a somewhat involved question, but the witness may answer it if he understands it.

A. Well, as I understand it, that calls for my opinion, and my opinion is that there probably would be a difference.

Q. Yes, and I have this purpose: you knew that at the time that you prepared yourself for this testimony, didn't you? A. Yes.

Q. And you did study this record before you testified in this case, didn't you? A. Yes.

Q. And how many hours would you say that you have put in studying this before you got on the witness stand cumulatively? A. Well, in the past several months I would say that I had read the record twice.

Q. Well, how many times all told have you read the record? A. That would cover approximately an hour or an hour and a half. 1304

Q. Well, how many times have you read the record all told? A. Twice.

Q. Just twice? A. Just the twice.

Q. Have you read some parts of it more than other parts and studied it for months in your mind?

Mr. McGohey: I object to that, your Honor.

A. No.

The Court: I will allow him to answer. He has already answered "No".

The Witness: No.

1305

Q. Now I am going to ask you this question, referring to the testimony of Elias Bayer, the substance of his testimony as you recall it; where did the first suggestion come from about uniforms? Did it come from the officers to Elias Bayer, or did it come from Elias Bayer to the officers? A. It came from the officers to Elias Bayer, according to my recollection of Elias Bayer's statement.

Q. Now, when you were examined on the witness stand by Mr. McGohey—

1306 *Gerald J. Flynn—For Government—Cross.*

Mr. McGohey: Page, please?

Mr. Keenan: Page 9fn.

Q. You were asked the question:

"Q. Will you proceed to tell us what Elias Bayer said on that occasion?" Perhaps I had better read the preceding question and answer, so that you will quite thoroughly understand it. Well, it has reference to page 7fn:

"Q. Now, Agent,"—you are now being inquired of by Mr. McGohey. The last question on page 7:

"Q. Now, Agent, on that same day were you present in Mr. Wallace's room when Elias Bayer was present and
1307 made some statements? A. Yes, sir."

Mr. Keenan: Now, on the next page 9fn, and before that, there is colloquy between counsel, you were asked this question:

"Q. Will you proceed to tell us what Elias Bayer said on that occasion?" Now, when that question was asked of you, you knew that it was a very important question in this lawsuit to be answered, didn't you? A. I knew that I was expected to give Elias Bayer's statement on that occasion to the best of my recollection.

Mr. Keenan: Now read the question to the witness again, please, and please answer the question that I
1308 have asked you, and not the one that you would like.

Mr. McGohey: I move to strike that out, if your Honor please.

Mr. Keenan: Repeat the question, please.

The Court: The jury will please disregard that comment, and counsel will not pursue that line.

Mr. Keenan: Please read the question to the witness again, Mr. Stenographer.

(Question and answer read.)

Q. Now will you please answer the question I asked you? A. Yes, I knew that that was an important statement.

Q. And your answer was as recorded by the reporter in this case: "A. Elias Bayer stated that in the early part of 1943 he was at the Copacabana night club with a friend of his, whom I believe was Martin Goldstein, and that while there he met Colonel Vidal and Roeser. I believe Roeser was a Lieutenant at that time, and they were at the bar. They indulged in some conversation and finally inquired into each other's background, and he told these two officers that he was in the thread business.

"Further conversation led to the fact that they sold thread to people who were making uniforms, and that 1310
Elias Bayer could probably get uniforms at a wholesale price for these officers."

Now you did not disclose in your answer where the initiative came from with reference to the question of getting uniforms, did you, in this answer? A. No. I can see that I did not.

Q. But clearly the answer given to the question by Elias Bayer was that he was asked by one of the two officers what his business was, isn't that true? A. That is true, and I might add further——

Q. That is all I have asked you for the moment.

The Court: He may complete his answer.

Mr. Keenan: I object to that. Just a moment, your Honor. I object to this witness volunteering a state- 1311
ment that is not called for by the question.

The Court: That objection is overruled. He may proceed.

Mr. Keenan: Exception.

The Court: He may explain or add to his answer.

The Witness: I may add that when I made that statement it was made according to my recollection, giving the pertinent facts of the statement made by

Elias Bayer, and the mere question as to who initiated that conversation at the time didn't appear to be important in the general summary of my recollection of the statement made by Elias Bayer.

Q. So, was that your own conclusion of what was important, or was that the conclusion that you arrived at after conference with Mr. Wallace and Mr. McGohey? A. No, that was my conclusion in giving the gist of the conversation which took place there. I was interested at the time in the pertinent portions of his statement.

Q. Yes. A. Which had to do with the fact that the money was paid and that the boys were transferred from an 1313 activated unit over to an unalerted unit, in order to keep them from going overseas.

Mr. Keenan: Now, if your Honor please, I ask that be stricken out, and I ask that this agent be instructed to no longer pursue those tactics on the witness stand. That is unfair.

The Court: I will sustain the objection and instruct the jury not to regard it, and the witness will please answer the question that was asked. All right, go ahead.

Q. Well, Agent Flynn, was it your purpose in getting on the witness stand to tell the jury from the statements of 1314 Elias Bayer what you thought was pertinent in the case, or what Elias Bayer himself said in answer to the questions of Mr. Wallace? A. My purpose in getting on the stand was to give my recollection of the answers Elias Bayer made in answer to questions of Mr. Wallace.

Q. Well, you have just stated a moment ago that you attempted to in substance confine yourself to what you thought were the pertinent parts of the statement of Elias Bayer. Didn't you say that to us a few moments ago? A.

I do not believe I said that. I believe that I said that I was more concerned with what I considered the pertinent portions. I was not attempting to recall verbatim everything that was said in the conversation.

Q. Well, while we are on that point, didn't you think it was important what Elias Bayer said about the first time the subject matter of money came up from Radovich to Samuel Bayer, and wouldn't you say that that was one of the most pertinent and important things in this lawsuit in your judgment? A. Yes, I concede that is important.

Q. Well, did you give the whole story about that in substance? A. To the best of my recollection.

Q. Do you remember Elias Bayer in answering Mr. Wallace's questions, stating that as soon as the first conversation between Captain Radovich and Samuel Bayer took place, when there was a conversation about $500 to pay the expenses of Mrs. Radovich going to California, do you remember Elias Bayer stating before you in answer to one of Mr. Wallace's questions, that immediately after Radovich walked out, Samuel Bayer had a conversation with Elias immediately afterwards? Do you remember that? A. I recall that—— 1316

Q. Well, will you answer the question yes or no? Do you recall it? A. I have to answer it no, if you insist on that.

Q. Then you don't recall Elias Bayer telling Mr. Wallace in the office of this interview about which you are called to testify about what you heard, that as soon as Radovich went out of the room he was talking to Samuel Bayer alone, that immediately afterwards Samuel Bayer said to Elias, "I don't know whether this is a holdup or a loan"? Do you remember that? A. I recall it, but not whether it was immediately. That was my distinction before. I was not attempting to run away from your question. 1317

Q. When do you think it was? A. I think it was shortly after Radovich left.

Q. You draw the refinements between shortly after and immediately. What is your distinction on that? Do you want to estimate it in the yardstick of minutes or seconds or hours? A. Well, I am not—I don't think it is necessary to estimate it. I was just trying to answer your question as you put it to the best of my ability.

Q. Well, was it right? A. I was not trying to quibble.

Q. Right after Radovich left, wasn't that the statement, that it was right after Radovich left? A. Some time after he left, just how immediately it was I do not recall.

Q. Well, it was the statement that Elias made that Samuel said to him, "I don't know whether it is a holdup
1319 or a loan." Do you remember that? A. Yes, I remember that statement.

Q. But you didn't tell the Court and jury anything about that, did you? A. I don't believe that I mentioned that.

Q. Did you leave that out purposely, or did you forget to tell them about it? A. I didn't leave it out purposely.

Q. You forgot to tell the jury about that, is that it? A. Yes.

Q. Well, don't you now think that it is an important matter?

Mr. McGohey: Your Honor, I object to the question of what the witness thinks is or isn't important. I think it speaks for itself.

Mr. Keenan: I think, if your Honor please——

1320 The Court: Overrule the objection.

Q. Don't you now think it is important? A. Well, I think the entire statement is important in that, too. I am not trying to run away with the question, but I think it is important.

Q. You were good enough to say that you wouldn't want to quibble. I am just asking, didn't you think it was important, don't you think it is important? A. Yes.

Q. Don't you wish now that you had told the Court and jury about that? A. Yes. I would like to be able to give a verbatim recital of what took place, but it is beyond my ability.

Q. Oh. But there was a stenographer there present, and they took it down in shorthand? A. Right.

Q. And were they capable stenographers, do you know? A. I consider them capable.

Q. Do you know them? A. I don't know them personally, no.

Q. Did you ever look over any of their work before? A. I may have.

Q. By the way, when these reports were transcribed by these six young ladies, they weren't court reporters, were they? A. It is my understanding that they are the stenographers attached to the United States Attorney's office and not court reporters. 1322

Q. That is right. And when they brought back their statements, did you know whether there were any corrections made or not? A. By the stenographers or by myself in reviewing the statements?

Q. By any of them. A. I know when I reviewed one statement I corrected the spelling of several names, that is about all.

Q. Just the spelling of names? A. Yes, sir.

Q. But outside of that, the little girl, as far as you knew, got everything just right, according to your recollection? A. I found nothing in reviewing the statement which clashed with my recollection. 1323

Q. Do you know if anybody else did? A. No, I don't. I didn't discuss that with anyone else.

Q. You don't know whether any changes were made or not, do you, other than spelling? A. Well, let me go a bit further on that. I don't know that any changes in spelling were made on any other copies. I made them on the copy that I was reading at the time, and I made them with my pen.

Q. Were there many of them or just a few? A. Oh, I would say they were a few.

Q. Now, Mr. Flynn, would you draw a distinction between Captain Radovich telling Samuel Bayer that he needed $500 to send his wife to California, or send his wife home, and asking for the $500? I am drawing the distinction now of the word "needed", that Captain Radovich said he needed $500, or Captain Radovich asking for the $500; would you draw any distinction between those two situations? A. As I understand it, it is asking for it to send his wife back or needing it to send his wife back.

Q. Yes. A. I would draw no distinction there.

1325 Q. You wouldn't. Not in the case where a charge is being made, in substance, to corruptly influence the judgment of an officer by paying him money; you wouldn't think it would make any difference whether Captain Radovich initiated the conversation by saying "I need $500 to send my wife to California," or Captain Radovich asking for $500; you wouldn't draw any distinction between them?

Mr. McGohey: I object to that as argumentative, your Honor, and it has already been answered.

Mr. Keenan: It is preliminary, your Honor.

The Court: I will permit him to answer.

A. Well, as I interpret that, I would draw no distinction because of the fact that he wanted $500. Now, it was an

1326 attempt to get $500.

Q. Do you happen to know that you said in answer to Mr. McGohey, quoting or summarizing or testifying with reference to what Elias Bayer said as to what he heard, "They heard Captain Radovich tell Samuel Bayer that he needed $500 to send his wife to California." Do you know that is what you stated here in the courtroom? A. In substance, yes. I mean—I don't know that I used the exact words; I don't remember the exact word.

Mr. McGohey: May I have that page, please?

Mr. Keenan: Yes, the page is 11fn.

Q. Now, when you gave your recitation of the story, the statement that Elias Bayer made in the presence of these United States Attorneys and myself and others, Mr. Wallace, when you described Elias Bayer's statement on what happened the first time that Radovich mentioned the matter of money to Samuel Bayer, you described it all in a little less than six lines of testimony, didn't you (showing transcript)? A. About six and a half lines there, as I see it. No, six lines.

1328

Mr. Robb: If the Court please, we can't hear him.

The Court: Speak out.

A. (Continuing) That is right.

Mr. Keenan: He said "six and a half", then "That is right, six lines."

Q. Less than six lines, isn't it, a little bit? A. (No answer.)

Q. And no place in that statement do you tell this Court and jury that Elias Bayer told you that he heard Captain Radovich ask for $500 (showing transcript)? A. That is right.

1329

Q. Do you recall Elias Bayer stating to you, before you at this conference, and I am always referring to this conference before Mr. Wallace, I won't keep repeating it, that he listened to the conversation outside the door, Elias did, the conversation between Radovich, Captain Radovich and Mr. Bayer, because it seemed peculiar to Elias that he was being asked to step out, that Radovich said he wanted to talk to Sam alone; do you remember that? A. Yes, I recall that.

Q. You didn't tell about that, did you? A. No.

Q. Then do you recall that Samuel—that Elias said, "I thought it was peculiar. He was a man I introduced to my brother and here he was having secrets from him." A. I recall that statement.

Q. "The door opened against the wall and we stood against the other side." Do you remember him saying that? A. I remember that.

Q. And do you remember him saying, "I heard him ask my brother for $500"? Do you recall that? A. Well, not in those specific words, but I recall the fact that he did say at the conference that Radovich had, as I recall, told Samuel Bayer that he needed $500 to send his wife
1331 back to Los Angeles. Now, when I selected the word "needed" at the time, I did not mean to place any particular emphasis on the word "needed".

Q. What is your recollection now as to— A. My recollection——

Q. Just a moment, please. What is your recollection now as to what Elias Bayer said he heard Captain Radovich state to Samuel? A. My recollection is still the same.

Q. Whether it was "needed" or whether he asked for it? A. Prior to the time you read that statement to me my recollection would be still the same, and that is, that he needed the $500.

Q. If the word used was "asked" would you say that that record would be wrong? Would that record be that, still, when emphasis is placed upon it, that the statement was
1332 that Radovich said he needed, rather than Radovich outright asking for it? A. Would I say that the record is wrong if the record includes "asked"?

Q. Yes. A. No, I wouldn't say the record was wrong.

Q. Do you remember Elias Bayer continuing and saying, "My brother hesitated awhile and told him he didn't have the money but he would try to get it." A. Was this the occasion of the first request by Radovich for $500?

Q. The first asking for it; yes; request? A. Yes, I recall that.

Q. Did he say that? A. Yes.

Q. And did you tell the Court and jury that? A. I don't recall telling that in my statement yesterday.

Q. Did you leave that out inadvertently or because you didn't think it was pertinent? A. I left that out inadvertently.

Q. We all leave things out now and then when testifying. Now, "he started to walk out and as he did we walked in and my brother says to me, 'I don't know whether this is a loan or a holdup.'" Do you remember hearing that? A. Yes.

Q. And do you remember, now does it refresh your recollection, that it was so close to the incident as it is described, 1334
"he started to walk out, and as he did we walked in"? Now does that refresh your recollection that it was immediately afterwards? A. It was close to the incident. I still don't know—don't say that it was immediately.

Q. You couldn't have it much closer than when Radovich walked out Elias walked in, could you? A. I agree with you that you couldn't have them passing each other much closer.

Q. That is getting down to pretty fine measurements, isn't it? A. But I don't know how long Elias was in the room before Samuel Bayer said that to him.

Q. Well, anyway, did you hear the statement made, "The door"—withdraw that—"The door opened up against the wall and we stood on the other side and I heard him ask my brother for $500. He said he needed it because I believe 1335
his wife was going to California. My brother hesitated awhile and told him he didn't have the money but would try to get it. He started to walk out, and as he did we walked in." Wouldn't that indicate that these people got in there even before Captain Radovich left the room where he was talking to Sam? Wouldn't it? A. Well, it would indicate to me that they got in there at approximately the time Radovich was leaving the room. It wouldn't indicate

to me that they got into the room before he actually left the room.

Q. We won't try to measure the space. A. Because I know the office and it is a small office.

Q. "And as he did"—that means Radovich, doesn't it—"he started to walk out, and as he did, we walked in, and my brother said to me, 'I don't know whether this is a loan or a holdup.'" Did Elias Bayer say that to you in his statement when he was reciting this conversation? A. Yes, sir.

Q. Now, did you leave that out inadvertently or because you thought it was not pertinent to tell this Court and jury in this case? A. I left that out inadvertently.

1337

Q. Wasn't that a rather important thing, when a claim is made of extortion, that Samuel Bayer used the words "hold-up" to an F.B.I. man? A. Samuel Bayer didn't use that word to me, if I understand you correctly.

Q. Oh, no, we are not talking about that. We are talking about Samuel Bayer using that statement to Elias, and we are talking about your recitation of what Elias said. That is what we are talking about.

Does the F.B.I. have to do with the suppression of kidnaping and extortion in the United States of America? A. Yes, sir.

Q. Do you happen to know that that was my work for many years in Washington?

1338

Mr. McGohey: I object to that, your Honor.

The Court: I sustain the objection.

Mr. Keenan: I think it is pertinent.

The Court: I don't, and I sustain the objection.

Q. Now, Mr. Flynn, anyway, to an F.B.I. man, the subject matter of extortion is of extreme importance, isn't it?

Mr. McGohey: I object to that, your Honor.

The Court: I sustain the objection. It is getting away from the subject and is not proper cross-examination.

Mr. Keenan: I note an exception to the Court's ruling and remarks.

The Court: Very well. You may have your exception to both.

Q. Mr. Flynn, didn't Mr. Bayer in his statement tell of the numerous times that Radovich had come to the office, that Captain Radovich had come to the office? A. Which Mr. Bayer?

Q. Elias Bayer. A. Elias Bayer? I believe that he did state that Radovich came to the office on numerous occasions. 1340

Q. You didn't say anything about that to the Court and jury in your recitation, did you? A. No, sir.

Q. And with reference to the uniforms, do you recall that Samuel Bayer—that Elias Bayer stated that Lieutenant Roeser spoke to him about getting a uniform at cost for Colonel Jacobson? A. Yes. My recollection is that Lieutenant Roeser introduced Colonel Jacobson to Elias Bayer and told him that Jacobson also wanted to get a uniform. I don't recall the words "at cost" there.

Q. Well, do you recall any other statement that Elias made as to what Roeser told him about uniforms, or why he wanted to try to help get a uniform for Colonel Jacobson? A. Not without reading the transcript. 1341

Q. Well, do you remember he said that "Lieutenant Roeser brought in Lieut. Col. Jacobson, he introduced me to him, and he also told me that Col. Jacobson would like to get some uniforms; also, it was very hard to get them at the PX at Mitchel Field." Do you remember that? A. Yes, I remember the statement that it was difficult to get them at the PX.

1342 *Gerald J. Flynn—For Government—Cross.*

Q. Do you remember that many questions were asked, then—Elias Bayer—as to whether or not he had met Schnozzel Durante and some of the night club leaders, and had introduced them to the officers? A. I recall that he was asked if he knew Jimmy Durante.

Q. Jimmy Durante. I think he calls himself Schnozzel in the pictures; is that right? A. I believe he does call himself that.

Q. And the questions were asked about Elias introducing these officers to top flight entertainers. Do you remember that? A. Yes.

Q. And the answers were in the negative, weren't they, that he had never seen them, except as you and I or anyone else might go in there and sit down at a table and see them entertain? Isn't that the answer that he gave? A. If I recall correctly, Elias Bayer said that he didn't know any of these top flight entertainers, and then he said that he didn't know Jimmy Durante, but that he spoke to him once.

1343

Q. Well, wasn't an effort being made by asking this question, to show you that this was elaborate entertainment of these officers and that——

Mr. McGohey: I object.

Mr. Keenan: Just a moment.

Q. (Continuing) And that they were being introduced to the top flight entertainers of the country, like Mr. Durante?

1344

Mr. McGohey: I object to that, your Honor.

The Court: Objection sustained.

Q. Wasn't that part of the release that was given from the office of the United States Attorney to the press?

Mr. McGohey: I object to that, your Honor. There is no proof of anything here about a release.

The Court: I sustain the objection.

Mr. McGohey: And I ask your Honor to direct the jury to disregard that remark of counsel.

The Court: I will so direct the ladies and gentlemen of the jury to disregard any inference which you may otherwise draw from the question.

Q. Do you remember the question there being asked by Mr. Wallace, "Did you ever introduce anybody to Durante?" Do you remember that question being asked? A. I remember the fact that he was asked if he had ever introduced anyone to any of these entertainers. It was in connection with that question that Durante's name came up. Now that is my recollection. 1346

Q. You have used a lot of words. I will ask you if the question was asked in your presence by Mr. Wallace, "Did you ever introduce anybody to Durante?" and the answer, "No, sir. During one of the visits to the office Colonel Jacobson asked me where my nephew was stationed." A. Substantially, yes.

Q. Now do you recall that Elias Bayer said in his statement that Colonel Jacobson brought up the subject matter of these boys, Usdan and Martin Bayer? A. I don't recall it just that way. I will be glad to give you my recollection.

Q. All right. What is your recollection? A. My recollection——

Q. As to who brought the subject matter up first, whether it was the Bayers who brought it up with Colonel Jacobson or whether it was Colonel Jacobson who brought it up, according to the testimony of Elias Bayer? A. My recollection is that there was a general conversation taking place concerning the two boys and that Jacobson asked where they were. 1347

Q. Now are you talking about Colonel Jacobson's statement or are you talking about Elias Bayer's statement to

you, to Mr. Wallace and Mr. McGohey? A. I am talking about Elias Bayer's statement made in the office of Mr. Wallace.

Q. Well, now, I will ask you if these were not the questions and answers with reference to the meeting with Colonel Jacobson and with reference to these boys, Melvin Usdan and Sergeant Martin Bayer:

"Q. Where was your apartment? A. I shared an apartment with two friends of mine, 120 Central Park South. A short time thereafter Lieutenant Roeser brought in Lieut. Col. Jacobson. He introduced me
1349 to him, and he also told me that Colonel Jacobson would like to get some uniforms, and also"—I will not repeat that part of the answer, I have read it before.

"Q. Where would you take them? A. Hickory House or a night club.

"Q. What night club? A. Martinique or Cocacabana.

"Q. Did you ever introduce them to any of the entertainers? A. No, sir, I did not."

And, by the way, Mr. Wallace here asked him these questions, didn't he? I didn't ask any questions, did I, of Elias Bayer? A. I don't recall that you—you asked some questions toward the end. Which one you asked I don't recall.
1350 Q. You don't know which one I asked questions of? A. I think that you—I know that there was a space there that you asked one or two questions. Now, just which one——

Q. Just which one it was you don't recall? A. I don't recall.

Q. I asked one or two questions. We won't quarrel about three or four. A. No, sir.

Q. To proceed, and I am reading this for the continuity— A. Yes, sir.

"Q. Did you ever meet Jimmy Durante?"—we did cover that. "Did you ever introduce anybody to Durante? A. No, sir. During one of the visits to the office, Col. Jacobson asked me where my nephew was stationed"—I will ask you if it is not your recollection that that was the first conversation as related by Elias, between Jacobson and Elias, as to these boys, Melvin Usdan and Sergeant Martin Bayer? A. Yes. Jacobson asked him where the boys were stationed.

Q. And you remember that the question was then asked by Mr. Wallace, "Before you met Radovich? A. Yes, sir. I told him they were clerks in Mitchel Field. He said, 'I can use clerks in my outfit.' He said, 'I am going to have him transferred to my outfit.'"

1352

Do you remember that question and answer? A. Substantially, yes.

Q. You didn't tell anything about that in your statement, did you? A. Well, I believe I did.

Q. What? A. I believe that I did. Not as completely, but I believe that I did.

Mr. McGohey: Page 10fn, next to the last paragraph, Mr. Keenan.

Mr. Keenan: All right. I certainly can make mistakes.

Q. Oh, on page 10fn—it is pointed out to me——

Mr. Keenan: And thank you, Mr. McGohey. 1353

Mr. McGohey: You are quite welcome.

Q. (Continuing) That in your story you stated—now about Elias Bayer—"He stated that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field and they were clerks, and that Jacobson told him that he needed clerks and that he intended to have these boys transferred to his outfit." That is what you

said. But you didn't state that Colonel Jacobson asked him about the boys, did you? You left that out, didn't you? A. I concede that I didn't say that.

Q. Now was that inadvertence or was that because you didn't think it was pertinent? A. That would be inadvertence.

Q. You should have stated it? A. I don't believe that I should have.

Q. Was it inadvertently left out or deliberately left out?

Mr. McGohey: I submit that question has been answered. He stated that it was inadvertent.

The Court: I will let him answer that question.

1355

A. I say that anything that I left out, including this statement, would be inadvertence, and I don't consider that even at this moment that I should have put that statement in there. I think that I gave a substantial recollection of what occurred there.

Q. That is, you don't think it is important in the subject matter of the transfer of these boys or what happened to them, whether the boys were mentioned first by the officers or whether the boys were first mentioned to the officers by the Bayers? A. Well, yes, that would be important.

Q. Well, that is what I am driving at. A. But I already have said that Jacobson, according to my recollection, asked Elias Bayer where these boys were.

1356 Q. Mr. Flynn, will you bear with me for a moment? A. Certainly.

Q. I will read your testimony. Elias: "he said that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field and that they were clerks." Now, do you think that tells the jury that it was Jacobson that first brought up the subject matter of the boys, or don't you think it rather leads at least to the inference that Elias Bayer took the matter up with Jacobson about the

two boys being out there in the first instance? A. I think when the——

Q. I am asking for your interpretation on this subject. A. As isolated by you there I think that it might lean to the interpretation you put on it.

Q. I am not an isolationist; but I want you to read this and tell me what I have isolated there (handing transcript)? A. Well, as I read this statement, I said he stated that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field and that they were clerks, and that Jacobson told him that he needed clerks and that he intended to have these boys transferred to his outfit. Now, that is my recollection of it. 1358

Q. Well, did I isolate any portion there, or didn't I read that whole answer to this jury?

The Court: Oh, I think you——

Mr. Keenan: Perhaps I am getting a little touchy too.

Q. Mr. Flynn, the fact is that when you recited Elias Bayer's statement in this case, when it came to the vital matter as to these boys and what was said about them, the fact is that Elias Bayer said that it was Jacobson that first asked about these boys, where they were, but when you testified you described that answer as Elias Bayer stating that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field. 1359

Mr. McGohey: I submit, your Honor, that has been answered at least three times.

The Court: I sustain the objection, as being argumentative and repetitious.

Q. You left out in your statement that Roeser brought up the question of the uniform with reference to Jacobson;

you didn't refer to that in any way, did you? A. Possibly not as such. It is my recollection that I said that Roeser introduced Jacobson and stated that Jacobson wanted to get a uniform.

Q. It only took a few lines in that; will you look it over and tell us where you said that (handing transcript)?

Mr. McGohey: What page is he looking at?

Q. What is the page you are looking at?

Mr. Keenan: This is 11fn.

1361 A. No, on 10fn.

Q. Read it, please. A. I stated that the next officer he met was Colonel Jacobson, and also with Samuel Bayer's approval he took Jacobson into the I. Buss Uniform Company and introduced him and Jacobson was fitted for a uniform.

Q. All right. Is that your statement? A. No, I apparently left out the fact that Elias Bayer stated that—my recollection now is that he was—that he was introduced to Jacobson by Lieutenant Roeser. Is that your question?

Q. It goes a little beyond that, and I don't want to be tedious about it, but I think it is very important. You left out the fact that Roeser asked the Bayers if they couldn't get a uniform for Colonel Jacobson, didn't you?

1362 You left that out entirely.

Mr. McGohey: If your Honor please, I object to the form of the question—"you left out the fact that."

Q. You left out—I beg your pardon—you left out of the statement that part of Elias Bayer's statement where he said that Lieutenant Roeser was the one who asked him if he couldn't take Colonel Jacobson up and have him

measured or fitted for a uniform; you left that out, didn't you? A. I didn't say that.

Q. Are you drawing a distinction now between "leaving things out" and "not saying it"?

Mr. McGohey: I object to that.

Q. Then I will ask the question——

Mr. Keenan: I withdraw the question to keep the record straight.

Q. Did you fail to state that inadvertently or because it was unimportant? A. I failed to state it at the moment 1364
because at the moment my recollection was what I did state there.

Q. There was nothing wrong with your recollection about what you did say, if I may be permitted to say it, Mr. Flynn, because——

Mr. McGohey: I move to strike that out, your Honor. That is not a question. It is argument.

Mr. Keenan: I am trying to be fair with the witness.

The Court: I do not think those comments about his recollection are entirely necessary to the question.

Mr. Keenan: I did not hear you, your Honor.

The Court: Those comments are not necessary.

1365

Mr. Keenan: I think your Honor may not have understood me. I did not mean to comment about his recollection. I am attempting to state and to direct his attention not to the fact that he did tell the jury that Elias Bayer brought Lieutenant-Colonel Jacobson over to the Buss Uniform tailor shop, but that he left out, omitted, failed to state in his recollection of Elias Bayer's statement that he did so because Lieutenant Roeser asked him to.

Q. That is what I am commenting on. You left that out, didn't you? A. I left that part out because Lieutenant Roeser asked him——

Q. That is right. A. Asked him if he could get Jacobson his uniform?

Q. Yes. A. Yes.

Q. Now, did you leave that out inadvertently or deliberately? A. Purely inadvertently.

Q. And there is no doubt in your mind now that that is what Elias Bayer did say, that Roeser asked him to bring Colonel Jacobson over to get a uniform, to get measured for a uniform? A. Well, without refreshing my recollection by the transcript, my recollection is that Roeser introduced Jacobson to Elias Bayer and told him that Jacobson also wanted to get a uniform.

1367

Q. Now, coming to the subject matter of the conference or the talk, I am addressing myself now entirely to what you heard Elias Bayer say in answer to Mr. Wallace's question. What do you recall Elias saying as repeating the statement made by Captain Radovich when he came to tell Samuel about the boys being transferred in the first instance. Do you understand my question? A. No, I don't.

Q. Well, you recited the story about Captain Radovich coming in and seeing Samuel Bayer. This is the recitation of Elias Bayer that I have reference to now. A. Yes, sir.

1368

Q. That first he told him something about the boys being transferred in the first instance. You recall that? A. Yes.

Q. And do you know what discussion I have reference to? A. This is on the occasion that Radovich first asked Samuel Bayer for the $500?

Q. That is right, when he first asked him for the $500. Now, Elias Bayer told you that he was right in the room

with Radovich at the first part of the conversation? A. That is my understanding, yes, sir.

Q. That is before they got to the subject matter of money, right? A. That is right.

Q. Now, what was it that you recall Elias told you that Captain Radovich said in his presence about the boys and their transfer? A. I recall that Elias Bayer stated that Radovich told him that his company was breaking up, and that he would have to transfer the boys out to an outfit in Massachusetts.

Q. Now, you didn't tell that to the jury yesterday, did you? A. I told the jury my recollection at that time. I thought I mentioned that fact. 1370

Q. Have you looked at the transcript of the statements taken last February since you were on the witness stand last night, or yesterday? A. No, I have not.

Q. Did you discuss your testimony with anyone? A. No, I haven't.

Q. Now I will ask you if yesterday you didn't say this with reference to Elias's statement, on page 11fn:

"He also stated that during the summer of 1943 he was in Sam Bayer's office when Captain Radovich came in and told him that the boys would have to be transferred to another outfit for overseas duty inasmuch as Captain Radovich's outfit was breaking up."

Now you used the words, or you used the expression that Elias Bayer said that Radovich said the boys would have to be transferred for overseas duty yesterday, didn't you? 1371 I am asking you now what you said yesterday. A. I believe that I did, yes. May I see that?

Q. Yes. I am sorry, it is right there (handing). A. Yes, I used that outfit—pardon me—that phrase, "for overseas duty," yesterday.

Q. Are you now making a change in your statement of what you believe your recollection to be of what Elias Bayer said that Radovich stated in his presence? A. Yes,

I think it would. I am not absolutely certain about that overseas phrase there.

Q. Well, now, the matter of transferring these boys overseas is a vitally important thing in this prosecution, is it not? A. I agree with you, yes, it is important.

Q. Is there anything more important in it—or I will withdraw that; isn't it one of the most important points in the whole prosecution?

Mr. McGohey: I object to that, your Honor. I think it has been answered.

The Court: I will sustain the objection. That is a
1373 matter for argument.

Mr. Keenan: Is there any doubt about it, your Honor?

Mr. McGohey: I move to strike that out, too, your Honor, that comment.

The Court: I did not hear it.

Mr. Keenan: I beg your pardon?

Mr. McGohey: I think the jury did, your Honor.

The Court: I can't strike it out unless I know what it was.

Mr. Keenan: I will withdraw the remark and ask the Court to direct the jury to disregard it.

The Court: I will ask the jury not to regard it.

Q. In any event, have you changed your recollection
1374 from yesterday to today as to what Elias Bayer told you on the subject matter of whether Radovich told his brother that the boys were going to be shipped overseas in the conversation where he asked for the $500?

Mr. McGohey: I object to that question, your Honor. I object to the form of the question, has he changed his recollection?

The Court: I will overrule the objection. He may answer it.

A. Well, my present recollection is that he stated that the boys were to be shipped to an outfit in Massachusetts. I am not prepared to say my recollection is that he used the words "overseas duty" at the time he made the statement.

Mr. Keenan: Thank you, Mr. Flynn.

The Court: The Court will take a ten-minute recess.

(Short recess.)

1376

Q. Do you remember testifying about Elias, during this statement to Mr. Wallace and Mr. McGohey, and referring to a Colonel Jones? A. Yes.

Q. What is your recollection as to what Elias said he asked Colonel Jones to do? A. My recollection is that Elias Bayer said that he asked Colonel Jones if the boys could be transferred and kept at the field, and that Colonel Jones told him that he would try, but that he never did anything.

Mr. Keenan: Would you be good enough to read that answer to me, please, Mr. Stenographer?

(Answer read.)

1377

Q. I will ask you to look at page 13fn of the record and see if that is what you said (handing)? A. It isn't exactly what I said.

Q. What you said yesterday was that he asked Colonel Jones if he could get the men transferred? A. That is right.

Q. Now, today, you say your recollection is that he asked Colonel Jones if he could get the men transferred and kept on the field? A. That is right.

Q. You are adding "and kept on the field" now? A. That is my present recollection.

Q. Is it different than your recollection was yesterday? A. Not substantially.

Q. Well, where were the boys at this time, according to Elias Bayer? A. I believe the boys were at Westover and Bradley Fields.

Q. All right. Now, Westover and Bradley Fields were airborne engineer units? They were in the airborne engineers, weren't they? A. That is my understanding.

Q. I mean Melvin Usdan and Sergeant Bayer? A. That is my understanding.

1379 Q. And there would be a difference in asking Colonel Jones to transfer them out—transfer them from Westover Filed and keeping them at Westover Field, wouldn't there? A. There would be a difference.

Q. A rather sharp difference, wouldn't there be, in having a man transferred from a field, or having him kept at a field? A. Well, I think that would depend on the purpose.

Q. We are talking now about your relating what you heard a witness say. That is the subject matter under discussion. Now, what did you hear him say? Did he say he asked Captain Jones to transfer the boys from Westover Field, from the airborne engineers, or from Westover Field, or to keep them there a little longer? A.

1380 I—my present recollection of what Elias Bayer stated, without looking up the transcript, is that he asked Colonel Jones to transfer the boys.

Q. I will ask you if this is not the question that was asked Elias Bayer in your presence, and concerning which you are giving your recollection now to this jury and Court, asked by Mr. Wallace in February, in this interview we are talking about:

"Q. What did you say to Colonel Jones? A. I explained that my brother was worried, very worried about the boy, and if they could keep him on the field a little longer it would be very good."

Isn't that what Elias Bayer told you he told Colonel Jones, and which you are relating to this jury? A. May I see that transcript, please?

(Transcript handed to witness.)

A. (Continuing) The statement is substantially—the statement is exact.

Q. Do you mind reading it? A. Not at all. 1382

Q. Again? A. Just the portion which had to do with——

Q. Colonel Jones. A. Yes. "What did you say"—the question is, "What did you say to Colonel Jones?" The answer is, "I explained that my mother"—I guess he means brother here——

Q. Yes. A. —"was very worried about the boy, and if they could keep him on the field a little longer it would be very good.

"Q. What did Colonel Jones say? A. He said he would try, and nothing was done."

Q. Now, Mr. Flynn, that is not in accordance with your testimony to the jury as to what happened at all, is it? A. Well, I think——

Q. You are mistaken about it, aren't you? A. I am not 1383 mistaken over the fact that Elias Bayer stated that he talked to Colonel Jones——

Q. Oh, no. A. —and about the fact that he discussed with Colonel Jones the movements of the boy.

Q. Oh, no. But you are mistaken— A. I am, I find we have left out the point that you bring up.

Q. Well, you stated that he asked Colonel Jones if the latter could do anything to have the boy transferred, pe-

riod. Isn't that your testimony yesterday? A. That is right.

Q. Now you now read what happened last February, haven't you? Now, it is "I explained that my brother was very worried about the boy, and if they could keep him on the field a little longer it would be very good." Those are not the same things at all, are they? You just made a mistake in that point? A. Well, I prefer to accept the transcript rather than my recollection. I was testifying yesterday from my recollection.

Q. Yes. A. Without seeing the transcript.

Q. We all know that. A. Now, when I see the tran-

1385 script——

Q. Yes. A. I am inclined to accept the transcript.

Q. Well, is that as far as you would go to say that you are inclined to accept the transcript? A. I am going to accept the transcript.

Q. You will just change the word "inclined" to "going to". The point of it is that yesterday when you testified before the jury you said Elias told Mr. Wallace that he asked Colonel Jones to have the men transferred from the airborne engineers. Now you say after looking at the transcript that it was just the opposite, that he asked to have the boys kept there a little longer, is that right? A. I say that the transcript is correct. Yesterday my testimony was to my recollection.

1386 Q. Well, I am not talking about recollection, but one is the opposite from the other, isn't it? A. I don't agree that one is opposite from the other.

Q. You don't agree that "transferring the men out" is the opposite from "keeping them where they are"? A. I think we are quibbling on words here.

Q. I beg your pardon. I am just asking you what you testified about yesterday. A. I stated what I testified to yesterday.

Q. Yes. A. As being what you read.

Q. You did not tell the jury yesterday that Samuel Bayer said that "I didn't like it, Mr. Wallace. I didn't know what to think, whether it is a loan or a hold-up." You did not tell the jury about that yesterday, that Samuel Bayer said that to Mr. Wallace in your presence, did you? A. I don't recall saying that yesterday.

Q. Well, do you recall now whether or not Samuel Bayer did say that in answer to Mr. Wallace's question back in February? A. That was on the first visit there, on the occasion of the first request?

Q. Elias was talking about the first asking for money, yes. A. I don't recall that without looking at the tran- 1388
script.

Mr. Keenan: I would like to have the record show that you have had a moment or two to look at the transcript.

Q. What do you say now? A. I say that I will accept the record rather than my recollection, and I prefer the record.

Q. Well, what do you say now, now that your recollection is refreshed by the record about that? A. About what? May I have the rest of the question?

Q. Yes. Did Samuel Bayer say in answer to Mr. Wallace, "I didn't like it, Mr. Wallace. I didn't know what to think, whether it is a loan or a hold-up. So I said to 1389
him, 'I have not got no money on me now. Come in tomorrow and I will give it to you'"? A. Yes.

Q. Well, you left that out yesterday, didn't you? A. Yes.

Q. Did you do that purposely, or did you do it because your memory was faulty? A. I left it out inadverently.

Q. The jury should have known about that to get the pertinent story.

Mr. McGohey: I object to that, your Honor, and move to strike it out.

The Court: Mr. Keenan, that is a matter of argument.

Mr. McGohey: I move to strike it out, your Honor.

The Court: I will sustain the objection to the question.

Q. And Samuel Bayer said that he told Captain Radovich at that time, "I told him that is all I could get together. I could give him the $500. I just wanted to show him that it wasn't so easy to get money." Did he say
1391 that in your presence? A. Yes, I recall him saying that.

Q. You did not tell the jury about that, did you? A. I don't recall that I did.

Q. Was that inadvertently, or by design? A. That would be inadvertently.

Q. Did he say when he, Radovich, was walking out, "My bookkeeper and my brother walks in and she said, 'I heard all about it,' and I said, 'And I don't know whether it is a hold-up or a loan. I don't know.' My brother shrugged his shoulders." Do you remember that being said in your hearing in answer to Mr. Wallace's question? A. Not of my own recollection; I recall it now that you have read the transcript.

Q. Well, did you leave that out yesterday? A. I did
1392 not mention that yesterday.

Q. Was that through inadvertence or by design? A. Inadvertence.

Q. Inadvertence? A. Yes.

Q. Now, do you remember that when he came for the second $500, Captain Radovich, as related by Samuel Bayer, in answer to the question of Mr. Wallace, he said, "I haven't got it, Walter. You know that's a lot of money." Do you remember that statement being made? A. No, I don't remember that exact statement.

Q. Would you accept it as being made? A. I would accept—I would be inclined to accept that statement. There was a delay, as I recall it, and he stated that to him after a while.

Q. And further did he say, "He said, 'I haven't got it, Walter; you know that's a lot of money,'" and that Captain Radovich answered, "Well, Sam, I need it, and get it for me." Do you recall that statement being made? A. May I see it, please?

Q. Yes (handing to witness).

Mr. McGohey: If your Honor please, may I have the last question asked read to me, please? 1394

(Question read.)

Mr. McGohey: That is a quotation from the transcript.

A. The transcript is correct to my recollection.

Q. Well, is it now your recollection that what Samuel Bayer said upon that subject and what you did not tell the jury yesterday in that respect was that Samuel Bayer said, "I haven't got it, Walter. You know that's a lot of money." And Radovich said, "Well, Sam, I need it, and get it for me." Is that in accordance with your refreshed recollection? A. That would be in accordance with my refreshed recollection.

Q. Yes. A. Yes.

Q. And did Samuel Bayer proceed and say "I didn't know what to do. I didn't know what to say to him, but I was scared if I didn't give it to him he would take it out on my kids. So I promised him I will give it to him." Was that statement made in your presence by Samuel Bayer in answer to Mr. Wallace's question? A. This is on the occasion—I don't know that—this is on the occasion of the second visit? 1395

Q. Yes. A. Yes, I believe that he did say that he didn't know what to do, that he was afraid that Captain Radovich might take it out on his children.

Q. On his kids. A. Well, his kids.

Q. Do you know how many children Sam Bayer has? A. I recall that he has three sons.

Q. Any daughters? A. I don't know.

Q. You have been working on this case for six or eight months and you don't know how many children Sam Bayer has? Are you telling that to this jury?

Mr. McGohey: I object to that, your Honor.

1397 The Court: Objection sustained.

Mr. Keenan: All right.

Q. Well, anyway, you recall now that he did say, "I told him I didn't know what to do, I didn't know what to say to him, but I was scared if I didn't give it to him he will take it out on my kids"? A. Yes.

Q. You didn't tell that to the jury yesterday, did you? A. No.

Q. Was that left out by design, or inadvertence? A. That was left out by inadvertence.

Q. You didn't think that was an important part of this conversation?

Mr. McGohey: I object to that, your Honor.

1398

Q. Or did you?

The Court: I will let him answer.

A. I think that the entire conversation is important.

Q. But not— A. I was giving—I was giving my recollection without refreshing it by using that transcript.

Q. Were some parts of the conversation more important than others in your mind?

Mr. McGohey: I object to that, your Honor.
The Court: I will let him answer.

A. Oh, yes.

Q. And wasn't this one of the most important parts of the conversation as far as Sam Bayer's statement, that he was frightened and scared not to pay this money or it would be taken out his boys who were out in the camp under Captain Radovich?

Mr. McGohey: I object to that, your Honor. It is argument.
Mr. Keenan: Oh, your Honor——
The Court: I will sustain the objection. 1400
Mr. Keenan: Exception.
The Court: Very well.

Q. Well, when you used the expression in answer to my question, "He said he was afraid Captain Radovich would do something to his children," you did not mean to intimate by that that there was anything said by Samuel Bayer that anything was going to happen to the boys that were out there in the Army, in the uniform of the Army, as privates under Captain Radovich, didn't you?

Mr. McGohey: I object to that.
The Court: I will overrule the objection.

A. As far as I am concerned, we are discussing only the 1401
two boys right now, and no mention has been made previously to my recollection in our conversation about any other children, and I intended that to be only with reference to these two boys.

Q. Now, when you use the word "boys" and use the word "children", you use them interchangeably? A. They may be so used.

Q. Because they are very, very young, both of them?

Mr. McGohey: I move to strike that out, your Honor.

Q. Is that why you used the word "children"?

Mr. McGohey: I object, your Honor.
The Court: I will let him answer.

A. I consider—no, I consider that the sons and daughters of any person are the children of that person.

Q. All right. A. No matter what their age is.

1403

The Court: Well, I think we have had enough discussion on that.

Mr. Keenan: All right. Thank you.

Q. You tried to give this jury a faithful and accurate recollection that you had of these statements of these two men without in any manner leaving out anything of any importance in this proceeding? A. I tried to give them my present recollection as unbiased and as faithful as I could.

Q. You did not try to shade it one way or the other? A. No, sir.

Q. Or leave out any points here and there? A. I did not

1404 deliberately try to shade or leave out any point.

Q. You are not particularly anxious to gain or win in this prosecution?

Mr. McGohey: I object to that, your Honor.
The Court: I overrule the objection.

A. Well, it won't mean anything to me personally whether I gain or lose, or win or lose the prosecution.

Q. But it has been a matter to which you have devoted the greater part——

Mr. McGohey: I object to this, your Honor.

The Court: You have already asked about that.

Mr. Keenan: All right, your Honor. I beg your pardon. That is all. Wait just a minute.

Q. Now, that I have sort of stimulated your recollection a little bit, is there anything else you would like to tell the jury in that same spirit of fairness; anything that you think you have left out that they ought to know about, or any inadvertences of moment, so that a fair statement can be given? 1406

Mr. McGohey: I move to strike that last part out, "so that a fair statement can be given", your Honor.

Mr. Keenan: I will withdraw that last part.

Q. Anything that you left out. A. Well, I don't recall anything at the moment, but I would be glad to have you refresh my recollection.

Q. Well, I am just asking you if you got any of your own? A. I don't recall anything at the moment.

Q. Do you remember Samuel Bayer stating that Captain Radovich had called him several times after his boys were transferred to Westover Field, and that Samuel Bayer told him in substance to leave them alone, that he was satisfied where they were? Do you recall Samuel Bayer stating that? A. I recall that. There was, I believe, one telephone conversation mentioned by Samuel Bayer to that effect. 1407

Q. Just one? A. That is all I recall.

Q. Do you remember Samuel Bayer telling you, "After they were at the medical detachment at Mitchel Field for a short while, I believe less than a week, they went to Bradley Field, and he"—stating about his boy—"my kid,

when he got there, called me on the phone. As a matter of fact, he called me the very day because I asked him to specially, and he told me what a nice place it was, and that he met a nice sergeant from Brooklyn, and he was very happy, and I was very happy and contented as long as the kid was happy up there." A. Yes, I remember him saying that the kid called him and told him he had met a nice sergeant from Brooklyn. I remember that.

Q. And that he was happy there? A. And that he was happy.

Q. And you didn't tell that to the jury yesterday, did you? A. No, I don't believe I did.

1409 Q. And do you remember him saying, "It went along two or three weeks. The kid called me lunch hour or home at night, and he talked to his mother, too, and he kept on telling us how happy he was, and he said he was going home for a week-end with some of his friends." A. I don't recall that of my own recollection.

Q. Is that right (handing witness)? A. That is right.

Q. You did not tell the jury about that yesterday? A. No.

Q. "I don't know. It is two or three weeks had passed, whether it was Sunday or a holiday, but I was home that morning. Captain Radovich called me [redacted] said 'Sam, I found out who did the transferring', and [redacted] said, 'If you will give me $1500 Sam, I will have him transferred back to Mitchel Field.' I said, 'Walter, please forget all about it.
1410 The kids are very happy. They met a nice captain, a nice sergeant.'" Now, the latter part of that, do you recall Samuel Bayer stating that in your presence? A. Yes.

Q. Did you tell that to the jury yesterday? A. I believe I told them that Samuel Bayer told him not to bother about that.

Q. Well, that part that I have reference to, describing in essence that the boys were happy out there at the field? A. Oh, no, I did not mention that yesterday.

Q. You did not mention that? A. No.

Q. But Sam did to Wallace, didn't he? A. Yes.

Q. Now, do you remember after that he said, "Maybe about a month later, he"—meaning Radovich—"called me up in the place and says the same thing. 'Sam, you are foolish. Now I will be leaving the country soon. If you give me the $1500 I will have the boys transferred to Mitchel Field.'" Do you remember the second telephone conversation? A. I don't recall him testifying or stating that.

(Mr. Keenan hands transcript to witness.)

A. Yes.

Q. Do you recall that now? A. Yes, I recall it. 1412

Q. Did you leave that out inadvertently or deliberately? A. No, I left that out inadvertently.

Q. That is just a fault of memory, is that right? A. Yes, sir.

Q. Do you recall that he said that he didn't hear from him again until the McAlpin meeting? A. Yes, I recall that.

Q. And that after the McAlpin meeting, do you recall he said he didn't hear from him for maybe six weeks or two months after that? A. Yes.

Q. You didn't tell that yesterday, did you? A. I think I mentioned yesterday that they met at the McAlpin and that subsequently they met at Cavanagh's Restaurant on 23rd Street. 1413

Q. But you didn't tell about Samuel Bayer saying that those were the only two conversations that he had with Radovich from the time these boys went to Westover Field? You didn't tell that to the jury, did you? A. Well, I wouldn't recall that I said they were the only two, or that they were the only two.

Q. You used the expression that Sam stated that Radovich then contacted him. Did you mean by that "contacted

him" that he called him on the telephone, or he came to see him personally? A. Well, what was the occasion of this?

Q. That is about after the transfer was made to Westover Field. A. May I see that, please?

Q. That portion of the testimony there (handing). A. Well, I used the word "contacted", and it is my recollection that the contact was made by telephone.

Q. Do you remember Sam telling about the meeting with Captain Radovich just before Captain Radovich left for Goldsboro? A. Is this the meeting at Cavanagh's Restaurant——

1415 Q. Yes. A. —or the day afterwards in Sam's office?

Q. At Cavanagh's Restaurant. Do you remember Sam stating that that very day his boy, meaning Sergeant Martin Bayer, called him from Westover Field, "and he tells me, 'I and Milly are leaving for Goldsboro'"? A. I recall that.

Q. You didn't tell that yesterday, did you? A. I don't believe I did.

Q. Was that inadvertence, or was it deliberate? A. Inadvertence.

Q. Failure of memory, or wasn't important enough? A. It was pure inadvertence.

Q. Failure of memory?

Mr. McGohey: I submit the question has been an-

1416 swered, your Honor.

The Court: I sustain the objection.

Mr. Keenan: Well, all right.

Q. Do you remember him saying, "We met him at the restaurant and we had a couple of drinks and sat down to eat, and he started to tell us he was leaving for Burma, India, on a very dangerous mission, and they were lucky if they would be back in about eight months, and that mission would write history"? A. Yes, I recall that.

Q. And that he said, "I signed out a request for the two boys. I am taking them with me." Do you recall his saying that? A. Yes.

Q. You didn't tell us about that yesterday, did you? A. I think I did substantially.

Q. About him stating, "I signed out a request for the two boys"? A. Perhaps not those words, but I think I did state that he was going to take the two boys with him.

Q. Well, did you tell yesterday that he said he was going to take the two boys with him when leaving for Burma, India? A. I believe that I did say that he was leaving for Burma. I don't think I mentioned India at all.

Q. You stated that he requested that the two boys come 1418
with him. That is the way you told the story yesterday, isn't it? A. May I see it?

Mr. McGohey: I suggest you read all of that paragraph of the witness' testimony.

Mr. Keenan: All right, I will read it all. Is that agreeable to the Court? It is very short, I think. It is about making an appointment to see Miss Solomon and Samuel Bayer at Cavanagh's. Page 6fn. I suppose that is what you want?

Mr. McGohey: I don't know what part you are going to talk to him about. You quoted part of what appears to be the second full paragraph on that page, and I suggest that you quote the full paragraph.

Mr. Keenan: Well, I will do it. I will even quote 1419
the one before that.

Mr. McGohey: That is quite all right with me.

Q. And I am reading from the record now of what your testimony was yesterday: "About a month or so thereafter Radovich telephoned Sam Bayer's office and made an appointment to see Miss Solomon and Sam Bayer at Cavanagh's Restaurant. When he arrived he told Sam

Bayer that he was being sent out on a dangerous mission to Burma, and that he had requested that the two boys come with him." Now, do you wish me to read after that, Mr. McGohey?

Mr. McGohey: Yes.

Mr. Keenan: I mean, do you think I ought to in order to make the question intelligible and fair? If you do, I will.

Mr. McGohey: I do not know what you are going to ask, Mr. Keenan. I can't tell that.

The Court: Go on and complete it.

1421 Mr. Keenan: It does not have to do with the subject matter, your Honor. I am trying to please Mr. McGohey.

Mr. McGohey: If it does not, I do not want it read, your Honor. Whatever is quoted ought to be quoted fully.

The Court: Please proceed.

Q. Now your recitation was, and you used this language, that he was being sent out on a dangerous mission to Burma, and he had requested that the two boys come with him. A. I recall that.

Q. Now that is not what Sam Bayer said, is it? A. It is not the exact words, I agree with you. I was giving substantially my recollection.

1422 Q. That might sound as though it was a request of these boys, that he requested that the two boys come with him? A. I did not so intend.

Mr. McGohey: I object to that.

Q. You didn't mean that.

Mr. McGohey: I object to that as argumentative.

The Court: I will let him answer.

A. I did not so intend.

Q. Did you know that it was a voluntary outfit, the Commando unit they were talking about? A. I have been told so.

Q. You know it now, and you knew it at the time you testified? A. Yes.

Mr. McGohey: Now I think that the next paragraph ought to be read.

The Court: You can do that on redirect if you wish to. Go ahead. 1424

Q. The next paragraph was: "Sam stated that he pleaded with Radovich to leave the two boys at home, but that Radovich refused and told him that he would have to pay $5,000 if he wanted the boys transferred out of this unit, and that he had to make up his mind quickly." Is that right? That is what you said? A. That is what I said yesterday, yes.

Q. Now I will ask you if this is not what was stated by Sam Bayer: He said, Sam, "Walter, please leave them alone. I never done you any harm. Why do you want to take it out on me and the poor kids? He said 'Sam, I will tell you what I can do for you. If you will give me $5,000 I will have them transferred elsewhere.' He said, 'Sam, 1425
don't think it is for me. I have to give up $2,000 to somebody and $1500 to another fellow, and all I will get will be $1500.'" Sam said, "I pleaded with him, Mr. Wallace, and he was just like a stone." Did you tell that to the jury? A. No, I did not use that word.

Q. Do you know where these boys are now? A. Not of my own knowledge, no.

Q. Do you know where Sergeant Martin Bayer is? A. Not of my knowledge.

Q. Have you inquired in the Army? A. I haven't made any inquiries as to the whereabouts of these boys.

Q. Did you find out what happened to him before the 15th day of July, 1945, while the Government claims this conspiracy was on?

Mr. McGohey: I object to that, your Honor.
The Court: Objection sustained.
Mr. Keenan: Exception.

Q. Did you find out what happened to Martin Bayer after he went to Delaware?

1427

Mr. McGohey: I object to that, your Honor.
The Court: Objection sustained.
Mr. Keenan: I note an exception.
The Court: Very well.

Q. Do you know about a File No. 201 in the Army that every private, every soldier and enlisted man has that gives his history and what happens to him? A. I have heard the term.

Q. Do you know what it is? A. I believe that I have a slight acquaintance with what is kept in that file.

Q. Tell us what was kept in Martin Bayer's file, if you know?

1428

Mr. McGohey: I object to that. There is no proof that he ever saw it, and it is irrelevant.
The Court: That might have some relevancy so I am going to allow him to answer it.
Mr. McGohey: If he ever saw it.
The Court: Of course, if he knows.

A. I do not recall that I ever saw Martin Bayer's 201 file.

Q. That would have the complete history of these transfers, wouldn't it? A. As I understand it, it would be a history of a man's movements at a particular base of assignment.

Q. Well, isn't it a continuing history of a man as long as he is in the Army? A. I may be wrong. As I say, I have only a slight knowledge of the 201 file, but it is my understanding that a 201 file stays at the base and is a history or a record of the man's movements and record while at that base. When he moves to another base they set up another 201 file.

Q. And where would the last one be of Martin Bayer in the United States of America, if you know? 1430

Mr. McGohey: I object to this, your Honor. This witness isn't qualified as an expert.

The Court: I am going to sustain the objection.

Q. I would like to ask you if you have conferred with the Intelligence Division of the United States Army in this investigation about these transfers?

The Court: All right.

A. Yes, I have conferred with them.

Q. Whom have you talked with? A. Well, I have talked to Lieutenant Colonel Miller, I have talked to Judge Harmeling—rather, they are of the Judge Advocate's office, and not the Intelligence Service. 1431

Q. Yes?

Mr. McGohey: Your Honor, I object to the whole line of questioning.

The Court: I am going to sustain the objection.

Mr. Keenan: May I ask your Honor if it is because the witness has failed to show whether he is qualified to answer the question or if the Court feels it is not a

pertinent matter to be brought out at this trial, or whether it is not pertinent matter to be brought out at this time.

The Court: As to whom he has conferred with it seems to me to be a matter not material or relevant.

Mr. Keenan: It is only preliminary, your Honor. I want to ask this witness for his knowledge, and he has indicated something about knowledge that the District Attorney claims a limited knowledge of.

The Court: Knowledge of what?

Mr. Keenan: Knowledge of what records are in the Army and whether or not this man knows about

1433 such records and where they are. I want to find them your Honor and bring them into this court room.

Mr. McGohey: I object to that statement, your Honor, and move to strike it out.

Now I would like to be heard on it, your Honor, either here or at the bench.

The Court: All right then, come up here.

(Conference at the bench, off the record.)

The Court: Ladies and gentlemen, I am going to excuse you for lunch now, as I want to take up something, so I will excuse you until 2.15.

(Recess until 2.15 P. M.)

1434

AFTERNOON SESSION.

GERALD J. FLYNN resumed the stand.

The Court: Have you further questions, Mr. Keenan?

Mr. Keenan: Yes, your Honor.

*Cross-examination by Mr. Keenan.*

Q. I would like to ask the witness if Mr. McGohey was in the room when the witness came in to this interview with Samuel Bayer and Mr. Wallace? A. If Mr. McGohey was in the room when Samuel Bayer entered? 1436

Q. No, when you entered it. A. When I entered, in the interview with Samuel Bayer, no, Mr. McGohey was not in the room at that time.

Q. Do you recall that after the first three questions, the fourth question was, "Suppose you go right ahead and tell us everything you know in connection with Radovich?" Do you recall that? Was that question asked while you were there? A. I don't recall that specific question.

Q. Do you remember the next answer: "My boy was stationed at Mitchel Field," and then the next question by Mr. Wallace, "That's Martin Bayer? A. Martin Bayer was there for about three or four months when I met some officers. Their names were Colonel Jacobson, Colonel Vidal, and Lieutenant Roeser. I met him through my younger brother." 1437 Were you there when that question was asked? A. It is my recollection that I heard that part of it, that I came in around that time.

Q. Now the next was two answers with just a single notation of "The State of Maine" that took approximately five pages of the record. Were you there at the beginning of that recitation? A. I was there at the point where Samuel Bayer was talking about his son Martin being

stationed at Mitchel Field, and I was there during that section of the statement, I believe where he went on to tell his story.

Q. Was Mr. McGohey there during that time when those long answers were given? A. No, I don't believe he was.

Q. You know the record states when he came in? A. Yes.

Q. Does it state when you came in?" A. I don't recall whether it does.

Q. Have you looked at it to examine it to see if it does? A. I have read a copy of the transcript.

Q. Yes. A. Yes.

1439 Q. Did that show when you came in? A. Not that I recall.

Mr. Keenan: Now, your Honor, I think I would like to return to the question asked just before adjournment. May I have the question asked the witness, because I believe there was an objection at that time.

The Court: It was my understanding that I would sustain the objection and that that matter would not be pressed pending the production of some records.

Mr. Keenan: Then in view of your Honor's ruling to that, I have no further questions to ask at this time.

The Court: All right. Have you any questions?

Mr. Robb: Just one or two, yes, sir.

*Cross-examination by Mr. Robb.*

1440 Q. Agent Flynn, in your investigation of this case you devoted considerable time and effort to an attempt to determine the circumstances surrounding the obtaining by these various officers of certain uniforms, did you not? By "officers", I mean Vidal, Jacobson, Radovich and the others. A. Yes, we considered that.

Q. You investigated that incident, did you not? A. That the officers obtained uniforms?

Q. Yes, sir. A. Yes.

Q. And you also devoted some effort to finding out who paid for the uniforms, didn't you? A. That is right.

Q. That was a rather important matter, right? A. Yes.

Q. And in that connection, Mr. Flynn, it was important, was it not, to determine whose idea it was, in the first place, that the Bayers should pay for them, isn't that right? A. I am not sure I understand your question.

Q. Wasn't it important to find out who suggested, if anybody did, that the Bayers and not the officers should pay for the uniforms? A. I would say yes.

Q. In other words, whose idea it was that the Bayers should pay for them; isn't that right? A. Yes.

Q. Now in the interview of the statement which he made 1442
to Mr. Wallace, didn't Elias Bayer tell Mr. Wallace in your presence that when he took those officers to the Busch store or shop he understood and intended that the officers were going to pay for the uniform themselves? A. I believe that is my recollection.

Q. Yes, sir. Did you tell that to the jury yesterday? A. I don't recall that. I would have to see the record.

Q. Would you look at it, sir? I hand you the record. A. No, I did not.

Q. And didn't Elias Bayer also say to Mr. Wallace that he, Elias, had spoken to Colonel Vidal or at least hinted to him that payment of those uniforms by him was due, by him and the other officers, was due? Didn't Elias say that in substance to Mr. Wallace? A. I don't recall that statement. If it appears—I would like to see the transcript. 1443

Q. I show you this transcript which has just been handed to me by Mr. McGohey very kindly, and direct your attention to the bottom of page 5. A. I recall that the transcript would be correct in answer to a question, "Did you ask Vidal to pay for his uniform?" The answer is, "Well, directly asking, I wouldn't say, no. It was definitely decided that they were to pay at wholesale price, and I did pass the remark, I believe, once, that these uniforms hadn't been paid for as yet."

Q. Read the next. A. "And what did Vidal say? A. Nothing much. He changed the subject and I just rode along with them." "Well, is there any reason why you shouldn't ask him to pay for the uniform? A. No, I don't."

Q. All right. Now, Agent Flynn, do you recall now that in that same, or, rather on that same occasion, Samuel Bayer told Mr. Wallace that this man Harold Busch at the uniform company, called up Sam and got after him about the uniforms not being paid for? A. No, I don't recall that of my own recollection.

Q. Do you recall— A. If I may interrupt you, I recall that there was some remark about the Busches asking
1445 for payment, but I don't recall whether Samuel Bayer said it or whether Elias Bayer said it.

Q. Do you recall Samuel Bayer also saying to Mr. Wallace that he hinted to Colonel Vidal or said in Colonel Vidal's presence that Harold Busch had been asking him for the money for the uniforms? A. Not specifically, no.

Q. You don't recall that? A. I would have to see the transcript.

Mr. McGohey: What page is that?

Mr. Robb: Page 11 on this one.

Mr. Keenan: Your Honor, in view of the statement just made by the witness, I ask that the testimony of this witness regarding these remarks, statements made by Samuel Bayer and Elias Bayer be stricken,
1446 since the witness himself can't remember which of the two, Samuel Bayer or Elias Bayer, said it, and at the same time the Court is asking this jury to hold that thought in mind until the end of this cause.

The Court: Motion overruled.

Mr. Keenan: Exception.

The Court: Go ahead.

Q. Don't you recall that Samuel Bayer said that Busch called him up and said these uniforms had not been paid

for? A. I say specifically I do not recall that. If you give me the page, why, I will——

Q. I show you the transcript, it is page 11 here on this one I have, and ask you if you will look at that and then tell us if those statements were not made by Samuel Bayer? A. I agree with the transcript.

Q. In other words, Samuel Bayer said that Harold Busch called him up and told him that these uniforms had not been paid for and Samuel Bayer afterwards mentioned that statement by Harold Busch in the presence of Colonel Vidal and the other officers; right? A. I didn't catch that last part of your question.

Q. Let us break it up. Samuel Bayer said that Harold Busch called him up and told him these uniforms had not 1448
been paid for, that is right, isn't it? A. Correct.

Q. And didn't he also say that he, Samuel Bayer, afterwards mentioned his conversation with Harold Busch in the presence of these officers? A. Yes. He stated, "I hinted to him," meaning Vidal, "that the boys wanted, you know, they wanted to get paid, in a nice way. I didn't say to them——"

Q. Would you read down to the bottom of that page, too? A. "Question"—the last——

Q. The last on that page and the first on the next. A. "Did you say specifically to your brother Eli, that Harold Busch wanted you to pay for the uniforms? A. I said to him, Harold asked for the money for the uniforms.

"Q. Who was present there when you said that? A. 1449
Vidal, Jacobson and Roeser."

Q. All right. Now, agent, you did not tell the jury about that yesterday, did you? A. I don't recall that I did. I did not recall it until I refreshed my recollection here.

Q. Yes, sir. But your testimony is that the matter of who paid for these uniforms and who originated the idea that the Bayers were going to pay for them was an important matter, wasn't it? A. It was important, and I believe that I testified as to who paid for the uniforms.

Q. Yes, sir. Don't you think that those statements had an important bearing on the origin of the idea that the Bayers should pay for them and not the officers? A. From that point of view, yes.

Q. From what point of view? A. From the point of view as to who initiated it.

Q. Yes, sir. Now, agent, in your investigation did you also give consideration to the matter of the obtaining by Colonel Jacobson, or the alleged obtaining by him of some automobile tires from the Bayers? A. I was told by Colonel Jacobson that he had obtained automobile tires.

Q. And you heard him testify——

1451 Mr. Keenan: I object. Just a minute.

The Court: What is that?

Mr. Keenan: Am I to understand now that this witness is quoting what Colonel Jacobson said to him?

The Court: He was asked if he gave consideration to it.

Mr. Keenan: Well, I object to it.

The Court: All right. I direct the jury not to consider that. You were not asked what Colonel Jacobson said. You were asked, in your investigation, if you considered the matter of the tires.

The Witness: Yes.

Q. You investigated that, did you not? A. No.

1452 Q. Wasn't that a rather important matter? A. Well, it could be considered important.

Q. Didn't you consider it important?

Mr. McGohey: I object to this line of questioning, your Honor.

The Court: I sustain the objection.

Q. You did investigate it, though, didn't you? A. I considered it. I didn't investigate it.

Q. Now isn't it a fact that in his statement to Mr. Wallace, Samuel Bayer said that he had never given Mr. Jacobson any tires? A. I believe that is my recollection.

Q. Yes, sir. Did you tell the jury that yesterday? A. I do not recall. I would have to look at the record as to whether I mentioned that or not at the time.

Q. Would you look at the record? A. No, it does not appear that I did mention it yesterday.

Q. You didn't; that is the fact, isn't it, Mr. Flynn? A. Yes.

Mr. Robb: Thank you. That is all.

The Court: Any redirect on this phase of the examination? 1454

Mr. McGohey: No, I have no redirect examination.

The Court: All right. You may proceed.

Mr. McGohey: I said I had no redirect.

The Court: I know, but you have further examination of this witness, have you not?

Mr. McGohey: Oh, yes, your Honor, but at this time I now offer in evidence the transcript of the statement of Samuel Bayer and the transcript of the statement of Elias Bayer.

The Court: Is there objection, gentlemen?

Mr. Robb: Has it been identified, if the Court please?

Mr. McGohey: The transcript of the statement made in the office of Mr. Wallace at which I and the agent were present. That is the original transcript. I offer it in evidence. 1455

Mr. Keenan: I object to them until they are properly authenticated and they bring in the little girls that took it down, so that I can have a chance to ask them some questions about it.

Mr. McGohey: I will be glad to do that.

The Court: All right.

Mr. McGohey: I make the same offer with respect to the testimony of Elias Bayer.

Mr. Keenan: And the same objection to it, until we get to it properly.

Mr. McGohey: May I withdraw this witness now and bring those witnesses in?

The Court: Yes.

(Witness temporarily withdrawn.)

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FRIEDA MEISNER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

1457

*Direct examination by Mr. McGohey.*

Q. Miss Meisner, now in answering questions will you please keep your voice as high as you can so that the last juror in the box and all of counsel and all the people at this table may hear you? What is your present occupation, Miss Meisner? A. Stenographer.

Q. By whom are you employed? A. The United States Attorney's office.

Q. You are employed here in this office? A. Yes.

Q. On September 7th of this year 1945— A. February 7th.

Q. I beg your pardon. On February 7, 1945, were you

1458 called to the office of Mr. Wallace? A. Yes.

Q. And when you came there did Mr. Wallace ask some questions of a man who was in the room? A. Yes.

Q. And did you make stenographic notes? A. I did.

Q. Would you let me finish my question? A. I am sorry.

Q. Did you make stenographic notes of the questions that were asked and the answers that were made? A. I did.

Q. And thereafter did you transcribe your stenographic notes on the typewriter? A. I did.

Q. And on the pages that you typewrote did you identify them by your initials? A. I did.

Mr. McGohey: May I have that exhibit marked for identification.

(Marked Government's Exhibit 8 for Identification.)

Q. Now, do you have with you the notes that you took that day? A. Yes. Here they are.

Q. When you took notes, did you take them on more than one occasion that day in Mr. Wallace's room? A. No, 1460
just once.

Q. You just took them once? A. Yes.

Q. I show you Government's Exhibit 8 for Identification and ask you to look at it and tell us whether or not that is an accurate transcription of the notes which you took that day? A. Yes, it is.

Q. And you made this transcription yourself? A. Yes.

Q. Now, will you indicate to me where your stenographic notes begin in that book? A. Right here (indicating).

Q. Will you tell me where they continue through? A. Down to here.

Q. Including everything on that page? A. Yes.

Mr. McGohey: Will you mark those for identification, that is, pages 155 to 163 inclusive? 1461

(Marked Government's Exhibit 9 for Identification.)

Mr. McGohey: I now offer in evidence Government's Exhibit 9 for Identification, being the stenographic notes.

Mr. Keenan: You are offering it in evidence?

Mr. McGohey: Yes.

Mr. Keenan: Objected to.

The Court: Do you wish to examine before I pass on this question of admissibility?

Mr. Keenan: Yes. I would like to ask a question or two.

The Court: All right.

Mr. Keenan: May I proceed now?

Mr. McGohey: May I interrupt for just a minute? May I offer at this time the transcript?

The Court: I thought you had already offered that.

Mr. McGohey: I don't think I offered it in evidence, your Honor.

The Court: You offer the whole transcription; you
1463 had not offered that particular portion.

Mr. McGohey: I have offered the whole transcript, but now I am offering so much as has been identified by this witness as the transcription of her notes.

The Court: All right. You may examine. I will pass upon the admissibility, if you wish.

*Preliminary cross-examination by Mr. Keenan:*

Q. Are you a court reporter? A. No, I am not.

Q. Have you ever taken a statement of witnesses as they have spoken from the witness stand, transcribed their evidence? A. Where do you mean, witness stand? In court?

Q. Yes. A. No.

Q. Were there any inaccuracies in your transcription?
1464 A. I don't think so. I may have had a "g" on one word; I think; I don't remember exactly.

Q. That would be "g" for G-man? A. No, I think I may have "alone" or "along", something like that.

Q. Making it what? A. I think I may have a "g" on the word "alone"; I am not sure. I don't remember; I didn't touch it. If you want me to look through, I will. It was just a typographical error.

Q. How many pages did you transcribe? A. I don't remember. Let me look at it and I will tell you.

Q. I mean, how many pages of notes did you take, first? A. Eight and three-quarters.

Q. Pages of shorthand notes? A. Yes.

Q. How many pages of transcript does that make? A. Almost five full pages.

Q. And have you checked those back carefully with the notes? A. Yes, I have.

Q. When did you do that? A. I think I did that last Thursday or Friday.

Q. And you didn't find any inaccuracies at all— A. No.

Q. —except possibly the letter "g" on one word? A. Yes. 1466

Q. Do you ever make any mistakes in your transcription that you find out later, that you have taken something down wrong? A. Well, you see, I don't because if I don't understand anything or I don't hear anything, I usually repeat it and correct it right then and there in front of the witness.

Q. Did you do that in these five and a half pages at all of testimony? A. I don't think I did in that case. If I look in my notes I can see, but I don't think I did, because I think Mr. Bayer spoke fairly slowly.

Q. You think —A. He spoke fairly slowly, I believe, because my notes are very good. If he had spoken very rapidly my notes would be big and distorted.

Q. If he spoke rapidly, your notes would be big and distorted? A. Yes, and I have very nice notes on it; they are very clear. 1467

Q. How long have you been attached to the United States Attorney's office? A. Over twelve years.

Q. Who else worked on this besides you? A. Well, there are several other girls. I believe Mr. Wallace would be in a better position to tell you who those were.

Q. How many girls are there that worked with you on this? A. I couldn't tell you that either. I mean I didn't check on that or count them. A girl relieved me, and I can tell you who she is; other than that——

The Court: What is the materiality of the girls who worked with her?

Mr. Keenan: I would like to know from this witness, your Honor.

The Court: She testified she took certain dictation and left.

The Witness: I can tell him who relieved me, your
1469 Honor, that is all.

The Court: All right.

The Witness: Mrs. Ginsberg followed me, so I know.

Q. You were never called to verify these notes or to check back on the notes, on the transcript, with your notes, until last Thursday? A. That is right.

Mr. Keenan: That is all.

The Court: All right. You may be excused.

Mr. Robb: We have no questions, your Honor.

The Court: All right, you may be excused. And the exhibits offered pursuant to this testimony will be admitted. Call the next witness.

1470 Mr. Keenan: The record shows our objection——

Mr. McGohey: I didn't hear what was said.

The Court: I understood your objection to be to the admission of the statement until it had been identified and authenticated by a witness.

Mr. Keenan: I did not say that, your Honor. I object to the introduction of it on the ground that it it inadmissible for reasons that were urged before your Honor for a full afternoon in this court room.

The Court: Oh. That objection will be overruled. Exception noted. With the same——

Mr. Robb: I hadn't thought of that, because we also objected on that ground, but on that ground alone—

The Court: Very well, then, and it may be considered that the same objection is made to all the different portions on both sides.

Mr. Robb: Yes, sir.

The Court: That objection being, ladies and gentlemen, as to the admissibility, and I repeat to you what I said when the verbal testimony from the witness was admitted, that you are to consider these statements as evidence in your consideration of the case 1472
of the person making the statement, but not consider it as evidence as to the co-defendants. All right, call the next witness.

(Government's Exhibits 8 and 9 for Identification received in evidence.)

The Court: That admonition goes throughout all the statements presently involved.

Mr. Keenan: If your Honor please, I want to renew the objection on the additional ground that your Honor has already stated that you would not permit some of the exhibits which you read to be introduced because of extraneous matter that you thought was not proper to be introduced in this court. I don't know which your Honor had reference to. But I want to save my objec- 1473
tion and exception in the event it is contained in either of these two documents.

The Court: You will have to make your objection more specific than that. If you wish to object to any particular portion I will hear it.

Mr. Keenan: I can only say to your Honor that I can't make it any more specific from the information I have. And, furthermore, I make an objection to it

on the ground that it is improper to introduce in bulk a statement of that kind without seeing whether there is prejudicial matter that is not germane to this case under the rules of evidence, and I cite to your Honor the case of——

The Court: No, I don't want to hear a legal argument, sir.

Mr. Keenan: All right, your Honor. I am willing to give it.

The Court: That is, on that matter. I have admitted a certain portion of the statement. If there is another one offered I will pass on it when it is presented. If you have a specific objection I will entertain it. Proceed.

1475

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FANNIE R. GINSBURG, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Mrs. Ginsburg, will you please keep your voice high enough and loud enough so that the last juror here and all counsel and the others at this rear table here can hear you clearly? A. Yes, sir.

Q. By whom are you employed? A. By the United States Attorney's office.

1476

Q. What is your position? A. I am a stenographer, taking legal work and also taking and transcribing hearings.

Q. How long have you been employed by the United States Attorney's office? A. About twenty-four years.

Q. I direct your attention to the date of February 7, 1945, and ask you if on that day you were called into the office of Mr. Wallace, down on the fourth floor? Were you? A. Yes, sir.

Q. And when you came there did you take notes of questions which Mr. Wallace asked and answers which were made by one of the men in the room? A. Yes, sir.

Q. And specifically, was one of the persons who was answering those questions a man named Samuel Bayer? A. Yes, sir.

Q. Do you have your notes of the questions and answers which you took down in stenographic notes? A. Yes.

Q. Will you indicate where the notes begin here and where they continue, for how long? A. Here (indicating).

Mr. McGohey: I ask that these pages, I haven't counted them, down to here, be marked for identification. 1478

The Witness: Only on the one side.

(Marked Government's Exhibit 10, consisting of 44 pages, for Identification.)

Q. Now on that occasion did you take your notes at one time, or did you take some notes at one time and be relieved and come back and take notes later on? A. No, sir; all at the one time.

Q. All that you took you took at one time? A. Yes, sir.

Q. And did you thereafter transcribe those notes? A. Yes, sir.

Q. And you typewrote your transcription? A. Yes, sir.

Mr. McGohey: Will you mark this for identification, please. 1479

(Marked Government's Exhibit 11 for Identification.)

Q. I show you Government's Exhibit 11 for Identification and ask you if that is a true and accurate transcription of your stenographic notes as they appear in Government's Exhibit 10 for Identification? A. Yes, sir.

Q. And you have examined them? A. Yes, sir.

Mr. McGohey: I offer in evidence Government's Exhibits 10 and 11.

Mr. Keenan: I object. I don't care for any voir dire examination. I am objecting to these exhibits coming in.

The Court: All right, sir. Objection overruled.

Mr. Keenan: And I want to state the specific ground in the language of the court, that it contains material that has not been proven or shown to be germane to the issues of this case, and improper.

1481 The Court: I am going to do this about that. Let me finish with this situation. It is my understanding that you do not propose to read these exhibits to the jury at this time, or do you?

Mr. McGohey: I do not propose to read them at this time, your Honor.

The Court: All right. Well, now, inasmuch as the exhibit is somewhat lengthy, I am going to suggest or direct that as to any matter in any of the exhibits which you consider and which you contend is irrelevant and immaterial and inadmissible for that ground, that you take time to consider the matter and make a motion to strike such matter as you consider improper, upon that ground.

1482 Mr. Keenan: I except to your Honor's ruling on that point, on these following grounds: that your Honor has already permitted to be introduced without qualification and over objection, and with great respect, without desiring to listen to legal argument, for the reason for the objection, and now in the presence of the jury an anomalous proceeding is taking place in which it is suggested that after it has been introduced over objection it may be restricted by a motion to strike, and that such direction is being made by the

Court in the presence of the jury, which is prejudicial to the defendants, and I except on that ground, your Honor.

The Court: Motion overruled.

Mr. Robb: If the Court please, may I address your Honor?

The Court: Yes, sir.

Mr. Robb: If the Court please, we have been more or less on the outside looking in on this particular matter. I haven't had a chance yet to see these statements. I have glanced at them, I glanced at them this morning very briefly while I was having my breakfast. I think the jury ought to have these stenographic statements so far as they have anything to do with this case, 1484
but I understood from your Honor that these statements may contain some matters which do not have to do with this case. I would like to have a chance to read them prior to their being read to the jury, to see if there is anything in there which ought not to go in.

The Court: It is exactly that that I suggested.

Mr. Robb: Yes, sir. Your Honor's thoughts and mine run along the same channel.

The Court: I would be glad to let you have that privilege and entertain at any time before they are read any motion which you may wish to make as to materiality of any particular portion of the statement.

Mr. Robb: Before they are read, yes.

The Court: Yes. 1485

Mr. Keenan: I would like the record to show, your Honor, that we make our objection, and in view of the Court's statement that he had already examined these exhibits and that if they were offered, some of them, he would not permit them to be brought into this case because he felt there was material in them that was improper.

The Court: I think you have stated your position.

Mr. Keenan: Thank you, your Honor.

The Court: Objection overruled, with the understanding that if you desire to move to strike out any portion thereof, as to immateriality, I will consider your motion. Proceed.

Mr. McGohey: Your Honor, may the record state that the very copies of transcript which are now being introduced were delivered to counsel for Samuel Bayer and Elias Bayer yesterday afternoon.

The Court: I think the record already so shows.

Mr. Robb: That is true, if your Honor please, but I didn't get a chance to see them; and I am not counsel
1487 for Samuel and Elias Bayer.

The Court: I understand that. Go ahead.

(Government's Exhibits 10 and 11 for Identification received in evidence.)

Mr. Keenan: I think the record also should show, your Honor, that when I called for them for the week-end, so that I would have time to look them over, the United States Attorney refused to permit me to see them.

The Court: Your statement may go in. All right, sir.

Mr. McGohey: Just one more question of this witness.

1488 Q. Can you tell me from your notes who it was that followed you? A. Yes, sir, I can. Relieved by L.D., which stands for Lena D'Elia.

Mr. McGohey: I have no further questions of the witness.

The Court: Do you wish to cross-examine? All right, call the next witness.

1489

LENA M. D'ELIA, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Miss D'Elia, on February 7, 1945, by whom were you employed? A. I was employed in the United States Attorney's office in this building.

Q. Have you since left that employ? A. I resigned on September 4, 1945.

Q. How long had you been employed by the office of the United States Attorney? A. Exactly nineteen years.

Q. What was your duty in the United States Attorney's office? A. Well, I was a law stenographer, and in my capacity I also took statements.

1490

Q. On February 7th, 1945, were you called to the office of Mr. Wallace on the fourth floor of this building? A. Yes, sir, I was.

Q. Did Mr. Wallace ask questions of a man named Samuel Bayer? A. Yes, sir, he did.

Q. Did Samuel Bayer make answers to those questions? A. Yes, sir.

Q. Did you make stenographic notes of the questions and answers? A. I did.

Q. Do you have your notebook with you? A. I have.

Q. Will you indicate to me the pages on which those stenographic notes appear? A. Down to here (indicating).

1491

Mr. McGohey: I ask to have these pages, page 39 and one-half of 46, marked for identification.)

(Marked Government's Exhibit 12 for identification.)

Q. Now after taking these stenographic notes did you transcribe them? A. I did.

Q. And have you compared your transcription with the original notes? A. I have.

Mr. McGohey: May I have this marked for identification.

(Marked Government's Exhibit 13 for Identification.)

Q. I show you Government's Exhibit 13, and I ask you if that is a true and accurate transcription of your stenographic notes? A. Yes, sir.

1493 Mr. McGohey: I offer in evidence Government's Exhibit 12 for Identification and 13 for Identification.

Mr. Cohen? How many pages?

Mr. McGohey: Of the transcript? Four and a half.

Mr. Cohen: Five pages.

Mr. Keenan: We object, for the same reasons stated before, your Honor.

The Court: Very well. The objection is overruled and the exhibits accepted upon the same terms and conditions as those previously offered. Proceed.

(Government's Exhibits 12 and 13 for Identification received in evidence.)

Mr. Robb: If the Court please, I don't want to be captious, but I assume we have the same general ob-
1494 jection about these, to all these exhibits.

The Court: It is so understood.

Mr. Robb: Yes. The same exception.

Mr. McGohey: Just one more question of this witness, your Honor.

Q. Can you tell me from your notes which stenographer relieved you? A. You mean that continued then?

Q. Yes; continued taking the notes after you? A. She was Celia Reitman; she relieved me.

The Court: All right. You may be excused.

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CELIA REITMAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Miss Reitman, will you please keep your voice up 1496
high enough so that the last juror over here and all these gentlemen at the counsel table can hear you clearly? A. Yes, sir.

Q. On February 7th, 1945, by whom were you employed? A. United States Attorney's office.

Q. Are you still employed by the United States Attorney's office? A. No, sir.

Q. When did you leave the United States Attorney's office? A. The end of February, 1945.

Q. For how long a period were you employed by the United States Attorney's office? A. For three years.

Q. What was your duty in the United States Attorney's office? A. During most of that time I was hearing stenographer, in the conscientious objector cases.

Q. On February 7, 1945, were you called to the office of 1497
Mr. Wallace? A. Yes, sir.

Q. And did Mr. Wallace ask questions of a man named Samuel Bayer? A. Yes, sir.

Q. Did Samuel Bayer make answers to those questions? A. Yes, sir.

Q. Did you make stenographic notes of the questions and answers? A. I did.

Q. Do you have your notebook containing your stenographic notes? A. Yes, sir.

Q. Will you indicate to me where in that book your notes appear? A. From pages 1 to 15.

Mr. McGohey: I ask that these pages 1 to 15 inclusive be marked for identification.

(Marked Government's Exhibit 14 for Identification.)

Q. Now, after taking those stenographic notes did you afterwards transcribe them? A. I did.

1499

Mr. McGohey: May I have that marked, please.

(Marked Government's Exhibit 15 for Identification.)

Q. Now I show you Government's Exhibit 15 for Identification, and ask you if that is a true and accurate transcription of the stenographic notes which you took on that day? A. Yes, sir, it is.

Q. You have compared them? A. Yes, I have.

Q. They are true and accurate? A. Yes, sir.

Mr. McGohey: I offer Government's Exhibits 14 for Identification and 15 for Identification in evidence.

1500

Mr. Keenan: May the record show the same objection for the same reasons?

The Court: On the part of counsel for all defendants, the same objection. The same ruling. The exhibits are admitted under the same terms and conditions. Proceed.

(Government's Exhibits 14 and 15 for Identification received in evidence.)

Q. Would you look at your notes, and can you tell me from your notes who was the stenographer that followed you in taking the notes? A. Miss Kravet.

Mr. McGohey: I have no further questions.
Mr. Keenan: I would like to ask just one question.

*Cross-examination by Mr. Keenan.*

Q. When did you transcribe these notes? A. Right after I took them.
Q. And you haven't seen them since until Thursday of this last week? A. That is right. 1502

Mr. Robb: No questions.
The Court: Call the next witness.

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EDITH KRAVET, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. McGohey.*

Q. Miss Kravet, you are employed, are you not, by the United States Attorney's office? A. Yes, sir.
Q. And how long have you been so employed? A. Twenty years. 1503
Q. What is your duty in the office? A. I am a stenographer.
Q. In the course of your duties have you taken hearings? A. Yes, sir.
Q. Now on February 7, 1945, were you called to the office of Mr. Wallace? A. Yes, sir.

Q. Miss Kravet, will you please keep your voice up high enough so that the last juror and everybody at this here table can hear you? A. Yes, sir.

Q. When you came to Mr. Wallace's office, while you were there, did he ask questions of a man named Samuel Bayer? A. Yes, sir.

Q. And Mr. Bayer made answers to those questions? A. Yes, sir.

Q. Did you make stenographic notes of the questions and answers? A. Yes, sir.

Q. Do you have your notebook with you? A. Yes, sir.

Q. Will you indicate to me in the notebook where the
1505 stenographic notes appear? A. Here (indicating).

Q. Beginning on page 179? A. Yes, sir.

Q. And how far do they continue? A. Through page 189, inclusive.

Mr. McGohey: May I have that stenographic notebook marked for identification?

(Marked Government's Exhibit 16 for Identification.)

Mr. McGohey: Will you also mark this paper for identification?

(Marked Government's Exhibit 17 for Identification.)

1506 Q. Now, after taking those stenographic notes, did you thereafter transcribe them? A. Yes, sir.

Q. And will you look at Government's Exhibit 17 for Identification and tell me if that is a true and accurate transcription of your stenographic notes? A. Yes, sir. I would like to tell you though in reading over the notes I found that I had transposed in two places two words.

Q. Will you indicate that to us? A. Yes. On page 6, in answering a question I have——

Q. Never mind that. Where did you make the transposition? A. This should be "regular", not "written". In our shorthand, when I read it quickly——

Mr. Robb: What is that?

Q. Will you speak up loud enough so that counsel can hear you? A. Yes. One word I wrote down as "written". The word is "regular". They look somewhat similar in shorthand, and when I transcribed it I did not note that error.

Q. So that the word "written" as it appears on page 6 of Government's Exhibit 17 for Identification is inaccurate, and it should be "regular"? A. Right. And there is one other point. On page 4, I left off the "not"—"was not"—"was not there". I wrote "was"; and when I looked in my notes it is "was not". 1508

Mr. McGohey: Your Honor, I ask that the witness be allowed to make in ink the corrections which she has just stated in the transcript, so that the transcript will conform to her notes.

Mr. Keenan: I have no objection to that, your Honor.

(Witness complies.)

Q. Now with the correction of those two words on Government's Exhibit 17, is Government's Exhibit 17 for Identification now an accurate transcription of the notes that you took on that day? A. Yes, sir. 1509

Mr. McGohey: I offer in evidence Government's Exhibit 16 for Identification and 17 for Identification.

Mr. Keenan: We object, your Honor, for the same reasons, the former reasons stated.

The Court: The objection of counsel for all parties is overruled and the exhibits are admitted under the same terms and conditions as those previously stated. Any questions of this lady?

(Government's Exhibits 16 and 17 for Identification received in evidence.)

Q. Can you tell me from your notes here who it was, if anybody, who relieved you in taking these notes? A. Miss Celander relieved me.

Mr. McGohey: I have no further questions.

1511 Mr. Keenan: Just one question.

*Cross-examination by Mr. Keenan.*

Q. Young lady, did you discuss this with anybody from the United States Attorney's office? A. I did not discuss anything. I called them up and told them that I noted those two errors, that is all. That was the extent of the conversation.

Mr. Keenan: I see. That is all.

The Court: Call the next witness.

Mr. Keenan: Your Honor, to save time, as far as the defendants Bayer are concerned, we don't know how many more of these ladies there will be, but I

1512 assume there will be several of them now for Elias, if there are different ones, and we are willing to stipulate that if called they would state that they were accurate transcriptions of their notes, that they are not court reporters but they believe them to be accurate and have checked them. To save time.

The Court: What have you to say?

Mr. Robb: That would be entirely agreeable to us, if the Court please.

The Court: All right. Let it be so stipulated and the documents offered and admitted over the same objections of counsel for both defendants under the same terms and conditions.

Mr. McGohey: Then, your Honor, may I have them all marked?

The Court: Yes. Just have them all marked and introduced as I indicated, and while you are doing that we will take a ten-minute recess, ladies and gentlemen.

Mr. McGohey: Your Honor, perhaps to save time, there are four sets of papers comprising the statement of Elias. Could we have them all marked as 1514
one exhibit? I withdraw that request, your Honor, and we will have the transcription of each——

The Court: Let it be uniform.

Mr. McGohey: And have each one of them marked in order, marked in evidence.

(Government's Exhibits 18, 19, 20, 21 and 22 received in evidence.)

(Short recess.)

Mr. Wallace: Mr. Henderson.

Mr. McGohey: If your Honor please, it is possible that this man Henderson has not come down on this floor. We didn't know whether we would call him or not, but we have another witness here that we could call. Henderson is in the building, but he may be up 1515
in my office.

The Court: Either way you wish.

Mr. McGohey: It might take a few minutes to get the witness, if he is not here, and rather than waste the time, we can call another witness. We will withdraw him and call Lasko.

WILBUR G. LASKO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Wallace.*

Q. Sergeant Lasko, you are a member of the United States Army? A. Yes, sir.

Q. How long have you been a member of the United States Army? A. Two years and eleven months.

Q. Would you tell us what your occupation was in private life before you entered the Army? A. I was a secretary and conference reporter for The Texas Company.

1517 Q. How long did you have that job? A. Approximately fourteen years.

Q. Just what did your duties entail when you were working for The Texas Company? A. I was a secretary and conference reporter, reported conferences.

Q. Reported them in shorthand? A. Yes, sir.

Q. And where are you stationed now? A. Mitchel Field.

Q. Where were you stationed in August, 1944? A. At Mitchel Field.

Q. What were your duties at that time? A. I was assigned to the Judge Advocate's office as a court reporter.

Q. Now on August 15, 1944, were you at 30 West 21st Street, here in New York City? A. Yes, sir.

Q. At that time did you meet a man named Samuel Bayer? A. Yes, sir.

1518 Q. Do you recognize Samuel Bayer in the courtroom? A. He is sitting directly behind you.

Q. Did you meet Elias Bayer? A. Yes. I believe if you will move, I will recognize him. He is seated to the right of Samuel Bayer.

Q. Were you accompanying an officer at that time? A. Yes, sir.

Q. Whom were you accompanying? A. Lieutenant-Colonel George Snyder.

Q. Were you in the office of the Plymouth Thread and Yarn Company? A. Yes, sir.

Q. At that time did you make notes of a conversation between Colonel Snyder and Samuel Bayer, and subsequently Colonel Snyder and Elias Bayer? A. Yes, sir.

Q. And did you reduce them to your notebook? A. Yes, sir.

Q. Now, would you tell us what Colonel Snyder said to Samuel Bayer and what Samuel Bayer said to Colonel Snyder on August 15, 1944, in your presence? A. Well, when we arrived at the Plymouth Thread Company——

Mr. Keenan: I object to this, your Honor. 1520

Mr. Robb: We object to this.

The Court: Very well. Upon the same grounds as you formerly stated to the other statements, the objections are overruled; exceptions may be noted. I direct you ladies and gentlemen of the jury in considering the evidence of these statements that you consider the statements only in your consideration of the case of the person making the statement, and not as evidence against the other defendants in the case. All right.

Mr. Wallace: Your Honor, in connection with these statements it is the position of the Government that they are such statements that might be found and might be used against all defendants.

The Court: Let me hear them. I will leave my 1521 instruction as it is now, ladies and gentlemen. Let me hear the statement. If I feel that I should amend the admonition to the jury, I will consider that.

Mr. Wallace: All right, your Honor.

Q. Will you proceed? A. When we arrived at the Plymouth Thread Company, Colonel Snyder introduced himself as Colonel Snyder, the First Air Force, who is a

representative of the United States Army in connection with charges pending against Major Radovich.

Q. Then what did Samuel Bayer say? A. He acknowledged the introduction, and then I was introduced to Samuel Bayer as a stenographer accompanying Colonel Snyder.

Q. And what happened then? A. Then Colonel Snyder interviewed Samuel Bayer.

Q. Have you your notes of that interview? A. Yes, sir.

Mr. Ansell: Introduced who, Mr. Wallace?

Mr. Wallace: Introduced Sergeant Lasko.

1523 Q. You have to keep your voice up, Sergeant. A. I am sorry, sir.

Q. Have you your notes in your possession at the present time? A. Yes, sir, I have.

Q. Of that interview? A. I have them here.

Q. Will you read those notes for us, please? A. Yes, sir.

Mr. Keenan: I take it it will not be necessary to repeat the objection, your Honor.

The Court: It is understood that the objection is continued.

The Witness: The interview took place. Do you want the background or——

1524 Q. No. I want the notes. A. I see. The witness was instructed as to his right; every witness under the law should be told in advance that anything that you say may be used against you. If you make any statement that will incriminate you, it may be used against you. Your rights are that you need not say anything of an incriminating or degrading nature under the law, and in fairness to you I want to explain to you you do not have to make a statement that would besmirch your character, that will lower

you. All I ask is that you tell us the truth to enable us to piece together this entire case as there are some loose ends you can assist me on.

The witness stated he understood. The witness was sworn.

"Will you please state your name and occupation? A. Samuel Bayer, 30 West 21st Street, New York City.

"Are you the father of Martin Bayer? A. I am, yes, sir."

Do you wish it this way, sir, or do you want question and answer, the way I have it in the book? 1526

Q. No. You may proceed the way you have been. A. "Are you also the uncle of Melvin Usdan? A. Yes, sir.

"Do you know or have you ever met the following named Army officers: Colonel Vidal? A. Yes.

"Lieutenant-Colonel Jacobson? A. Yes, sir.

"Major Radovich? A. Yes, sir.

"And Lieutenant Roeser? A. Yes, sir.

"Did you at any time make an offer of money or other remuneration to any of the above mentioned officers with reference to the transfer of your son or nephew? A. No, sir.

"When was the first time and under what circumstances did you meet Lieut.-Col. Jacobson? A. I met him through my brother, Elias Bayer. 1527

"Under what circumstances? A. They came up here. They used to come up here to see my brother.

"How about Colonel Vidal, Major Radovich and Lieutenant Roeser? A. Exactly the same thing.

"Did you ever give Major Radovich any gifts for his baby? A. No, sir.

"Did you ever take Major Radovich to a uniform concern, namely Lauderstein Uniform Company, for the purpose of buying a uniform? A. No, sir. I don't even know the name.

"Did you and Major Radovich ever discuss the purchase of tires? A. No, sir.

"Did you at one time offer to reimburse Major Radovich for his purchase of tires? A. No, sir.

"Did you once call Major Radovich and ask him to come in to see you in your office as you had something very important to ask of him? A. No, sir.

"Do you know a full Colonel in the First Air Force?
1529 A. What do you mean by a full Colonel?

"An Eagle Colonel? A. I don't know any more than those mentioned.

"You don't know any officers other than those? A. No, sir.

"Coming back to the uniform dealer we discussed before, have you ever done business with the I. Buss & Company? A. Yes, sir.

"Did you ever pay for uniforms for Colonel Vidal, Jacobson, Roeser and Radovich? A. No, sir.

"Did you at any time speak to any officer in the Army or civilian for the purpose of effecting the transfer of your son and nephew? A. No, sir.

"I again give you an opportunity to tell me what
1530 you really know of this case. From my knowledge of this case you are withholding the truth, and I must warn you of the possible consequences of such an act. A. I am not.

"Is there any information you would agree to offer in connection with this matter? A. I have none, sir.

"During the past five months has anyone approached you to discuss the matter with you in any way whatsoever? A. No, sir.

"The witness was then excused and called back, reminded he was under oath and asked:

"Did you ever know Captain Pepper? A. No."

Q. Did that conclude the statement of Samuel Bayer? A. Yes, sir.

Q. At that point was Elias Bayer interviewed? A. No, not at the time that Samuel Bayer was being interviewed. He was asked to leave the room.

Q. But after Samuel Bayer was interviewed, did Samuel Bayer leave the room? A. Yes, sir. He was asked to leave the room and send Elias Bayer in.

Q. Did Elias Bayer come into the room? A. Yes, sir. 1532

Q. Did Colonel Snyder ask Elias Bayer certain questions and did Elias Bayer make certain answers? A. Yes, sir.

Q. Did you reduce those to your notebook in stenographic form? A. Yes, sir.

Q. Will you tell us what Elias Bayer said and what Colonel Snyder said?

Mr. Keenan: The same objection, your Hoonr.

The Court: Same ruling. Go ahead.

A. "Please state your name, address and occupation. A. Elias Bayer, 30 West 21st Street. Thread salesman.

"The witness's rights were explained to him. I 1533
want to explain to you as to your legal rights, that you need not answer a question which may incriminate or degrade you, that anything said may be used against you, but I want to clarify that you need not answer a question which will incriminate or degrade you, but you cannot tell a lie. A. That is right, I understand. The witness was sworn.

"What is your relation to Martin Bayer? A. Uncle.

"What is your relation to Melvin Usdan? A. Uncle.

"Do you know or have you ever met the following named officers: Colonel Vidal, Colonel Jacobson, Major Radovich, Lieutenant Roeser? A. Yes, I have. I knew Radovich when he was a captain.

"Which officer did you meet first? A. I met Lieutenant Roeser and Colonel Vidal.

"Approximately when was that? A. I met in a very casual way. It was in 1943.

"Where did you meet these officers? A. At the Copacabana, a night club in New York.

"When did you first meet Lieutenant-Colonel Jacob-
1535 son? A. About a month after I met Lieutenant Roeser and Colonel Vidal.

"Under what circumstances did you meet him? A. I was introduced to him by Lieutenant Roeser.

"Do you remember what time of the year it was in 1943? A. No, I don't.

"When did you meet Major, then Captain Radovich, and under what circumstances? A. I met Captain Radovich in my apartment. Lieutenant Roeser introduced me to him.

"Where is your apartment? A. It was, I don't have it now, at 122 Central Park South. I got married since and gave up my bachelor quarters.

"Did you at any time accompany any officer or offi-
1536 cers to the I. Buss Company on Fifth Avenue, a uniform concern, for the purpose of selecting uniforms? A. I might have gone up with them, but I did send them up to buy uniforms at wholesale prices.

"Was that approximately on July, 1943? Was it last summer some time, do you think? A. I imagine it was around that time.

"Did you ever buy any uniforms for any Army officer? A. No, I never did.

"Do you know or have you ever heard of Captain Pepper of Mitchel Field, New York? A. No, I don't.

"Did you during the month of November, 1943, go to Goldsboro, North Carolina? A. No.

"Did you at any time make an offer of money or other form of remuneration to any Army officer for the purpose of effecting a transfer for your nephews? A. Definitely not.

"Is there any statement you would care to offer with reference to the matter at hand? A. I can only say I never offered anybody, I never gave anything to anybody for the purpose of effecting any transfers.

"Did you ever offer any money to any Army officer 1538
or civilian for the purpose of any special treatment for your nephews? A. No.

"During the past five months has anyone ever talked to you with reference to the transfer of your nephews? A. Major Hogan from Washington was down here and asked me a few questions.

"Along these same lines? A. Along the same lines.

"I again give you the opportunity to tell me what you really know of this case. From my knowledge of this case you are withholding the truth, and I must warn you of the possible consequences of such an act. A. I still have nothing more to tell you."

Q. That was the end of the interview with Elias Bayer? 1539
A. Yes, sir.

Q. Could you tell us what happened then in the office, if you know? A. Then Sam Bayer came back into the room and asked whether he could have a girl in his office take down the testimony. Colonel Snyder agreed. They brought a girl into the office and I read from my notes and she typed, and I stood at her shoulder as she typed to see that she had it exactly as I have it here.

Q. Did you dictate the statement you had taken from Samuel Bayer to this girl? A. Yes, sir.

Q. Did you dictate the statement you had obtained from Elias Bayer to this girl? A. Yes, sir.

Q. Were Elias Bayer and Samuel Bayer present throughout your dictation of both statements? A. Yes, sir.

Q. And was the girl an employee in that office? A. Yes, sir.

Q. Do you know who it was? A. I took her name. It was Ann Solomon, 659 Ocean Avenue, Brooklyn, New York.

Q. Now, when you were dictating to the stenographer did Samuel Bayer or Elias Bayer at any time make any corrections in their previous statements? A. No, sir.

1541 Mr. Wallace: That is all.

The Court: Do you wish to cross-examine?

*Cross-examination by Mr. Keenan.*

Q. What is mean by the statement, "Witness not excused"? A. The witness was excused. We excused Samuel Bayer first and then upon reflection, Major—Lieutenant-Colonel Snyder decided to ask him whether he knew a Major Pepper of Mitchel Field.

Q. Did I misunderstand you? I might have. I thought you said first, "Witness not excused" at one time.

The Court: Now excused.

1542 Q. Was it "now excused"? A. "Witness now excused."

Q. Who administered the oath? A. Colonel Snyder.

Q. And do you know if Colonel Snyder has any power to issue oaths to anyone? A. He was appointed investigating officer.

Q. And do you know who Major Hogan was? A. I knew who Major Hogan was, yes, sir.

Q. Who was he? A. He was a representative of the United States Army, from Washington. He is connected with the Inspector General's Department.

Q. Inspector General of the United States Army? A. Yes, sir.

Q. And Colonel Snyder is from what branch of the Army? A. He is Administrative Inspector of the First Fighter Command.

Q. Administrative Inspector? A. Yes, sir.

Q. Is he in the Inspector General's Department, too? A. It is an administrative staff, sir. He is not an I.G.D.

Q. What is I.G.D.? A. Inspector General's Department.

Q. Was any lawyer present representing any of these defendants, either Samuel or Elias Bayer? A. No, sir.

Q. Did Colonel Snyder suggest that it may be wise for these two men to consult counsel? A. Not exactly that, sir. 1544
He asked——

Q. Did he mention the words, getting a lawyer? A. Yes, sir.

Q. What did he say? Is there anything that you have read about that? A. I don't have it in my notes, no, sir.

Q. Why didn't you take that down? A. That was off the record.

Q. Why was it off the record? A. Because at the beginning we asked, before we started taking testimony, Colonel Snyder said to Samuel Bayer he was going to ask him some questions, and if Samuel Bayer wanted to have his lawyer here, he had permission from the Army.

Q. He had permission? A. Not in that way, but it was implied.

Q. It was implied? A. Yes, sir. 1545

Q. Did you take it down, what was said? A. No, sir.

Q. Why not? A. It was not on the record.

Q. Why wasn't it on the record? A. Because we didn't ask questions, I took my notes down——

Q. You only take down on the record questions that are asked? A. I take my instructions from Colonel Snyder, sir.

Q. Well, that might be an answer that was not taken down because you were not told to do that by Colonel Snyder? A. Yes.

Q. Is that the reason it was not on there? A. Yes, sir.

Q. Colonel Snyder, of course, was in his uniform? A. Yes, sir.

Q. And you were? A. Yes, sir.

Q. And that statement was taken when? A. On August 15, 1944.

Q. That is, right in the height of the war period? A. Yes, sir.

1547 Mr. Keenan: That is all.

*Cross-examination by Mr. Robb.*

Q. How long were you there in all, Sergeant? A. I would say roughly an hour at the most.

Q. How long did it take to take these particular statements? A. About fifteen minutes or twenty minutes.

Q. What went on in the other forty minutes, or forty-five minutes? A. Well, fifteen minutes for Samuel Bayer approximately.

Q. Yes. A. Or twenty minutes, and twenty minutes for Elias Bayer, and the rest of the time was navigating to the car.

Q. How long was it before you started to take these
1548 statements in shorthand? A. Almost immediately, sir.

Q. Can you give us an estimation of minutes? A. I would say roughly ten minutes.

Q. Ten minutes? A. Yes.

Q. Could you tell us what was said in those ten minutes? A. The introductions, and Colonel Snyder's offer to Samuel Bayer to ask his lawyer to come.

Q. That had taken you maybe thirty seconds to tell us. Wasn't there something else that went on? A. Well, when

we came up the elevator we were let out in the corridor, and as we walked to the office Samuel Bayer and Elias Bayer came out, and they both walked into the office in which the interview was, and Colonel Snyder introduced himself most or mainly to Samuel Bayer, and then asked Elias Bayer to leave the room.

Q. Did you have an appointment with the Bayers, Sergeant? A. Did I?

Q. Or did the Colonel, if you know? A. Not that I know of, no, sir.

Q. In other words, you walked in on them more or less unannounced, isn't that it? A. I would say so. I didn't make the plans. I just accompanied Colonel Snyder. 1550

Q. I understand your function perfectly, sir. A. Yes, sir.

Q. Now, can you give us any other conversation that took place before you started to take down this statement? A. I don't believe there was any, sir.

Q. By the way, Sergeant, where is Colonel Snyder? A. Where is he?

Q. Yes, sir. A. The last I knew he was on orders.

Q. On orders? A. Yes, sir.

Q. He is not here today? A. I have not seen him.

Q. You have not seen him in the witness room? A. Oh, no, sir.

Q. Sergeant, before you started to take that statement or these statements, was there anything said by Colonel Snyder about his right to examine these two men at all, his right to examine civilians? A. I would have to reflect upon that. 1551

Q. Would you do that, please, sir? A. If I remember it correctly, sir, we walked into the office, and, just as I said, Colonel Snyder said that he was from the First Air Force, represented the United States Army, in connection with charges pending against Major Radovich. I believe that is about all. He was empowered as investigating officer to investigate the charges.

Q. Yes, sir. He was empowered as an investigating officer by the military to investigate those military charges, isn't that correct, Sergeant? A. I don't know, sir, on that.

Q. He did not have anything to do with any civil charges, did he? A. As far as I know——

Mr. McGohey: We submit the witness has answered that he does not know how extensive his authority was.

The Court: He answered that question. Any further questions?

Q. And your answer is, Sergeant, that you don't recall any discussion about Colonel Snyder's jurisdiction over the 1553 civilians? A. As far as I know, no, sir.

Q. They did not raise the point, so far as you recall? A. No, sir.

Mr. Robb: Will your Honor indulge me just a moment?

The Court: Yes, sir.

Mr. Keenan: One further question, your Honor, if I might ask it.

*By Mr. Keenan.*

Q. Did Colonel Snyder say anything about where Major Radovich was at the time? A. No, sir.

1554 Q. Or what his status was? A. No, sir.

Q. You are certain of that? A. I am pretty positive, yes, sir.

Q. It was not discussed at all? A. No, sir.

The Court: Is that all?

Mr. McGohey: The Government has no further questions, your Honor.

The Court: You may be excused.

(Witness excused.)

JAMES JOHN HENDERSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

*Direct examination by Mr. Wallace.*

Q. Mr. Henderson, will you keep your voice up so that all the jurors and all counsel can hear you? A. Yes, sir.

Q. Where are you employed, Mr. Henderson? A. First National Bank of Palm Beach, at Palm Beach, Florida.

Q. And in what capacity are you employed at the First National Bank? A. As auditor and assistant comptroller.

Q. Are you familiar with the records of the bank in relation to cashier's checks? A. Yes, sir. 1556

Q. Did the bank have a facility at Morrison Field— A. Yes, sir.

Q. —in 1943? A. Yes, sir.

Q. Now, in the course of the business of the bank, when a cashier's check is issued, is a record kept by the bank as a permanent part of its file? A. Yes, sir.

Mr. Wallace: Your Honor, in this case I would like to have marked the photostat, as I understand the bank wants to keep the original as part of its records.

The Court: Both may be marked.

(Original marked Government's Exhibit 23 for Identification; photostat marked Government's Exhibit 23-A for Identification.) 1557

Q. Now, will you look at Government's Exhibit 23-A and tell me if you recognize that as a part of the record of the bank kept in 1943? A. Yes, I do.

Q. And this photostat marked 23-A, that is a duplicate of 23, is that correct? A. That is correct.

Q. You haven't the original of 23, have you? A. No, sir.

Q. What happens to the original of the cashier's check? A. After it is presented for payment it is cancelled and kept, retained as part of the bank's permanent records.

Q. Was the original of 23 ever cancelled? A. It has never been presented for payment.

Mr. Wallace: I offer in evidence Government's Exhibits 23 and 23-A.

Mr. Robb: We object, if your Honor please.

The Court: Is there objection, gentlemen?

Mr. Robb: Yes, sir, we object to it.

The Court: Let me see them, please. I will overrule the objection and admit the exhibits.

1559 Mr. Robb: Exception, if your Honor please.

The Court: Very well.

Mr. Keenan: May we record an objection, if your Honor please?

The Court: Very well.

Mr. Robb: Would your Honor like me to make a statement as to the grounds of my objection?

The Court: If you wish to.

Mr. Robb: There is no connection shown between that check and this case.

The Court: I assumed that would be your ground, but I will overrule the objection.

You wish to withdraw the original and leave the copy?

1560 Mr. Wallace: That is correct, your Honor.

The Court: Well, in addition to that, I think it may be better to keep both in the court file for the present, and if you wish to do that later you may take it up with me.

Mr. Wallace: All right, your Honor.

Mr. Keenan: Well, I think it can go back. We may want to ask some questions about it, but I think there can be a substitution.

The Court: I would prefer to have the original remain in the case for the present, and if you wish to withdraw it later I will entertain a motion. Have you any further questions for the Government?

Mr. Wallace: Yes, I have, your Honor. I wanted to read the exhibit to the jury at this time.

(Government's Exhibits 23 and 23-A for Identification received in evidence.)

Mr. Keenan: I object to it on the additional grounds, your Honor, that it can't be, if I understand the testimony correctly, can't be the check that was described by Captain Pepper, who was a Government witness, because if my memory serves me correctly he said he tore that check up. 1562

The Court: The witness has testified it is not the original but it is the bank's duplicate and that the original has never been presented to the bank. That is what this gentleman has testified to, so the objection is overruled.

Mr. Ansell: May I have one moment, please, to make a statement, your Honor?

The Court: Yes.

Mr. Ansell: As yet I see nothing to connect any one of these defendants with these documents here, or the documents with the defendants.

The Court: All right. That is the ground which I understand your colleague asserted, sir, and I over- 1563
rule that objection.

Mr. Ansell: Well, he said, "with the case," and I wanted to make it more definite than that.

The Court: I so understood.

I do not believe that you are going to be able to complete the examination of this witness this afternoon, and I think I am gong to recess now unless there is some further reason not to do so. However, from the

looks of the documents that you have on the desk there I do not think you will be able to complete it.

We will adjourn now, ladies and gentlemen, until 10.30 tomorrow morning.

Mr. Wallace: Would your Honor direct the witness to return tomorrow morning, please?

The Court: Yes. You will please be back here tomorrow at 10.30.

The Witness: Yes, sir.

(Adjourned to October 11, 1945, at 10.30 A. M.)

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1565

New York, October 11, 1945, 10.30 A. M.

TRIAL RESUMED.

JAMES JOHN HENDERSON, resumed the stand.

Mr. Robb: If the Court please, might I address your Honor briefly?

The Court: Yes, sir.

Mr. Robb: I have read the two statements, one by Samuel Bayer and one by Elias Bayer, which were offered in evidence yesterday and received over our general objection. While, of course, I may say that general objection, since then they have now come into
1566 evidence, and it seems to me they ought to be read to the jury.

The Court: They ought to be what?

Mr. Robb: It seems to me they ought to be read to the jury in their entirety. I have gone over them, and while I find, as your Honor did, there is some chaff in the statements, I do not think there is anything in there which we have any large objection to insofar as the language is concerned, or the particular context

is concerned, although we do, of course, maintain our general objection that we have talked to your Honor about before.

The Court: All right, proceed.

*Direct examination (continued) by Mr. Wallace.*

Mr. Wallace: I think, your Honor, when we recessed yesterday, Exhibit 23 had been marked in evidence, and I was about to describe it to the jury without passing it around.

Exhibit 23——

The Court: Now I think it would be proper rather than to have a description, to read the document in full. 1568

Mr. Wallace: That is what I intended to do.

The Court: All right.

Mr. Wallace: Exhibit 23 reads as follows:

(Reads Exhibit 23 to the jury.)

Q. Now, Mr. Henderson, in connection with Exhibit 23, that is, cashier's check No. 49896, did you ever receive any correspondence in connection with the original of that cashier's check? A. Yes, sir.

Q. And did the bank maintain a pile of correspondence in relation to that cashier's check? A. Yes, sir.

Q. Will you look at these papers and tell me if you can identify them (handing)? 1569

Mr. Keenan: Are you going to show them to us?

Mr. Wallace: Yes.

The Court: Yes.

A. These papers were taken from the files——

Mr. Robb: Pardon me, just a minute. If the Court please, I think the question could be answered yes or no.

The Court: Yes.

Q. Can you identify them? A. Yes, sir.

Q. What are they?

Mr. Robb: I object to that, if the Court please.

The Court: I will permit him to identify them.

Mr. Keenan: I want an exception noted.

The Court: Very well.

1571 Mr. Robb: The same for us, if the Court please.

The Court: All right.

Q. Without going into any details just tell me generally what those papers constitute. A. These papers constitute the file in connection with cashier's check 49896.

Q. Now, I draw your particular attention to this paper, the bottom. Is that paper part of the file which is maintained by the bank in the regular course of its business in connection with that cashier's check, Exhibit 23? A. Yes.

Q. And was this a letter that the bank received? A. Yes.

Mr. Wallace: I offer in evidence the letter which forms part of this file.

1572 The Court: Show it to counsel.

Mr. Wallace: Yes, sir.

The Court: Or suppose you let me see it first, if you don't mind.

Mr. Wallace: Yes, sir (handing to Court).

The Court: All right. Now show it to counsel.

(Mr. Wallace handed letter to Mr. Robb.)

Mr. Robb: Will you bear with us, if your Honor please, for a moment?

The Court: All right.

Mr. Robb: We object, if the Court please.

The Court: On what ground?

Mr. Robb: Might counsel approach the bench, if the Court please?

(The following proceedings took place at the bench.)

Mr. Robb: If the Court please, we object on two grounds: First, I assume that the only ground for the offer is that this is a business record kept in the usual course of business, and we submit that this is not the kind of record which is contemplated by the Federal Business Record statute as it is made by this bank, it is not a record made by anyone in the course 1574
of the ordinary routine of the bank and it does not come within the scope of the exception to the hearsay rule which is contemplated by the Business Entry statute. It is entirely outside the scope of that statute.

Secondly, if the Court please, this matter purports to be a confessional act on the part of this defendant Radovich, and we think that before any such act or declaration by him is received in evidence we should have the opportunity to explore fully the circumstances under which he was induced to make that confessional act or statement.

On both of those grounds we object to this.

The Court: Objection overruled.

Mr. Robb: May we have an exception, if the Court please. 1575

Mr. Keenan: We object to it on behalf of the Bayers. Obviously, in the first place, the mere fact that if otherwise admissible it would be admitted in the manner and fashion approved under the statute quoted, it does not cure the vice of inadmissibility on other grounds, and it is obvious from the date that whatever happened the Radovich letter happened after he was under arrest, as we think the evidence has and

will show, and that it took place not in furtherance of any conspiracy on its own face; and, secondly, after any alleged conspiracy had terminated.

The Court: What has the Government to say as to the last objection?

Mr. Wallace: On the question as to whether the alleged conspiracy has ended, it is the Government's position that it had not ended. As far as Radovich's participation in the conspiracy is concerned, the Government does not claim that this particular act was in furtherance of the conspiracy and is therefore not admissible against all of the defendants, but only as
1577 against the defendant Radovich.

The Court: Objection overruled. And the letter will be admitted as to Radovich, and I will so inform the jury.

Mr. Robb: Might I say one further thing, if your Honor please?

The Court: Yes.

Mr. Robb: In connection with the second ground of my objection, which was that we should have an opportunity to show the circumstances which induced or produced this letter by Radovich, we offer to prove, if we are permitted, that he was induced to write this letter by promises and coercion held out and imposed upon him by the investigating officers at Mitchel Field, that that is why he wrote this letter which is
1578 now being offered in evidence.

Mr. Keenan: I want to add to our objection. While I understand the Court will instruct the jury that it is not binding upon the defendant Bayer, nevertheless, I think if it is improperly admitted even against Radovich, still it is to the Bayers' disadvantage, and I will add that to my objection.

The Court: What have you to say about the inducement and promises?

Mr. McGohey: There is nothing in that letter to indicate that it was made on any promises.

Mr. Wallace: The letter itself appears to be in the handwriting of the defendant, the entire letter.

Mr. Keenan: Nobody has so stated.

Mr. Wallace: That is for the jury to determine. The jury has before them Exhibit 1, which contains the signature of Walter Radovich. The jury is in a position to determine whether or not that is the signature and writing of Walter Radovich. They ultimately must decide that fact.

Mr. Ansell: We want to press the objection, your Honor, that inasmuch as this serves the purpose of 1580
a confession, that this man Radovich was being subjected to investigation, that he was being promised that he would be let out if he did certain things, that he had been there unlawfully for a certain period of time, and we think that all of those circumstances, that question of inducement and coercion ought to be considered before it is admitted.

Mr. Wallace: The letter is in no sense a confession. It is the Government's position, your Honor——

The Court: I will admit the letter.

Mr. Robb: May we have an exception?

The Court: You may have.

(The following proceedings took place in open court:)

The Court: The objections are overruled and the 1581
letter is admitted. Exceptions noted.

(Marked Government's Exhibit 24.)

The Court: Go ahead.

Mr. Wallace: Your Honor, I would like to read to the jury Government's Exhibit 24.

The Court: You may.

Mr. Keenan: I will ask the Court to instruct the jury before the letter is read.

The Court: I will instruct you, ladies and gentlemen, that the letter purports to be from the defendant Radovich, and I charge you that you may consider it in your consideration of the charge against the defendant Radovich, but you should not consider it as evidence in your consideration of the case as against the two Bayers.

Proceed.

(Mr. Wallace reads Government's Exhibit 24 to the jury.)

1583 Mr. Wallace: We have no further questions.

The Court: Do you wish to cross-examine, Mr. Keenan?

*Cross-examination by Mr. Keenan.*

Q. Do you know Samuel Bayer or Elias Bayer? A. No, sir.

Q. Does your bank have any account with them at all, that you know of?

The Court: What is the date of that letter?

Mr. Wallace: It is undated, your Honor.

The Court: Pardon me, Mr. Keenan.

Mr. Wallace: Except that at the top of the page it
1584 has "Received 8/26/44."

Q. Does that mean the date that the letter was received was the 26th day of August, 1944? A. Yes, sir.

(Previous question read as follows:)

"Q. Does your bank have any account with them at all, that you know of?"

Q. (Continuing) With Samuel or Elias Bayer? A. I don't know.

Q. Well, did you look up your records before you came up here, to see whether or not they were depositors at your bank or had any account at your bank? A. No, sir.

Q. What? A. No, sir.

Q. Did anybody ask you to do anything like that? A. No, sir.

Q. Did you look up to see whether Walter Radovich had an account in your bank? A. No, sir.

Q. Do you know who purchased the draft referred to, No. 49896? A. No.

Q. You don't know? A. No. 1586

Q. Is there anything you see in any of your records in any manner or fashion relating to either Samuel or Elias Bayer? A. No, sir.

Mr. Keenan: That is all.

*Cross-examination by Mr. Robb.*

Q. Mr. Henderson, you don't know the defendant, Major Radovich, either, do you, sir? A. No, sir.

Q. Never saw him in your life? A. No, sir.

Q. You don't know his handwriting, of course? A. Only from the letter, I have seen it.

Q. You don't know who wrote the letter, do you? A. No, sir. 1587

Q. Of your own knowledge you don't know who wrote it? A. No, sir.

Mr. Robb: That is all. Thank you.

*Redirect examination by Mr. Wallace.*

Q. Just a few questions, Mr. Henderson. How long have you worked in the bank? A. Since January, 1939.

Q. And prior to that time what was your occupation? A. I was with the Florida Bank & Trust Company at West Palm Beach.

Q. How long have you in all been in the banking business? A. Since June, 1929.

Q. Have you been a teller, a paying teller and receiving teller? A. Yes, sir.

Q. Have you in the course of your business had occasion to examine signatures on checks? A. Yes, sir.

Q. To determine whether the signature on the check corresponds with the signature on an account card? A. Yes, sir.

1589 Q. Now, I show you Government's Exhibit 1, and direct your attention to a signature which appears on the third page, and which reads "Walter Radovich," and ask you whether in your opinion the signature appearing on Exhibit 1, and the signature appearing on Exhibit 24, were written by the same person?

Mr. Robb: If the Court please, we object. He has not qualified him as an expert.

The Court: I think he has sufficiently qualified him as an expert by reason of his bank experience. I will overrule the objection.

Mr. Robb: Exception.

The Court: Go ahead.

The Witness: In my opinion both signatures were
1590 written by the same person.

Mr. Wallace: I have no further questions.

*Recross-examination by Mr. Robb.*

Q. One further question, Mr. Henderson. You don't know, of course, the circumstances under which whoever wrote the letter which you have produced wrote it, do you? A. No, sir.

Q. You don't know anything about that? A. No, sir.

Mr. Robb: That is all.

*Further cross-examination by Mr. Keenan.*

Q. Apparently you know that the letter was written by Walter Radovich while he was in ward 15 of the new confinement hospital at Mitchel Field?

Mr. McGohey: I object to that, your Honor. It appears on the letter itself.

The Court: Objection sustained. Any further questions? Have you further questions?

Mr. Keenan: No, thank you.

Mr. Wallace: Your Honor, the Government would like to substitute for the documents in evidence photostats of them, as Mr. Henderson has indicated that the bank would like to retain them, or retain the original of the document in evidence. 1592

The Court: Why not let Mr. Henderson's bank wait until we get through with this trial? I think I would prefer to have the originals here until the case has been tried. These gentlemen will return the original, Mr. Henderson.

The Witness: All right, sir.

(Witness excused.)

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GERALD J. FLYNN, resumed the stand. 1593

Mr. McGohey: May I proceed, your Honor?

The Court: Proceed.

*Direct examination continued by Mr. McGohey.*

Q. Mr. Flynn, did you see Major Radovich on the 15th day of March of this year, 1945? A. Yes.

Q. And where did you see him? A. I saw him in the office of the Federal Bureau of Investigation in this building.

Q. And on what floor is that? A. That is on the 26th floor.

Q. Was there anybody else present while you were with him? A. Yes, special agent, Edward McCabe was also present.

Q. Now, when Major Radovich——

Mr. Keenan: How is that spelled, please?

Mr. McGohey: M-c-C-a-b-e.

Q. Now, when Major Radovich came to your office was he accompanied by anybody? A. If I recall correctly, he was accompanied by a Major Fabbricatore, who had also
1595 come in to see me that day.

Q. Now, did you have a conversation with Major Radovich that day? A. I did.

Q. Was Major Fabbricatore present during the conversation? A. Well, he was present during part of the conversation, yes.

Q. And Mr. McCabe was present during the conversation? A. Mr. McCabe was present during part of the conversation.

Q. Now, were there any stenographic notes made of that conversation? A. No, sir.

Q. Well, subsequent to the conversation did you reduce to statement form anything that Major Radovich had said to you? A. Yes, I did.

Q. And did Major Radovich read that statement after
1596 it had been written? A. Yes.

Q. Did he make any corrections in it? A. I believe he initialed a correction or an addition on the first page.

Q. Now, did he place his initials on any part of the statement in addition to what you have just described about the correction? A. Yes, he initialed each page of the statement.

Q. Did he sign it? A. And he signed the last page.

Q. Now, was this statement prepared, the written statement, prepared on the 15th of March? A. The preparation

of that statement began on the 15th of March and it had ended a couple of days later, I believe about March 17th.

Q. Well, now, on March 17th did you see Major Radovich? A. Yes, I did.

Q. Where did you see him? A. In our office.

Q. On that day did you have a conversation with him? A. I did.

Q. Was anything he said on that day included in the statement? A. Yes.

Q. And that was the day that he signed the statement? A. That was the day that he read the entire statement and signed it.

Q. And signed it? A. Yes, sir. 1598

Q. Now, will you tell us, as well as you can from your recollection, what Major Radovich said to you on March 15th or on March 17th?

Mr. Robb: If the Court please, we object, and ask that we have an opportunity to explore the circumstances under which these statements were made.

Mr. Keenan: Of course, your Honor, I object to this witness now giving his recollection orally of some statement that he took and that was not taken down in stenographic form at the time, but which he wrote up afterwards and now gives his version, whatever it is. We object to it particularly in light of the previous testimony.

The Court: I overrule that objection. 1599

Mr. Keenan: Exception.

Mr. McGohey: Mark that, will you, please?

The Court: I will have him identify it first and then pass on your objection.

Mr. Robb: Yes, sir.

(Marked Government's Exhibit 25 for Identification.)

Mr. Robb: Will your Honor excuse the jury?

The Court: I will let him identify the statement and then I will excuse the jury.

Mr. Robb: Yes, sir.

Q. Mr. Flynn, will you look at Government's Exhibit 25 for Identification, and tell me is that the statement which you have just told us you wrote down after your conversations with Major Radovich (handing to, witness)? A. Yes.

Q. And Major Radovich signed that in your presence? A. He signed that in my presence.

Q. And this is your signature here, "Gerald J. Flynn" (indicating)? A. Right.

1601

Q. As a witness, is that correct? A. Yes, sir.

Q. And do you see the other signature of Mr. McCabe on there? A. Yes, sir.

Q. And that was made in your presence? A. Yes, sir.

Q. And in the presence of the defendant Radovich? A. Yes, sir.

Q. And your signature was put on there in his presence? A. Yes, sir.

Q. And you saw Major Radovich put his initials at the bottom of each of these pages? A. I did.

Q. Now, who wrote in that correction on the first page there, the fourth line?

Mr. Keenan: Just a minute.

1602

Mr. Robb: If the Court please, we are going too far now in this examination. I think we ought to have an examination first to explore the circumstances before we go into it any further.

Mr. McGohey: If your Honor please, may I be heard?

The Court: Yes.

Mr. McGohey: The witness has testified that Major Radovich made a correction on the first page. I am just identifying it.

The Court: I am going to permit it to be identified and that correction to be asked about.

Q. Is that the correction which you described to us just a few minutes ago? A. That is an addition. I inserted a word there and Major Radovich initialed the insertion.

Q. At that point? A. Yes.

Mr. Keenan: Can I see what he is talking about?

Mr. McGohey: I offer it in evidence, your Honor.

The Court: Ladies and gentlemen, you may retire to your room.

(At this point the jury was excused and the following proceedings took place in the absence of the jury.) 1604

Mr. McGohey: If your Honor please, may I at this time withdraw the question which I asked the witness, to give us his recollection of that statement?

The Court: Very well.

Mr. Keenan: What?

Mr. McGohey: I am withdrawing the question that I asked of the witness.

Mr. Keenan: The record will show a question was asked and objected to, overruled, and passed upon in the presence of the jury.

The Court: And withdrawn.

Mr. Keenan: And withdrawn in the absence of the jury.

The Court: Do you wish the jury here while it is withdrawn? 1605

Mr. Keenan: I do when the time comes, yes, your Honor. I do not want them brought back for that purpose.

The Court: All right. I reserve judgment on that.

Mr. Robb: Your Honor, I wonder if we might have a moment on this statement to look it over. I have

never seen it before. It has just been handed to me by Mr. Wallace and I would like a chance to look at it.

The Court: What do you call a moment?

Mr. Robb: It appears to be fourteen pages long.

The Court: I will give you, of course, any time that is reasonable, but I understood you are now going to explore the matter of the circumstances of the making of the statement.

Mr. Robb: Yes, sir.

The Court: If you wish time to study the statement before doing that, I will grant it to you, but I would not think that it would be absolutely necessary

1607 to familiarize yourself with the contents of the statement.

Mr. Robb: No, sir, because the contents have nothing to do with the circumstances of my inquiry.

The Court: All right.

*Preliminary cross-examination by Mr. Robb.*

Q. Now, Mr. Flynn, about what time of day was it that you had this first conversation with Major Radovich on March 15th? A. As I recall it, I think it was about the middle of the day when we talked on the first day.

The Court: You are referring to March of this year, are you?

1608 The Witness: March 15th of 1945, yes, sir.

The Court: All right. Go ahead.

Q. And he came direct to your office? A. Yes, sir.

Q. Had you arranged to have him come in? A. Yes, I had an appointment with him. I had asked him to come in.

Q. How did you make that appointment? A. I think I made that appointment with him when he had been in the office on a previous occasion.

Q. He had been in on previous occasions, hadn't he? A. Oh, yes.

Q. How many times? A. Well, he had been in our office, I would say, about four or five times. That is an estimate.

Q. And had you arranged to have him come in on those occasions? A. Yes.

Q. And how did you make those arrangements? A. Either by telling him when he came in on a previous visit, or by calling Mitchel Field.

Q. And who did you call at Mitchel Field? A. Usually I would call a Lieutenant-Colonel Miller.

Q. Who is he? A. He was—I believe his position was at the time assistant judge advocate of the First Fighter 1610
Command.

Q. That was the command to which Major Radovich was attached or under whom he was confined, isn't that right? A. I don't know whether it was a command under whom he was confined or attached at the time. I know that was the command that he was originally attached to.

Q. That is right. And you would tell Colonel Miller you wanted Radovich to come in, is that right? A. I would ask Colonel Miller if he would see if Major Radovich could come to the office on such and such a day.

Q. Well, you would tell him to send Radovich in, wouldn't you? A. No, I don't give commands to the Army.

Q. Well, you would ask him to send Radovich in, wouldn't you? A. I would ask him to have Radovich at the office 1611
on such and such a date.

Q. That is right. And then after you had that conversation Radovich would come to your office, is that right, pursuant to it? A. Not always.

Q. Not always? When didn't he? A. Well, I recall at least one occasion I had telephoned Lieutenant-Colonel Miller and Radovich did not come in, and I had to make a subsequent appointment several days later.

Q. Had you called Colonel Miller back about that to find out why he hadn't come in? A. No.

Q. Why didn't you call Major Radovich direct when you wanted him to come in? A. I tried that on one or two occasions, and I believe Major Radovich gave me his phone number direct, but he was rather difficult to find in the field. He was not always in the same spot.

Q. And that is why you called Miller? A. Yes, that is why I called Miller.

Q. Any other reason? A. No, that is about the only reason.

Q. You knew at that time that Major Radovich had to
1613 receive clearance or permission from his superior before he left the field, didn't you? A. Well, I believe that Major Radovich told me that he merely had to tell them that he was leaving the field, and that he was granted permission.

Q. Now, Mr. Flynn, the statement you took from Major Radovich on March 15, 1945, was not the first statement you had taken from him, was it? A. No.

Q. When had you taken a previous statement? A. I am not quite certain of the exact date, but I believe it was about September 5th or 6th of 1944.

Q. And where did you take that statement? A. I took that statement at Mitchel Field in the Santini Hospital.

Mr. McGohey: If your Honor please, I object to this, because, as I understand this inquiry, it goes to
1614 the question of the voluntary character of the statement offered in evidence. Now we are talking about something that happened six months before. The Government was not offering any statement taken at that time.

Mr. Robb: If the Court please——

The Court: It might have some bearing on the issue.

Q. Now, you had that statement with you when you were talking to Major Radovich on March 15th, hadn't you, Mr. Flynn? By "that statement" I mean the one you had taken out at Mitchel Field. A. I believe it was there; I think it was, yes.

Q. And was the statement that you took at Mitchel Field written out in longhand? A. Yes.

Q. In your handwriting? A. Yes, I wrote that statement.

Q. And that was signed also by Major Radovich? A. That is right.

Q. In fact, Mr. Flynn, you had before you when you talked to the major on March 15th and March 17th the 1616
statement that you had taken from him out at Mitchel Field, didn't you? A. I had it on the desk, yes, sir.

Q. And you more or less followed along that statement, I mean the previous statement, in framing the one you took on March 15th and March 17th, is that correct? A. No, I wouldn't say I followed it. I would say that it was read, that I read it and that Major Radovich, I believe, read it.

Q. I beg your pardon? A. I say Major Radovich read the statement and I read the statement. As I recall it, I got the statement out at the suggestion of Major Radovich.

Q. And he read it and you read it before you took the new statement from him, isn't that right? A. That is right.

Q. What was the purpose of taking the new statement? A. Major Radovich had remembered several additional 1617
pieces of information which I thought important. He had a more complete picture in his mind, and that was the purpose of taking the new statement.

Q. In other words, you wanted to add something to the old one? A. I wanted to incorporate the entire story into one statement.

Q. Expand it a little bit, is that right? A. I didn't intend to expand it——

Mr. McGohey: I suggest the witness has answered it. And I object to counsel putting words in his mouth.

Mr. Robb: I am cross-examining.

The Court: He is cross-examining; the jury is not here.

Q. Mr. Flynn, it is a fair statement, isn't it, that the statements you took at Mitchel Field in September were really the basis of the one you took in your office in March, basically they were the same, weren't they? A. Basically the same—if you want to go right down to the basis, and I will have to wander a bit from your question on this, Major
1619 Radovich told me the story in September. He didn't change that story basically, so the statements would be basically the same.

Q. And you used the September statement as a point of departure in preparing the new statement; isn't that a fair way to put it? A. I don't understand what you mean by that "point of departure."

Q. Perhaps we have covered it already. The new statement was really the old statement with some new facts added to it, isn't that about right? A. No. I would say it was a new statement. It may have been similar, but I say it was a new statement.

Q. You had the old statement on the desk when you were writing out the new one; isn't that true? A. That is true. It was there, as I recall, at the request of Major Radovich.
1620 Q. In other words, he remembered he had a previous statement to you? A. That is right.

Q. And he spoke about it to you, is that right? A. That is right.

Q. You said that when you took the statement in September Major Radovich was in the Santini Hospital. What ward was he in? A. I wouldn't recall the ward. There was no occasion for me to remember it.

Q. Can you give us any description of that ward? A. That is difficult because the Santini Hospital, as I recollect it, has a number of buildings or wings off a connecting corridor, and unless you know the place very intimately you would be lost down there.

Q. Well, you didn't go all over the hospital to see Radovich, did you? A. No, I did not.

Q. Was the ward that he was in locked? A. I don't recall that the ward was locked.

Q. How did you get in? A. I was taken there by a Lieutenant-Colonel Miller.

Q. You had never seen Major Radovich before? A. I had never seen him before.

1622

Q. By the way, did you give us the exact date of that statement? A. I told you I couldn't give you the exact date; that I thought it was about September 5th or 6th of 1944.

Q. Do you recall whether or not that ward had bars or grilles on the window? A. No, I don't recall it. I noticed that there was a screen there, I believe, but I don't know—

Q. Where? Screen where? A. On the window.

Q. What kind of screen? A. It would be an ordinary type of screen, to keep insects out.

Q. It was not a heavy wire? A. I don't recall that it was a heavy one. I paid no particular attention to it.

Q. You don't recall what kind of screen it was? A. I say, I paid no particular attention to it. I think there was a screen there.

1623

Q. When you say "there", where do you mean? A. Where we are talking about.

Q. On the windows? A. On the window.

Q. Window— A. Of Major Radovich's room.

Q. Do you recall you had to go through a locked gate to get into this ward? A. I think there was a gate there.

Q. Was it locked? A. I don't recall that, whether it was locked or not. Major—Lieutenant-Colonel Miller pre-

ceded me into the ward. Now, whether he had to have the gate opened or not, I don't know.

Q. Did Colonel Miller introduce you to Radovich? A. He did.

Q. What did he say when he introduced you? A. Well, my recollection is that he told Radovich that I and Special Agent Brown——

Q. Was Brown with you? A. Brown was with me at the time.

—were special agents of the Federal Bureau of Investigation, that we wanted to talk to him about this matter, and that it was up to him whether he wanted to tell us any-

1625 thing.

Q. What else did he say? A. I believe then he asked me if I thought I could find my way out without his coming back for me, and that is all.

Q. All right. Then what happened? A. Lieutenant-Colonel Miller left.

Q. Now, Mr. Flynn, at that time you were interviewing Major Radovich as a witness, weren't you? A. I was interviewing Major Radovich for the purpose of obtaining the story. I did not classify him as a witness or anything else.

Q. What was said by you or by Brown after Colonel Miller left? A. We discussed the case in general, and then——

Q. What do you mean by that? A. Well, the facts of

1626 the case. Do you want me to go into the discussion?

Q. I want to know how you opened up the interview with Major Radovich at that time. A. I told him that the Federal Bureau of Investigation was conducting an investigation into this matter and that we had come to him to get his story as to just what happened.

Q. All right. What was said then? A. He told me the story.

Q. All right. Was there any hesitation on his part? A. None at all.

Q. Do you recall him making a telephone call about that time or trying to make a telephone call? A. I recall that he mentioned a warrant officer by the name of Bradspies; I don't know whether that is right or not.

Q. That is all you recall about it? A. And that—I don't know whether he attempted to call him or not. Several times, as I recall it, Major Radovich would go out into the hall and either answer phone calls or make them. I did not accompany him out.

Q. Do you recall any conversation about whether or not you were interested in the military side of the case? A. 1628
No.

Q. That was not mentioned? A. I don't recall that at the time.

Q. Would you say that didn't take place? A. That I was interested in the military?

Q. Do you recall any conversation about whether or not you and Mr. Brown were concerned with the military side of the case or whether you were only interested in the apprehension and prosecution of the civilians who may be involved? A. No, I don't recall that.

Q. Would you say that didn't take place? A. I say, I don't recall it.

Q. But you wouldn't say it didn't take place? A. If I don't recall it I would say it didn't take place. I think 1629
I would recall a statement like that.

Q. You don't recall what kind of ward it was, do you? A. I don't see that there is any reason why I should pay attention to the type of ward. I go into a lot of rooms and buildings during the course of my work. There is no particular reason to describe those rooms afterwards.

Q. You don't take statements from witnesses every time you go into one, though, do you? A. I take statements from a great number of people.

Q. Do you know how long Major Radovich had been in that ward when you talked to him? A. No.

Q. Did you find out? A. No.

Q. Weren't you interested? A. No.

Q. You know, do you not, that if a man has been confined for longer than a reasonable time without being arraigned or brought before a commissioner, any statement he makes can be used against him; you know that, don't you?

Mr. McGohey: I object to that, your Honor. That is a question of law.

1631 The Court: That is a legal question.

Mr. Robb: I am merely trying to find out if there wasn't some reason for this witness to be interested in how long Major Radovich had been in there.

The Court: He said he wasn't and he didn't know. It has no bearing.

Q. Did you ever have any conversation with Major Radovich as to whether or not he was going to be tried over here in the District Court? A. I never had any occasion to discuss that with Major Radovich.

Q. I didn't ask you that, Mr. Flynn. I asked whether you did have any such conversation. A. No.

Q. Are you sure about that? A. Yes.

Q. Never heard any conversation about that? A. No.

1632 Q. Never heard anybody speak to him about that? A. No.

Q. Never heard him asked whether he was going to be tried with the civilians? A. No. I don't recall ever hearing that mentioned.

Q. Would you say it wasn't mentioned? A. I will say I don't recall it.

Q. Did you ever hear Major Radovich ask you or anybody else whether he was going to be indicted or tried along with the civilians in the case?

Mr. McGohey: If your Honor please, I think the time ought to be fixed about this, if it is material at all.

The Court: Well, he is asking him, comprehensively, if he heard it. I think that is all right. We can go into more detail, if he requires it at all.

A. I never—he never asked me that. There is no reason for him to ask me that. I have no——

Q. Did you ever hear him ask anybody else that? A. I don't recall that I ever heard him ask anybody else that question.

Q. Did you ever hear anybody tell him that he was not going to be tried along with the civilians or in the civilian 1634
court? A. No, I never did hear anybody tell him that.

Q. You never heard that? A. No.

Q. Did you ever hear anybody tell Radovich that the District Attorney's office was not interested in Army people but was only interested in prosecuting the civilians? A. I don't recall hearing anybody tell him that.

Q. Were you present when the major was interviewed by Mr. Wallace on several occasions? A. I think I was present on some of the occasions, but not all of them. There was an occasion, I believe, when you were present; I wasn't there.

Q. Were any of those occasions prior to your interview, which you told us about, on March 15th? A. You mean prior to the taking of this statement?

Q. Yes, sir. A. I would say yes, that possibly they 1635
were.

Q. In other words, there were occasions when the major came in to see Mr. Wallace and those were other than the occasions when he came in to see you; is that right? A. That is right.

Q. Did you arrange to have him come in to see Mr. Wallace? A. I may have.

Q. Well, did you? A. On some occasions I believe I did.

Q. Did you do that by calling Lieutenant-Colonel Miller? A. My usual method was to call Lieutenant-Colonel Miller unless I had been in contact with Major Radovich.

Q. Let me ask you, Mr. Flynn, why did you go to see Lieutenant-Colonel Miller on the first occasion when you went to see Radovich in the hospital? Why did you go to see Miller before you went to see Radovich? A. I didn't know where Radovich was.

Q. Why did you pick on Colonel Miller as the one to see? A. Well, Miller is the judge advocate or the assistant, the then assistant judge advocate of the First Fighter Com-
1637 mand, and I believe the case had been brought to our attention through the Office of the Judge Advocate of the First Fighter Command.

Q. Through Colonel Miller? A. It was not brought to my attention through Colonel Miller; it was brought to my attention by the office of the United States Attorney.

Q. Yes. But you said it was brought to "our attention". A. It was brought, as I understand it, and I have no knowledge of this, of my own knowledge, it was brought by Colonel Harmeling.

Q. Who is Colonel Harmeling? A. He is Judge Advocate or was the Judge Advocate at that time.

Q. Colonel Miller's superior? A. Yes.

Q. In other words, the case was referred to the United States Attorney by Colonel Harmeling, who was Colonel
1638 Miller's superior; right? A. That is what I understand.

Q. And then you were assigned to investigate it, is that right? A. That is right.

Q. How long had you been on the case when you went out to see Radovich the first time? A. Several days.

Q. Well, could you give us about how many days? A. I would estimate it would be about three or four days.

Q. He was not the first witness you interviewed?

The Court: Aren't you getting off the subject, Mr. Robb?

Mr. Robb: Perhaps I am, your Honor. May I have that question answered, then I will go on to another one.

The Court: Yes, sir.

A. That would be hard to say at the moment. I don't recall if he was the first one.

Q. Mr. Flynn, isn't it a fact that when you interviewed Major Radovich in that hospital that you didn't consider him to be a prospective defendant in your case, the case you were trying to make? 1640

Mr. McGohey: I object to that, your Honor.

The Court: I think we can consider that as immaterial, what he considered then. I suppose that is different from what we are considering. I am stretching pretty far in my consideration that statement, because the March statement is the thing that we are concerned with, isn't it?

Mr. Robb: That is all true.

The Court: I understand that there might be some connection——

Mr. McGohey: Certainly not the answer to that last question, your Honor.

The Court: I say, I don't think that question is proper. It is the reaction in the declarant's mind that 1641 is important, or what he had a right to have in mind,

Mr. Ansell: If the Court please, I admit Mr. Robb can take care of himself, but there is a point that I think has not been sufficiently brought out so far. It does not seem to me to be important upon any examination to show the capacity in which this witness was approaching and examining Radovich. I think it is important to show what this witness did.

The Court: So do I, and I am letting him testify fully about what he did and said.

Mr. Ansell: I thought it would be important, if your Honor please, to know in what capacity the witness approached Radovich, whether as a defendant or as a mere witness. I am speaking, your Honor, about the necessity of taking a defendant, if he is a defendant, before a duly authorized committing magistrate. It might be different if he were a mere witness. But here was a man, so far, in a very small room Mr. Brown calls it, and I thought it would be important and enlightening—it will have to be brought out some day or
1643 other—as to the relationship of this investigating witness to Radovich at that time, whether he was out there examining Radovich as a defendant or as a mere witness. I think it makes a big difference.

The Court: I don't see how he could possibly tell what his status would be until after he completed his investigation. He testified he went out there as an investigator and declared himself as such. What took place from there on I will permit you to go into.

Mr. Ansell: He saw he was in confinement, your Honor, already; whether held by the civil authorities or held by the Army, he was in confinement.

The Court: Let us complete the examination about the facts and then I will hear you. Have you further questions?

1644 Mr. Robb: Yes, I have.

The Court: Go ahead.

Q. Now, Mr. Flynn, how large was this room in which you found Radovich at the hospital? A. I think that fact can be readily ascertained from the records, but my estimate would be it was possibly, oh, 10 or 12 feet square, with a lavatory attached to it.

Q. 10 or 12 feet square? A. 10 or 12, I mean "by" 12; I don't mean 10 square feet now.

Q. I know what you mean. And how was it furnished? A. Well, my recollection is that there was a bed in there, a small table, and I believe two chairs.

Q. Straight back chairs? A. I don't recall that.

Q. Do you recall any conversation with the defendant Radovich on the occasion you went there the first time to the hospital about whether or not he was being stupid if he didn't talk to you? A. No.

Q. You don't recall that? A. No.

Q. You said that Radovich left the room a couple of times, and you thought, to make a telephone call? A. Yes. 1646

Q. Did he tell you what he was going to call about? A. Well, as I said before, the name of Bradspies was mentioned. Now, whether he was talking to Bradspies or whether he received a call from Bradspies I don't recall.

Q. You don't know what he wanted to talk to Bradspies about? A. I think at that time that Bradspies was assigned to Radovich as counsel.

Q. How do you know that? A. I think Radovich told me that.

Q. All right. Would you answer my question, do you know what Radovich wanted to talk to Bradspies about? A. No, I don't recall that I know that.

Q. Don't you know, Mr. Flynn, that Radovich was worried about whether or not you were interested in prosecuting him and he wanted to assure himself about that before 1647 he talked to you? A. No. As a matter of fact, I know that he wasn't.

Q. He wasn't worried, is that right? A. That is right.

Q. Why wasn't he worried? A. Well, I can tell you what he told me.

Q. Go ahead. A. He told me that he regretted very much getting mixed up into this affair and wanted to get it all straightened out, and that in view of that fact that he

had returned as much money as he then had to the Army, he had turned over a certain—I don't recall the sum of money that he said he had turned over at that time, but he had turned over some money.

Q. That is why he wasn't worried about being prosecuted by the District Attorney's office? A. No. The reason that he apparently didn't impress me as being worried by that was the fact that he stated that he——

Mr. Keenan: I object to anything going in this record as what impressed this man about Major Radovich being worried.

1649 The Court: All right. Just tell what he said.

A. (Continuing) Well, he said that he regretted getting mixed up into this affair.

Q. Yes, you told us that. Now I want to know what there was about him which led you to conclude that he was not worried about being prosecuted? A. He didn't mention it.

Q. It wasn't anything you mentioned to him, was it? A. No, it was definitely nothing that I mentioned to him.

Q. Did you again see the major out at Mitchel Field after this first interview in the hospital? A. I don't recall that I ever saw him in the hospital again.

Q. I didn't ask you that. Did you again see him at Mitchel Field? Did you not say "in the hospital"?

Q. No, sir.

1650

Mr. Wallace: Let us have the question read back.

The Court: Oh, don't let us quibble, gentlemen.

A. If I misunderstood you, I am sorry.

The Court: Go right ahead.

A. (Continuing) I saw the major at Mitchel Field again.

Q. Where? A. I went out there to see a Captain Kogan one day. This was quite some time later. And Major Radovich heard that I was there and rode over on a bicycle to see me.

Q. Where did you see him? A. I saw him in the front of the temporary building in which the Judge Advocate's office was.

Q. Colonel Miller's office? A. Colonel Miller and Colonel Harmeling.

Q. Do you recall ever having any conversation with Major Radovich about whether or not the District Attorney's office was in sympathy with him? A. No, I wouldn't make—I did not and I would not make such a statement. 1652
That would be for the District Attorney to make.

Q. Did you ever hear anybody say that to Major Radovich? A. No.

Q. Now, on the occasion when you told us that you saw Major Radovich the second time at Mitchel Field, you did not have him sent over to the office to see you? A. No, I did not even know he was coming. In fact, I did not intend to see him that day.

Q. Now, Mr. Flynn, getting back for a moment to your interview with the major on March 15th, you told us you read his statement which he had made in the hospital in September; did you read it aloud? A. I don't recall whether I read it aloud. I recall that I read it and that I gave it to Major Radovich, and that he read it.

Q. You read it first? A. Well, I can't be positive whether 1653
I read it first or whether he read it.

Q. How many pages were in that statement?

Mr. McGohey: Pardon me. Which statement?

Q. The statement that you had taken in September and which you read. A. Maybe five or six.

Q. Did you have a copy of it with you? A. No.
Q. Is there a copy here? A. I don't know.

Mr. Robb: Mr. McGohey, do you have a copy?
Mr. McGohey: Yes, I have.
Mr. Robb: May I have it, sir?
Mr. McGohey: It is in the office. I answered the question that I have it. That is true. I have possession of that statement, your Honor, but I certainly am going to resist producing it now unless directed, because I am not offering that statement in evidence.
The Court: I will not require you to produce it.

1655 Mr. Robb: If the Court please, may we formally ask the Court to require Mr. McGohey to produce it, and take an exception to your Honor's ruling?
The Court: Very well.

Q. Mr. Flynn, how long had you been in that hospital room before you began to take down this statement from Radovich? A. I couldn't estimate; it wasn't too long. I got there some time in the middle of the afternoon. I would say maybe about 15 or 20 minutes, maybe a little longer. That is purely an estimate.
Q. Had one of these telephone calls that you told us about taken place before you began taking the statement down? A. I don't recall that.
Q. You don't recall whether it had or not? A. I don't
1656 recall whether it was before I started to write the statement or whether it was in the middle of the statement.
Q. Mr. Flynn, could you give us your best judgment as to what time of day it was that you went there to see Radovich?

Mr. McGohey: I think he has answered that, your Honor.

Mr. Robb: I want to see if he can give it a little more accurately.

A. Well, it was probably half-past two or three o'clock.

Q. In the afternoon? A. Yes.

Q. You knew, did you not, that at that time Major Radovich was confined?

Mr. McGohey: I think that question has been answered at least twice, your Honor.

The Court: I will let him answer it a third time.

A. I don't know that he was confined. I had nothing to do with any confinement. He was not in my custody. 1658

Mr. Keenan: Your Honor, I object and ask that this witness be instructed to answer the question of counsel.

The Court: Well, I think he has answered.

Q. Your answer is that you didn't know whether he was or not? A. I have no—of my own knowledge I don't know that he was confined.

Q. Did somebody come to take him out for a walk while you were there? A. No. I don't recall that. I am sure I would recall it if it happened.

Q. Do you recall whether at that time he was getting ready to go out for some exercise? A. No, I do not recall that. 1659

Q. Do you recall any conversation about some decorations he was wearing? A. Yes. I recall that there was some officer, I don't recall his rank, who came there with a letter to Major Radovich regarding the wearing of decorations in the hospital—I don't recall, I didn't see the letter. But it was apparently some reason why some officer there thought he shouldn't wear his decorations, and Radovich, as I recall it, just refused to take them off.

Q. At that time, Mr. Flynn, how was Major Radovich dressed—uniform? A. Oh, yes.

Mr. Robb: That is all for the time being, if the Court please.

The Court: All right. Have you other testimony?

Mr. Robb: Yes.

Mr. Keenan: I would like to ask a question of this witness at this time, your Honor.

The Court: All right, sir.

*By Mr. Keenan.*

1661 Q. Did you show Major Radovich the testimony, the statement you got from Bayer? Look at me.

Mr. McGohey: I object, your Honor.

The Court: I don't think you have any right——

Mr. Keenan: I think I have a right to interrogate this witness as to anything that is germane to the issues of this case.

The Court: I am not saying that. My point is that I don't think you have a right to direct the posture and the cast of his countenance.

Mr. Keenan: I beg your pardon. It was my own observation.

The Court: I am going to let you examine the wit-

1662 ness.

Mr. Keenan: May I have the question answered?

Mr. McGohey: Your Honor, may I be heard for a minute, please?

The Court: On what?

Mr. McGohey: I object to any examination here by Mr. Keenan: Your Honor has already instructed in

all of these matters that these statements were to be admitted only as against the person who made them. Now the question that we are going into, as I understand it now, is whether or not this statement made by Major Radovich is voluntary or not.

The Court: That may technically be true, but I am going to let counsel examine the witness if I think it is material.

Q. Answer the question, please. Did you show the statements taken from the two Bayers to Major Radovich? A. No.

Q. They had been written out beforehand? A. Which— 1664
you mean at any occasion——

The Court: Do you think that has any bearing on the admissibility of the statement, Mr. Keenan?

Q. Did you discuss the fact with him of what Bayer had stated?

Mr. McGohey: I object to that, your Honor. That is immaterial.

The Court: I don't see any bearing on the admissibility at all.

Mr. Keenan: I think I have the right, your Honor, to interrogate this witness as to any material fact in this case at this time in cross-examination. 1665

The Court: All I am saying now is the question of whether this is a voluntary, admissible statement.

Mr. Keenan: Oh, I beg your pardon. I won't go into it.

The Court: All right, sir.

Mr. Robb: If the Court please, I have one question I would like to ask the witness.

*By Mr. Robb.*

Q. Mr. Flynn, you were receiving, were you not, copies of statements taken by the Army investigators in connection with this case?

Mr. McGohey: May I have that question?

The Court: Had he been receiving copies of statements taken by Army officers.

Q. (Read.) A. I received copies which had been taken from the United States Attorney. I did not receive any copies of statements which were being taken or any copies—

1667

Mr. Ansell: I can't hear him.

(Answer read.)

A. (Continuing) —which were being taken by the Army investigative officers or any copies subsequent to the receipt of those original copies which I received from the United States Attorney's office.

Q. Now, the statements you had received from the United States Attorney's office were those which had been taken previously by Army investigators, is that right? A. That is right.

Q. The Army investigators turned over their statements to the United States Attorney, who in turn gave them to

1668 you, is that right? A. That is right.

Q. And you had those when you went out to interview Major Radovich at the hospital, isn't that right? A. No, I don't believe I had those statements with me that day.

Q. Well, I mean you had them in the files? A. They were in the office, I believe.

Q. And your office and the Army investigators were working together in this case, weren't they, co-operating at least? A. We were co-operating; we were not working together, though.

Q. Well, that is why I changed the expression. You were co-operating, weren't you? A. Well, I agree with your change then.

Mr. Robb: That is all.

The Court: All right, sir. You may step aside. Call the next witness.

Mr. McGohey: I have a few more questions I would like to ask of this witness, your Honor.

The Court: All right.

*Redirect examination by Mr. McGohey.*

Q. Now, the first time you saw Major Radovich was some time in the early part of September, was it not, at Mitchel Field? A. 1944? 1670

Q. That is, September of 1944? A. Yes.

Q. Now, between that time and the 15th of March had you had any communication with Major Radovich? A. Oh, yes.

Q. Did you have any telephone conversations with him? A. Oh, yes, he called me on the phone.

Q. He called you on the phone? A. Yes.

Q. At your office here? A. Yes.

Q. And in those telephone conversations did he make any statements to you that had a bearing on this case?

Mr. Robb: If the Court please, I submit these questions are very leading, and I object to them. 1671

The Court: Well, I do not find that. Some of them may be, but then he may be in a position to cross-examine him. I do not suppose he is. However, I do not think that the questions are very leading.

Mr. McGohey: Well, your Honor——

The Court: No. Go ahead.

Mr. McGohey: Read the question, please.

The Witness: Yes. On one occasion I recall that he called me to give me the correct name of the uniform company. He had been in error as to the name.

Q. Now, you stated that Major Radovich came to your office on March 15th, and I think you testified also that on some other occasions when you wanted to see Major Radovich you would call Colonel Miller? A. That is right.

Q. And ask him to send word to the Major? A. Yes.

Q. Now, was there any occasion between September, 1944, and March, 1945, when Major Radovich came to your office without having had an appointment made by a telephone conversation?

1673 A. I believe he came in one day unexpectedly. I don't recall that we did anything except talk for a few moments and——

Q. At least he came into your office? A. Yes. And there was a second occasion when he called me up and told me that he wanted to see me, and when he came into the office, why, he had no reason to see me. He wanted to just pick up a jacket, I think, which he was having tailored.

Q. Now, on any of the occasions that Major Radovich came into your office, was he accompanied by any guard? A. No, I never recall Major Radovich coming into our office under a guard.

Q. Now, by whom was he accompanied at any time? A. On most of the occasions he was not accompanied. I believe on one, or on at least one occasion he came in with a

1674 Major Fabbricatore, when they both drove in together.

Q. Well, you told us about that before? A. Yes.

Q. Now, was he ever accompanied by anybody else? A. No. He would sometimes come in in a staff car, and he would tell me that there was a chauffeur waiting for him downstairs. I believe that is all.

Q. Well, when he came into your office, I mean was he accompanied by anybody, except the day that he was accompanied by Fabbricatore? A. No.

Q. And when he left your office was he accompanied by anybody? A. No.

Q. Now, when you took the first statement from him, you told him that you were an agent of the Federal Bureau of Investigation. Did you tell him the consequences of any statement that he might make? A. I told him that, and I identified myself as an agent of the Federal Bureau of Investigation. I told him briefly that anything that he did say could be used against him.

I told him that I was in no position to make any promises to him either one way or the other, and that if I were to make such a promise I would not be able to keep it because I had no such authority. 1676

Q. And did you ever make such a promise? A. I never made him any promises.

Q. At any time? A. At any time.

Mr. McGohey: I have no further questions.

The Court: All right.

*Recross-examination by Mr. Robb.*

Q. Who brought up the subject of making any promise, you or Major Radovich? A. I beg your pardon?

Q. Who opened up the subject of whether or not you could make any promises, you or Major Radovich? A. I did in telling him just what my position was.

Q. He had not asked for any promises? A. No. 1677

Q. You opened that up yourself? A. I made the statement. I always make that statement.

Q. Is that why you say you made it to him, or do you remember making this particular statement? A. No, I recall specifically I made that statement to him.

Q. You remember this particular case, is that right? A. I recall it.

The Court: Any further questions of this witness?

Mr. Robb: No, sir.

The Court: All right. Call the next witness.

Mr. Robb: If the Court please, might this witness be instructed not to discuss this testimony with anybody, I mean, Mr. Flynn?

Mr. McGohey: If your Honor please, Mr. Flynn is the agent that I have been having at this trial all the way through. He has been in charge of the investigation, and I would prefer to have him sit right here.

The Court: Well, I would prefer not to have him sit there during the course of his testimony. While
1679 You are on the witness stand, Mr. Flynn, as I told you before, I do not want you to discuss this case with anyone. When the testimony is completed or when Mr. Flynn has completed his testimony as to the Bayer statements, I told him he might resume his place at the counsel table. So, he may not resume his place there until after he has completed his testimony here.

Mr. McGohey: All right, sir.

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WILLIAM JOSEPH PENDER, called as a witness on behalf of the defendant Radovich, being duly sworn, testified as follows:

1680 *Direct examination by Mr. Ansell.*

Q. Mr. Pender, will you tell me where you are employed now? A. I am stationed at Mitchel Field Fire Department, Mitchel Field, Long Island.

Q. How long have you been employed at Mitchel Field? A. At the present time, four months, sir.

Q. Were you ever employed as a wardman in the Santini Hospital at Mitchel Field? A. I was.

Q. Were you employed as a wardman in this hospital in August and September, 1944? A. I was.

Q. Will you please state to the Court the duties of your employment in that hospital? A. I will, sir.

Q. Please state what were your duties. A. My duties—

Mr. McGohey: I object to that, your Honor. I do not see its materiality to this question.

The Court: I suppose you are going to connect it?

Mr. Ansell: Certainly.

The Court: I would like you to connect it as directly as it is logical.

Mr. Ansell: Yes, sir. 1682

Q. Did you see or know Major Radovich in the hospital in August and September, 1944? A. I did.

Q. Did you have any duty with respect to Major Radovich at that time, August and September, 1944? A. I did.

Q. You were a wardman there? A. Yes, sir.

Q. You were there as a wardman, and do you remember when Major Radovich was brought into that hospital? A. I do.

Q. Do you remember about what time of the day and what month it was when he was brought there? A. I do.

Q. When? A. It was around the 8th or 9th of August, around 5:30 at night, on either one of those days, the 8th or 9th of August.

He was assigned over to me to take care of him, to undress him, relieve him of all property that he may have on his possession, such as razor blades, matches, fountain pens, tooth brush, whatever article may injure him. 1683

He was to take a bath, and then I gave him pajamas, coat and pants, pajamas without strings to tie up the pants, and a bathrobe without a string to tie around his waist.

I then assigned him to a room and watched him until my tour of duty was over.

Q. Will you tell me who brought Major Radovich into that ward? A. At the time he was entered in the ward and brought inside the gate, a nurse put him inside the gate, whoever was at this time the nurse, and he just transferred over to me.

Q. You did not see any officers bring him there? A. No, sir.

Q. Who was the nurse? Was it a nurse of rank in charge of that ward? A. It was a nurse of rank in charge of that ward.

Q. What was her rank? A. First Lieutenant.

Q. First Lieutenant? A. Yes, sir.

1685 Q. You say he was roomed in ward 15? A. That is right, sir.

Q. Will you describe to me what ward 15 of that hospital was? A. Ward 15, it was composed of twenty-four beds. One section of the ward had six beds on one side and seven on the other, rooms, and as you entered the ward you had to pass through a big iron gate and as you stepped inside the gate you were assigned to rooms on both sides of the ward.

Q. This iron gate then was the door or gate to ward 15, is that right? A. That is right, sir.

Q. And when you got into ward 15 there were little rooms, were there? A. Yes, sir, there were little rooms with doors attached, and inside of those was a bed about 6 foot long. The room was composed of about 6 by 9, and

1686 the windows in that room were screened with heavy mesh about a half an inch, and were locked by key at all times.

Q. By screens, do you mean an ordinary screen against insects, or was it a screen of steel grill? A. It was of steel grill.

Q. What about the door that entered into this ward? What kind of door was it? A. That was a big, heavy door weighing about 250 pounds, 200 pounds.

Q. And was that grilled, too? A. That door was solid except two leaves; one at about 5 foot high and the other about 12 inches from the floor.

Q. And there was a lock and key? A. Yes, sir.

Q. To that door? A. That is right, sir.

Q. A heavy door with a heavy lock and key, is that right? A. That's right, sir.

Q. Where was the key to that door kept? A. That was kept on the person of the attendant.

Q. And you had been an attendant? A. Yes, sir.

Q. Would you have that key? A. Yes, sir.

Q. Now, as you entered this ward 15 and went to one of the small rooms, as the room where Radovich was confined, 1688
will you state again for me the size of Radovich's room? A. Radovich's room was 6 by 9 with a heavy gate door, and on the side there was an adjoining bath. Now, this is only just one room I am talking about with adjoining bath, a bathroom.

Q. What kind of bed? A. The bed was an iron bed.

Q. Then, as I understand it, you entered this ward through a door, of course. What did that door consist of? A. A big, heavy iron gate.

Q. Did that have a lock and key, that door? A. That door did have a lock and key.

Mr. McGohey: I think we have been through this, your Honor. 1689

The Court: It seems to me you are repeating.

Mr. McGohey: It has all been described in great detail.

Mr. Ansell: Your Honor, we want to describe this in great detail.

Mr. McGohey: We have had it.

The Court: Possibly we have had enough on that.

Q. Well, was there a lock on the door that entered this small room where Radovich was confined? A. There was a lock on that door.

The Court: He has already so testified, and that the attendant carried the key.

Mr. Ansell: That was offered as to the big door.

The Court: As to the iron door I understood him to testify.

Q. You are familiar with the purposes and use made of ward 15, are you? A. Yes, sir.

1691 Q. What were the purposes and use made of ward 15? A. To see that no patient committed suicide while being detained there.

It was mostly for battle fatigue, nervous patients, acute alcoholics, or alcoholics.

Q. Well, it was a place where people who were violent or likely to commit suicide were kept, is that right? A. That's right, sir.

Q. And it was for that reason that you took away Radovich's uniform, presumably? A. Yes.

Q. And took away his shaving facilities? A. That's right, sir.

Q. And gave him pajamas without a belt? A. That is right, sir.

Q. A hospital robe without a belt? A. That is right.

1692 Q. Now, what kind of supervision did you keep over Radovich, or were you instructed to keep over him? A. The nurse in charge gave me strict orders "suicide", and on suicide we keep these doors wide open and watch him continually for the twelve hours we are on duty to see that he does not harm or hurt himself in any way.

Q. And you were on twelve hours and then there would be another wardman or attendant for different hours, is that right? A. There would be.

Q. When Radovich would want to shave, how would he shave? A. I would have to step through the iron gate and open a lock and get his briefcase, or whatever may be there, and take his razor out, and insert a blade, and bring him over to the bathroom and watch him while he was shaving.

Q. And then when he had finished shaving? A. I would take the razor right off him and put it back, lock it up again.

Q. How did he get his meals and how were they served? A. His meals were served on a tin platter, with no knife, only a fork and spoon and cup, no glass.

Q. Did he always have a fork and spoon with which to eat his meals? A. Yes, but with somebody watching him. 1694

Q. Did the time ever come when he was deprived of the fork even? A. Yes, he was deprived even of the fork. An order came through to take all forks away.

The Court: You mean all the forks in the ward?

The Witness: In the ward, yes, sir.

Q. Did you take away Radovich's fork? A. Yes, sir.

Q. Do you remember, or have you any recollection of a day when an Army officer and some civilians came there and visited that ward apparently for the purpose of examining Radovich? A. Yes, sir.

Q. Do you know who they were? A. I don't know who they were, sir.

Q. Do you know the rank of the officer who came? A. 1695
At the time I think he was a Lieutenant Colonel.

Q. You wouldn't know and couldn't identify now the civilians? A. No, sir, I couldn't.

Q. They were all together? A. That is right.

Q. About what time of day was that, if you recall it? A. As I recall it, it was around 12:45 or 1 o'clock at that time.

Q. Why do you recall it as of that particular time? A. On account of the dinner hour was over in the ward.

Q. Do you remember whether Radovich upon this particular occasion and time was in a uniform or not? A. He was in uniform that day.

Q. Why do you know that? A. He was going to be taken out for a walk.

Q. Who took him out for a walk? A. Some corporal from the M.P.'s office.

Q. Was he taken out for a walk daily? A. When they seen fit to send a man up to him; that is the only time.

Q. Was that a regular time, or fixed hour each day when he was to be taken out for a walk? A. Generally when the sergeant of the guards could let a man come up to take
1697 him out; very, very rare.

Q. When Radovich was first confined in this ward was he permitted to go for a walk, do you remember? A. No, sir.

Q. How long did that continue when he was not permitted to go out at all? A. It was eight to ten days.

Q. How long did these walks last? A. The walks lasted to my estimation about half an hour, three-quarters of an hour.

Q. And then the corporal, or whoever it was, the military party that took him out, brought him back? A. That is right.

Q. And his uniform was again taken off? A. That is right.

Q. What did you do with his uniform? A. This uniform was locked up at all times.

1698 Q. If a patient had money in it, or keepsakes, or what-not, what was done with those? A. The nurse in charge of those would relieve him of all money or property, whatever he may have on him at the time.

Q. I would like to get a more accurate description of this room that Radovich was in. Was it brick, or concrete, or what? A. It was concrete with a rough finish on it.

Q. Do you know who was then Corporal or Sergeant Kelly? A. No, sir, I did not know who he was. I don't know him.

Q. You don't know him? A. No.

Q. You were in the Army at that time? A. Yes, sir, I was.

Q. How long had you been in the Army at that time? A. Fourteen months, sir.

Q. You are not in the Army now? A. No, sir.

Q. But you are employed at Mitchel Field? A. I am, sir.

Q. Do you know, or can you infer why it was that you were assigned to duty over in this ward 15 as an attendant there? A. I held a job at Kings Park Day Hospital, working around these patients, insane patients, and when I was admitted to the Army I looked for that job right off, and I was assigned to ward 15 after four months. 1700

Q. You do not know whether upon your card they put previous experience over the insane? A. No, sir.

Q. But, in any event, you were assigned to this job of taking care of the insane? A. I was, sir.

Q. Were the occupants in this ward at the same time that Radovich was there violently insane? Were any or many of them violently insane?

Mr. McGohey: I object to that, your Honor. There is not any——

The Court: Objection sustained. I do not think that is material.

Mr. Ansell: It does not give a picture of what Radovich's situation was, your Honor?

The Court: Well, talking about other people, or taking other people in, I do not see that that has any bearing on it at all. 1701

Mr. Ansell: Right next door to him, your Honor?

The Court: I sustain the objection.

Q. Do you know whether Radovich had means of communicating with the outside or not by telephone or otherwise? A. When a patient was admitted to that ward he

is denied telephone privileges. He is not allowed to do any telephoning whatsoever until further orders, and that might be two weeks, or a month, or whenever they see fit to give him the chance to call, or do whatever he wants.

Q. Was a patient in this ward permitted visitors? A. The patients in the ward, yes, they were.

Q. Was Radovich permitted visitors? A. To my understanding, no, until somebody gave authority to visit him.

Q. Who could give that authority, so far as you know? A. As far as I know, it was up to the provost marshal.

Q. How about the mail coming in and going out? A. All mail was censored in and out.

1703 Q. So far as you recall, was there anybody who saw Radovich while he was in there other than Army officers in apparent authority? A. About eight to two weeks, eight days or two weeks, a Colonel and two civilians came in and we admitted them to the room.

Q. You don't— A. After that I don't know what happened in that room on account of the young man was on his own after that time. He had not started to commit suicide, or anything like that, and we left him on his own then.

Q. Did you see any visitors in there after this first eight or ten days? A. No, not that I can recall.

Q. Did you yourself see any evidence of insanity in Radovich?

1704 Mr. McGohey: I object to that, your Honor.

The Court: I will let him answer.

A. No, sir.

Q. Did you see any abnormal conduct of any kind, or anything that indicated he needed restraint? A. No, sir.

Q. Might I ask you whether as you observed Radovich he appeared to be fretful, or otherwise? A. At the time he was admitted, he was fretful and crying, and he was com-

plaining about he wanted to use the telephone to get in touch with the outside world and, of course, that could not be granted to him.

Q. Did he mention whom he wanted to get in touch with in the outside warld and for what purpose? A. He wanted to get in touch with his wife and see if he could talk to her, and, of course, that privilege was denied.

Q. Did he ever mention anything about wanting to get in touch with an attorney? A. Yes, he said he wanted to get in touch with an attorney, but he wasn't allowed to use the telephone.

Q. Were the inmates of this ward 15 mental cases? A. Yes, sir. 1706

The Court: Do you mean that Major Radovich was never allowed to telephone?

The Witness: Sir, they are not allowed to use the telephone.

The Court: For the first week or twelve days?

The Witness: Yes, sir.

Q. Well, after that, so far as you know, going into the question of telephones, what use did he have of the telephone? Could that telephone reach outside of the post, or did he have to get military authority to phone outside of the post?

Mr. McGohey: I object to that question. 1707

Mr. Ansell: Oh, your Honor, I think——

The Court: I will let him answer it. All right.

A. To my estimation, he only could call on the post.

Q. I did not get that, Mr. Pender. A. The only privilege he had was to use the telephone of the post. There were no outside calls made.

Q. On the post? A. That is the only place to my estimation.

Mr. McGohey: Now, your Honor, I move that that be stricken out because the witness says in his estimation. I thought we were going to get a fact.

Q. You mean as you knew the means whereby Radovich and other patients there could communicate outside of *this hospital* post, on your experience, is that right? A. Other patients were not allowed to use the telephone.

Q. And Radovich was no exception? A. He was no exception after eight or ten days or two weeks, whatever
1709 it may have been.

Q. I want to know whether Radovich after this eight or ten days had to get the authority of anybody to communicate by telephone with anybody on the post. A. He had to get permission from the captain of the ward to use the telephone, and whatever went on outside of the gate we don't know on account that we were inside of the gate at all times.

Q. You do know that they had to get permission of the captain of the ward? A. That is right, sir.

Q. An Army officer? A. An Army officer.

Q. A doctor? A. A doctor in the ward.

Q. Do you know whether he could after this eight or ten days communicate by telephone off the post? A. No.
1710

Mr. McGohey: Does that answer mean he does not know whether he could, or that he couldn't communicate? I am not clear on that.

The Witness: I do not know whether he could communicate off the post.

Q. You don't know whether he could or not? A. I could not say.

The Court: Any other questions?

Mr. Ansell: One moment, your Honor.

Mr. McGohey: Are you finished, General?

Mr. Ansell: One moment.

The Court: I beg your pardon. I thought you had finished.

Mr. Ansell: I probably am, sir. I just wanted to go over it in my mind. All right.

*The Court:* Have you any cross-examination?

Mr. McGohey: Just one or two questions, if your Honor please.

*Cross-examination by Mr. McGohey.* 1712

Q. How long was Major Radovich in that ward, if you know, sir? A. To the best of my ability, he was there five—five or six weeks, sir.

Q. And were you there all the time that he was there? A. At the time I was in the Army I was there on day shift and night shift, sir.

Q. Now you say your best estimate is that he was there about five or six weeks, as I understood you? A. That is right.

Q. And these five or six weeks commenced, I think you said, about August 8th or 9th, is that correct? A. That is right, sir.

Q. So that some time by the end of September, anyhow, he would have been out of that ward? A. That is right. 1713

Q. According to your estimate? A. Yes, sir.

Mr. Ansell: I do not know if you want to make any point of it, but it would not be the end of September, probably, but that is all right.

Mr. McGohey: Well, the witness——

The Court: No, go ahead.

Q. Now, I understood you to say that on this day when an officer and two civilians came to visit Major Radovich, that you brought them to this room that he was in and then you left them alone? A. That is right.

Q. The expression you used, I think, was that he was on his own? A. He was on his own.

Q. He was on his own? A. Yes.

Q. Did that mean, in your opinion, at that time, that there was not any danger of him committing suicide? A. That is right.

Q. Or otherwise destroying himself? A. Yes.

Q. You thought that he was perfectly all right at that
1715 time? A. That is right, sir.

Q. And could be trusted? A. Yes, sir.

Mr. McGohey: I have no further questions.

The Court: All right, you may be excused.

Have you other testimony, gentlemen?

Mr. Ansell: Yes, sir. Mr. Kelly, if you please.

Mr. McGohey: Judge, might be have a short recess here?

The Court: All right. Ten minutes.

(Short recess.)

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VINCENT JOSEPH KELLY, called as a witness on behalf
1716 of the defendant Radovich, being first duly sworn, testified as follows:

*Direct examination by Mr. Ansell.*

Q. Sergeant Kelly, what is your position now, your employment? A. I am a detective in the Nassau County Police Department.

Q. You were until recently in the Army of the United States? A. Yes, sir.

Q. And before you came into the Army, what had been your position or employment? A. Detective in Nassau County Police Department.

Q. You have gone back then to the same job— A. Yes.

Q. That you had before? A. Yes, sir, I have.

Q. While you were in the Army did you serve at Mitchel Field? A. Yes, sir, I did.

Q. Were you serving at Mitchel Field in the months of August and September, 1944? A. Yes, sir, I did.

Q. In connection with what office were your duties during those months? A. I was an investigator in the Provost-Marshal's office on the field.

Q. An investigator of the Provost-Marshal's office? A. 1718
Yes, sir.

Q. Did you come in contact or come to know in the months of August and September, 1944, Major Radovich? A. Yes, sir, I did.

Q. Where was Major Radovich when you came to know him? A. He was at the psychopathic ward in Santini Hospital.

Q. Is that commonly called in the Army the "nut" ward? A. Yes, sir, it is known in the Army as the "nut" ward.

Q. You in dignified language call it a psychopathic ward? A. Yes, sir, that is right.

Q. In what connection did your duties have to do with Major Radovich? A. Sir, I was assigned by the Provost Marshal to take Major Radovich out for exercise every 1719
day for the duration of about an hour, and——

Q. Do you know when you first came to perform that duty of taking Major Radovich out for exercise? A. No, sir, I don't have the exact date; I couldn't recall it.

Q. You do not know how long Major Radovich had been in ward 15 at that time? A. I recall; about two weeks, he had been in there before I arrived.

Q. Did you have or did you not have a regular time for taking Major Radovich out to walk? A. Well, the time

was set, but I only—my instructions were to take him out when I had the time to take him out, when my duties would permit me to take him out,

Q. Did your duties permit you to take him out every day, do you remember? A. No, sir. There were days that I missed, that I was unable to get over there to take him out.

Q. Were you able, the days that you did take him out, to go there and take him out at a fixed hour? A. No, sir; the time varied. Some days it would be one or two, other days it might be three o'clock in the afternoon.

Q. When you took him out, you were in uniform, of
1721 course? A. Yes, sir, I was.

Q. A Sergeant; armed? A. Yes, sir.

Q. Where did you go? In the immediate neighborhood of the hospital or elsewhere? A. Yes, sir, we stayed within the confines of the post, of Santini.

Q. Did you see anything in any way abnormal with Major Radovich, mentally, I mean? A. No, sir, I did not.

Q. Do you remember when you came in to take him out would you enter the ward and get him from there, or was he turned over to you outside of the ward? A. No, sir. When I would arrive at the hospital I would leave my gun outside. There was an iron gate there. They would admit me through the gate, and I would go down to the Major's room, and sometimes he would be dressed and other times I would have to wait for him to dress, and then we would
1722 leave together.

Q. And he would have to get his uniform, to get dressed, from an attendant, do you know that? A. Yes, sir, on a couple of occasions. The first few times I went there he would have to get his clothing and from then on, after that, he was usually dressed when I arrived, waiting for me.

Q. Would you have given him, usually, a prior notice that you were coming? A. Not always. Sometimes I did.

I would call up and say I was on my way over. I would tell the hospital nurse on duty.

Q. Had you known anything about this ward 15, this psychopathic ward, prior to the time that you came in contact as a matter of duty with Major Radovich? A. Well, only that it was a ward for mental patients. That is all I knew of it.

Q. You had never been in there before? A. I don't believe I was, no, sir.

Q. I would like a description of the very room in which Major Radovich was confined. Will you give it?

Mr. McGohey: Your Honor—— 1724

The Court: Wouldn't that be just repetition, General? The other man, the previous witness, has described it fully.

Mr. Ansell: Well, you remember, your Honor, that we had a witness for the Government testifying it was 12 by 12 feet.

The Court: He said 10 by 12.

Mr. Ansell: 10 by 12. We have my witnesses testifying, and what I believe to be the fact, that it was 6 by 9.

The Court: Would that be determinative of whether it was 6 by 9 or 10 by 12?

Mr. Ansell: I didn't get what your Honor said.

The Court: I say, would that be determinative of the issue before me, whether it was 6 by 9? 1725

Mr. Ansell: I think it would be highly informative, because I regard this as a cell, such a cell as you would find in any place for the insane or jail for the insane. I think it makes a big difference whether a room is 10 by 12 or whether it is 9 by 5 or 6. However, if your Honor regards that that is not a matter in dispute—

The Court: I think it has been fully described, but I am willing to take your description of it, I mean your witness' description of it, your previous witness.

Q. When you were taking Major Radovich out for exercise, what was his attitude, one of complaining or otherwise? A. Well, sir, he was complaining about being confined and he was complaining about not having counsel assigned to him to look out for his interests.

Q. You were a member of the Provost-Marshal's office, in general police charge of a garrison. Do you know whether or not a person in this ward had telephonic access to anybody on the post? A. No, sir, I don't believe he
1727 would. Inside the ward they had no access to phones. The phones were outside, in the office of the attending nurse, outside the gate where the lockup was.

Q. Do you know anything about the Provost-Marshal's orders about that? A. Yes, sir. The orders were the Major could not make any calls and he couldn't visit and have visitors.

Q. Did you make any suggestion to him when he was complaining about not having any counsel, of the name of anybody who might serve to assist him as counsel? A. The Major mentioned that a Mr. Bradspies, to me, who worked on boards and in court, and he said he knew him and would like to see him to get some advice, and he asked me if I would transmit that to my superior, who was Major
1728 Anthony.

Q. The Provost-Marshal? A. Yes, sir, the Provost-Marshal. I advised Major Anthony that Major Radovich desired counsel and would like to see Mr. Bradspies, also that he be released, if possible, to the confines of the base. I believe Major Anthony called his superior officer, and Mr. Bradspies was notified to go over and interview the Major.

Q. Do you remember about when it was that Radovich was released from this particular psychopathic ward 15? A. My recollection is that may be two or three weeks from the time I made my first visit to take him out for an airing.

Q. Did you make any report to the Provost-Marshal with respect to the release of Radovich? A. I conveyed Major Radovich's request to Major Anthony, and he carried it on from there. Who he spoke to or who he saw I don't know.

Q. You say you didn't go over there daily? A. Sir?

Q. You didn't go over there daily to take Radovich out for exercise? A. I did miss; some days I did miss, I was unable to get over there because of other duties which would prevent me from going over. 1730

Q. Could Radovich, so far as you know, have attended mass on Sundays if he had wanted to? A. I doubt that very much.

Q. If he had gone, he would have had to go under you or somebody else in a similar position? A. Yes, sir, that is right.

Q. With a gun strapped on you? A. Yes, sir.

Q. There was one episode that I wanted to question you about.

Mr. Ansell: My notes do not show, if your Honor please.

The Court: All right. 1731

Q. Do you remember, Sergeant Kelly, an occasion when Radovich was confined in ward 15 when some question arose about his decorations, some order having been given that he had to be deprived of them? A. Yes, sir. Our office, meaning the Provost Marshal's office, had orders to tell Major Radovich to remove his decorations. The order was in writing. And a Lieutenant La Plante went over to the hospital—in fact I drove him over, and we both went

into the ward and Lieutenant La Plante advised Major Radovich that he would have to remove his decorations. The Major was quite upset about it and Lieutenant La Plante said he was sorry, he felt very bad about having to do it, but that was his order. The Major was supposed to sign that order and he refused to do so. And Lieutenant La Plante returned to the office, we both returned, and he advised Major Anthony and I believe Major Anthony himself went over some time later. I did not go with him.

Q. You did not go with Anthony? A. No, sir, I did not.

Q. Did Radovich take off his decorations? A. No, sir, he did not.

1733 Q. At that particular time do you recall whether or not there was an Army officer and a civilian, or two civilians, in there at that time; do you remember? A. Yes, sir, there were two men from the F.B.I. department in there.

Q. Was there an Army officer there? A. I did not observe him, no, sir.

Q. But on this very occasion there were two F.B.I. men there? A. Yes, sir.

Q. On the very occasion that Radovich got the order to take off his decorations and turn them in; is that right? A. That is right.

Q. And he refused to do it? A. Yes, sir.

Mr. Ansell: Your witness, Mr. McGohey.

The Court: Have you any questions, Mr. McGohey?

1734

*Cross-examination by Mr. McGohey.*

Q. Detective, you told us that you in compliance with Major Radovich's request conveyed to your superior, the Provost Marshal, the Major's request to have counsel assigned? A. That is right, sir.

Q. And the name of Mr. Bradspies came up? A. Yes, sir.

Q. That was the man that Major Radovich had asked to see? A. Yes, sir.

Q. Then I think you said that some time later Bradspies did see him? A. Yes, sir.

Q. Do you know when that was? A. I am sorry, I can't give you the exact date. It wasn't too long after, though.

Q. Sir? A. It wasn't too long after, as I remember.

Q. Could you fix that a little more definitely? Would it be a day or two after?

Mr. Keenan: I object.

The Court: Objection overruled. Go ahead.

1736

A. It might have been two days, three days. It wasn't long. My recollection is that it wasn't too long after that.

Q. Now, can you tell us whether Mr. Bradspies' seeing Major Radovich occurred before this day when you came over with the officer who had the orders about the decorations? A. I believe it was, yes, sir.

Q. Bradspies had seen him before that day? A. I believe so, yes.

Q. And that is the day that you saw the two F.B.I. men in the room with Major Radovich? A. Yes, sir.

Q. And Major Radovich was in uniform that day, was he not? A. Yes, sir, he was fully dressed.

Q. And had his decorations on his blouse? A. Yes, sir, he did.

1737

Mr. McGohey: No further questions.

Mr. Ansell: One moment, your Honor.

*Redirect examination by Mr. Ansell.*

Q. At the time that you saw the two F.B.I. men there, and La Plante, from the Provost Marshal General's office, had come with the orders about decorations, was that the

hour that had been appointed by you to take Radovich out for exercise? A. No, sir. I had been there earlier to take the Major out and he advised me that there were two men from the F.B.I. there that wanted to talk to him, that he would not be able to go out with me that day for his exercise.

Q. But he was in uniform, ready to go out, but was prevented from going out with you by the fact that the F.B.I. men were there, is that right? A. Yes sir.

Mr. Ansell: Nothing further.

Mr. McGohey: Just one question, Detective.

1739 *Recross-examination by Mr. McGohey.*

Q. You answered yes to that last question from General Ansell to the effect that the Major was prevented from going out because the F.B.I. men were there. You didn't mean, did you, that he was physically prevented by the F.B.I. agents from leaving the room? A. No, sir. I didn't mean that.

Mr. McGohey: I have no further questions.

The Court: All right, sir. You may be excused. Have you further testimony, gentlemen?

Mr. Robb: Yes, sir, we have some further testimony, if your Honor please.

1740 The Court: All right, sir. I have a matter during lunch hour which is going to require me to take an hour and a half rather than an hour and a quarter. I am sorry, but it just so happens. I will have to take a recess now until 2.30.

(Recess until 2.30 P. M.)

AFTERNOON SESSION.

(The jury was present in the courtroom.)

The Court: All right, Mr. McGohey.

Mr. McGohey: May it please the Court, just before the jury was excused I had asked the witness to explain a question, to tell us the conversation that he had with Major Radovich. I request now permission to withdraw that question.

The Court: Is there objection, gentlemen?

Mr. Keenan: I believe the record shows that we objected to the question and the objection was overruled. Now the United States Attorney is asking to withdraw it. 1742

The Court: All right. It may be withdrawn.

Now, ladies and gentlemen of the jury, I have been hearing discussion of a legal question which I have not been able to fully hear as yet, and there is more to be heard, and it seems a useless imposition upon you to keep you any longer this afternoon because there will be very little time left for further evidence after I finish the task which immediately confronts me.

I am satisfied that one lady on the jury would not object to leaving a little early—she has already sent me word that she is a registrar and would like to be free to attend to her duties as such. And, as I stated the first of the week, tomorrow being Columbus Day, there will be no session of the court, and the same is true of Saturday, so when I excuse you now you may be excused until 10.30 1743 Monday morning.

And, repeating to you briefly my admonition not to discuss the case nor to permit anyone to discuss it with you, I am going to excuse you until 10.30 Monday morning.

(The jury retired from the courtroom and the following proceedings were had in the absence of the jury:)

The Court: Have you further evidence, gentlemen?

Mr. Ansell: Yes, your Honor. I hardly know where I am now.

The Court: Well, you have just concluded with the witness Kelly.

Mr. Ansell: Yes. Well, we will go into the records now in order to prove certain facts that I wish your Honor would take judicial notice of, particularly the 70th Article of War, because upon that we shall to a certain extent rely.

The Court: I will be glad if you will read it to me.

Mr. Ansell: Yes, sir. I am going to hand it up to your Honor. It is a long article, but I will point out the part of it which is at the very base of our objection to the
1745 admission of these statements as confessions:

> "When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try that person accused, or to dismiss the charge and release him. Any officer who is responsible for unnecessary delays in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct.
>
> When a person is held for trial by a general court-martial the commanding officer within eight days after the accused is arrested or confined, if practicable, shall forward charges to the officer exercising the general court-martial jurisdiction and furnish the accused a copy of such charges."

1746

I think probably that that is about all of that article which may be pertinent here.

The Court: Might I keep the book over the week-end?

Mr. Ansell: Oh, certainly, your Honor.

Now, our purpose here is to attempt to show as briefly as we can and with as little reference to the records as we can, the charges, the date when the charges were preferred; that is, signed by an officer under other articles

of war, when the accused was confined, and when those charges were referred for trial.

We have here in the hope of releiving us from going into other records what is known as a charge sheet, and the report of the staff command judge advocate, all required by the articles of war, and all of which was required by the articles of war 111th, I think, to be given to the accused.

I have these documents here. They were furnished to us by the trial judge advocate in obedience to that article of war, and of course they are authentic if I am telling the truth about it, which I suppose will not be questioned.

Mr. McGohey: It certainly will not, General. 1748

Mr. Ansell: Thank you, sir. Thank you.

Mr. McGohey: What is the purpose of it? What are you offering it for, General?

Mr. Ansell: The purpose is to show without going through a lot of records when the charges were preferred, when this accused was confined, when the charges were served on him and when he was tried.

Mr. McGohey: Do you want to specify those dates?

Mr. Ansell: That will be perfectly satisfactory.

Mr. McGohey: We can probably agree on those dates, your Honor.

Mr. Ansell: I think I will give you the dates, then.

Mr. McGohey: Yes, suppose you do that.

Mr. Ansell: There is one other thing, Mr. McGohey. 1749
I am not saying anything about it myself, but I feel fairness requires me to call your attention to this statement as the reason for the ten months' delay between the preferring of the charges and the trial (indicating).

Mr. McGohey: Yes, I see that.

Mr. Ansell: I set that out.

Mr. McGohey: It is being offered as a statement that was made and I won't question the fact that somebody made that statement on there.

Mr. Ansell: That is right.

Mr. McGohey: But there are some parts that I will confess, your Honor, as being accurate. I do not concede the truth of the statement; I will concede that it was made.

Mr. Ansell: That is satisfactory.

The Court: All right. As I understand it, the documents are not to be intended as general evidence, but as evidence of this particular issue?

Mr. Ansell: That is quite correct, your Honor.

In a word, I am applying to the situation here, as your Honor of course perceives, the principal rules established by the McNab case and the Anderson case; McNab v. United
1751 States, 318 U. S. 332, and Anderson v. The United States, in 318 U. S. at 350, the last authoritative expression upon the subject which I think is directly involved here.

The Court: I had perceived the direction you were headed, sir.

Mr. Ansell: I have never had any doubt about that, sir.

The Court: And I am not unfamiliar with the McNab case.

Mr. Ansell: I had no doubt about that.

The Court: Go ahead, sir.

Mr. Ansell: Probably now we could specify the dates, because Mr. McGohey would not say there was anything wrong about the dates. There is a statement made on the charge sheet as to the truth of which Mr. McGohey might
1752 dispute. So I would ask Mr. McGohey after he has examined this official charge sheet, furnished to us in accordance with the articles of war, whether it is agreed that the charges against Radovich were preferred August 10, 1944?

Mr. McGohey: Your Honor, I do not know what a charge sheet's function is in Army court-martial procedure. In other words, I don't know whether that constitutes the preferring of a charge or not. I will admit that there is a charge sheet here giving the name of the accused as Major Walter Radovich, then listing a lot of names and

specifying some charges, and that that is dated the 10th of August, 1944. I don't know whether it was served on the defendant at that time or not. 1753

You mean that is the date, then, that the charge was made?

Mr. Ansell: That is the date the charge was signed by Colonel Stewart.

Mr. McGohey: Oh, that I will stipulate, sir, I will agree to.

Mr. Ansell: The 10th of August, 1944, the charges were signed and authenticated and became charges.

Mr. McGohey: Yes. I will stipulate that, your Honor.

The Court: August 10, 1944. Do you wish to proffer the documents which you had in your hand, or is the stipulation which has just been agreed to sufficient? 1754

Mr. Ansell: I should think that should be sufficient. That is established.

Now, next we have the record of court-martial furnished us officially, Mr. McGohey, showing that the charges were referred for trial and served on this accused by the first endorsement on those charges, and that endorsement is dated 29 May, 1945.

Mr. McGohey: Yes.

The Court: What happened on that date?

Mr. Ansell: The charges were referred for trial to the trial judge advocate and served on the accused, so that all this (indicating paper) was given to the accused.

Mr. McGohey: That does not appear in the document, but if you say that is when it was served on him, General, I will accept that. 1755

Mr. Ansell: That is right.

Mr. McGohey: That is on May 29.

Mr. Ansell: We have certain administrative terms here: "Preferred," for instance, means, as I have always understood it, that the charges are framed and some proper person signed the charges. That is called "Preferred."

The Court: Do I understand that on August 10, 1944, charges were preferred and served upon the defendant?

Mr. Ansell: No, sir. The charges were preferred—we are not saying now what happened to them, the accused knows nothing about it, but they were preferred and they are here (indicating). Then later, ten months later, those charges were referred under date of 29 May, 1945, to a trial judge advocate for trial by court-martial that had been appointed for that purpose. That is the first endorsement on these charges. They were served May 29, 1945.

Mr. McGohey: The point I make, your Honor, is that, as I read this charge-sheet, all this first endorsement shows
1757 is that on May 29, 1945, they were referred to Major Harry V. Osborne, Jr., Judge Advocate General's department, Trial Judge Advocate, court-martial appointed by paragraph 13 of Special Orders, and so on, but I don't see anything in there to indicate that they were served on the defendant on that day. I don't know when they were served on the defendant.

Mr. Ansell: Well, I think Mr. McGohey is justified in making that observation. Under the regulations of the Court-Martial Manual, which Congress authorized the President to make so long as not inconsistent with statute, it requires that when a general court-martial is convened for the trial of an officer or enlisted man, the charges are referred to the trial judge advocate who is to prosecute the man at that trial, and he will serve a copy of these
1758 charges on that accused.

The Court: What is the provision if any, applicable to service of the charges as preferred?

Mr. Ansell: Nothing, sir. Under the article, your Honor will observe, they are to be referred immediately, referred immediately for trial. But when they are referred to trial a copy of them—when a court has been appointed and these charges are referred to that court-martial, to a trial judge

advocate, the trial judge advocate is required to serve a copy of these charges on the accused, and not before that. The trial judge advocate knows nothing about it before then. It is a way of acquainting the accused with the nature or cause of the accusation and telling him to get ready for trial.

Mr. McGohey: My only point is, I don't know whether there is anything wrong about it or not, but all I say is I have no way of knowing when they were served.

Mr. Rudykoff: What is the physical fact? When were they served?

Mr. Robb: May 29th.

Mr. McGohey: Do you make the representation that 1760
that is when they were served?

Mr. Ansell: Yes.

Mr. McGohey: If you do make that representation, I will accept your word.

Mr. Ansell: Of course I would not want you to accept my word as the law and the gospel on the subject, but the first endorsement here is a reference to the trial judge advocate for trial.

Mr. McGohey: Your Honor, I have tried to make myself clear. The record does not indicate when they were served. Now, if General Ansell knows as a fact that they were served on May 29th, or whatever day he knows that they were served as a fact, and he states that, I will accept his statement of what he knows to be true, without the necessity of calling anybody to prove it formally. 1761

Mr. Ansell: Of course that is necessarily true; and then later the court convenes.

Mr. McGohey: Maybe we have it here in the court-martial proceeding.

Mr. Robb: If the Court please, this might help us. I find in the court-martial proceeding, official court-martial record, a statement by the trial judge advocate, Major Harry V. Osborne, Jr., "The charges were served on the 30th day of May, 1945."

Mr. McGohey: I will stipulate to that date, your Honor.

The Court: All right.

Mr. Ansell: Now, on this same charge sheet, Mr. McGohey, there is this bottom line (showing). Now, I have exhibited to Mr. McGohey an official statement on that charge sheet required to be made, which is as follows: "Data as to restraint of accused." That is in print. And then "Confined"—typewritten—"at Army Air Base, Mitchel Field, New York, 1850"—that is the hour—"9 August, 1944." And that followed, the Court and Mr. McGohey, please, by a typewritten statement, doubtless written at another time, "Release from confinement by Commanding
1763 General on 2 January, 1945."

If Mr. McGohey would stipulate with me, we might save a lot of time, perhaps.

It is true, Mr. McGohey, that that statement, though, that we are making, "Released from confinement by the Commanding General on the 2nd of January, 1945," is not correct, because the confinement in this case started on the 10th of August and ended the 17th or 18th of September.

Mr. McGohey: Well, I will stipulate that the confinement began on the 9th or 10th of August and ended on the 18th or 19th of September.

Mr. Ansell: That is right.

Mr. McGohey: And that is your claim?

Mr. Ansell: Yes, and that is right.

Mr. McGohey: 1944.

1764 Mr. Ansell: 1944. Now, then, this officer was no longer confined, but he was in arrest and restricted to the limits of the post until this court-martial began.

Mr. McGohey: Well, I do not think that is what the statement says.

Mr. Ansell: No. I told you that this statement is wrong.

Mr. McGohey: No.

Mr. Ansell: He was not in that hospital.

1765

Mr. McGohey: Oh, I see written in here in pencil, "Released from restraint 2 Jan. 45."

Mr. Ansell: I say we have put the pencil notations in here for our own information. That is not on the official sheet.

Mr. McGohey: Well, then, your Honor——

Mr. Ansell: However, we could go into it.

Mr. McGohey: I would like to know who did put that on here.

Mr. Ansell: Well, I don't know, but we could go into this. The Commanding General says that this man was in confinement, and the only confinement he was in, your Honor, was in this ward 15.

1766

Mr. McGohey: Well, may I be heard for a minute?

The Court: Yes.

Mr. McGohey: May I have that a minute, General?

Mr. Ansell: Certainly (handing).

Mr. McGohey: Second line from the bottom has printed "Data as to the restraint of accused." Now, this whole document that I am holding in my hand is a carbon copy of another document, and there appears on the same line with the line "Data as to restraint of accused" these words in carbon, "Confined at Army Air Base, Mitchel Field, New York." And then down on the next line, "1850 9 August, 1944." That is all in carbon.

Now, then, in what is apparently ribbon type, appear these words, "Released from confinement by Commanding General on 2 Jan., 1945." Then a pencil seems to have been run through those figures, and above them appears, "18 Sept., 1945."

1767

Mr. Robb: That, I think, is my handwriting, Mr. McGohey.

Mr. McGohey: Very well. And then below that, in pencil writing, these words, "Released from restraint 2 Jan., 1945."

Mr. Ansell: I would say, your Honor, that inasmuch as I know that counsel can get into colloquies about those things, we will actually get the records here and find out about it. I know what the facts are but I do not want to impose that upon either the Court or Mr. McGohey.

Mr. McGohey: Now, your Honor, I understand that the General concedes that the defendant Radovich was released from confinement on September 18 or September 17, 1945.

The Court: The 18th or 19th, I think.

Mr. McGohey: 1944, rather.

Mr. Ansell: That is the truth.

Mr. McGohey: Yes. I will stipulate to that, your Honor.

1769 Now I would like to ask the General what further fact he wants to offer for me to stipulate to.

The Court: That he was restrained at the post until and 2nd of January, 1945.

Mr. Ansell: Yes, and much longer. And I think in order that we may clear up his status here, and I do not want too much trust put into me about the matter, we will call an officer here, and I think without great delay, Mr. McGohey, and just ask him the dates as shown by the records.

Mr. McGohey: Have we the records?

Mr. Ansell: Yes.

Mr. McGohey: Go ahead and call him.

The Court: What officer?

Mr. Ansell: Captain Fritchley.

The Court: Please call him.

1770 Mr. Ansell: I think I would rather have him myself, your Honor.

RICHARD G. FRITCHLEY, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

*Direct examination by Mr. Ansell.*

Q. Captain, among your records there have you a communication dated August 10, 1944, on the subject of the confinement of Major Radovich, addressed by the Chief of Staff of the Commanding General at Mitchel Field to the Commanding Officer at Mitchel Field? A. Yes, sir.

Q. Have you got that, sir? A. Yes, sir, I have.

Q. May I ask you to read that to his Honor? A. (Reading). "Subject: Confinement of Major Walter V. Radovich. 0416891. Air Corps to Commanding Officer, Army Air Base, Mitchel Field, New York. 1772

"1. On 9 August, 1944, Commanding General directed that the above named officer be confined at your base pending trial by general court-martial for violation of the 95th and 96th Articles of War.

"2. The Commanding General directs that Major Radovich be kept in confinement until further orders.

"Charles H. Caldwell, Brigadier General, G.S.C., Chief of Staff."

Q. Now, Captain, have you among your records there upon the same subject, that is, the confinement of Major W. V. Radovich, a communication from the Commanding Officer of the Base to the Commanding General of the First Air Force? A. Yes, sir, I have. 1773

Q. Will you please read that to the Court? A. (Reading) "Headquarters Army Air Base, Mitchel Field, New York. 16 September, 1944.

"Subject: Confinement of Major Walter V. Radovich. 0416891. Air Corps to Commanding General, First Air Force, Mitchel Field, New York.

"Pursuant to instructions of the Commanding General First Air Force, contained in letter dated 10 August, 1944, the above named officer is still being held in confinement.

"Douglas Johnston, Colonel Air Corps."

The Court: What is the date of that?

The Witness: 16 September, 1944.

Mr. Ansell: Your Honor will perceive we were off a day or two on that.

The Court: 16 September, 1944.

Q. I had intended to sandwich between those two, and I thought I was calling for that—and this is quite all right— 1775 a communication of which this is a copy (handing to witness). Have you got that, Captain? A. No, sir.

Q. You haven't got that? A. No, sir.

Mr. Ansell: I presume Mr. McGohey would not hesitate to stipulate that in accordance with the Commanding General's order, that Johnston, the Base Commander, reported back to him that he had confined Radovich on the 19th of August?

Mr. McGohey: I will concede that, your Honor.

Q. Now, Captain, you have last read a communication from Colonel Johnston of the Base, to the Commanding General of the First Air Corps, that is, on notifying the 1776 Commanding General that this officer had been held in confinement, or had since been held in confinement in accordance with the authority from the Commanding General, and that letter was dated September 16, 1944, wasn't it? A. The one from the Base, yes, sir.

Q. Yes? A. Yes, sir.

Q. Now, have you among your records a letter of the same date, September 16, 1944, from General Hunter to the Commanding General in Mitchel Field, on this same subject? A. Yes, sir, I have.

Q. Would you please read that to the Court? A. (Reading) "16 September, 1944.

"Subject: Release from confinement.

"To the Commanding Officer, Army Air Base, Mitchel Field, New York.

"1. Effective this date, Major Walter V. Radovich, 0416891, Air Corps, will be released from confinement and placed under administrative restriction.

"2. The limits of the restriction will be Mitchel Field, excluding officers' club, base operations, the flying field and the flying line.

"3. The limits of the restriction will be carefully explained to Major Radovich. 1778

"F. O. D. Hunter, Major General U. S. Army, Commanding."

Q. Now, on the same date, and appertaining to the subject of administrative restriction, have you a communication from Colonel Johnston, Commander of the Base, to Major Radovich, the same being dated September 17, 1944? A. No, sir, I do not.

Mr. Ansell: I wonder if Mr. McGohey would stipulate that. It is really a formal notice. May I proceed off the record, your Honor?

The Court: Yes, sir.

(Discussion off the record.)

Mr. McGohey: Yes, sir.

Mr. Ansell: Then it is stipulated, if your Honor please, that Colonel Johnston notified Radovich that he was therefore under administrative restrictions in accordance with General Hunter's orders by this letter of September 17, 1944: 1779

"Subject: Administrative Restriction to Major W. V. Radovich.

"1. Pursuant to confidential letter Headquarters F.A.F."—First Air Force—"16 September, 1944, F.

O. D. Hunter, Major General, U. S. Army Commanding, you, Major W. V. Radovich"——

Mr. McGohey: We have stipulated that, haven't we, General?

Mr. Ansell: Yes. I just want to put it in the record.

Mr. McGohey: All right. I have no objection. I thought the stipulation would save you the trouble.

Mr. Ansell: —"are hereby released."

The Court: It has not been put in the record. He is putting in the record now what he desired to have in.

Mr. McGohey: All right, your Honor. I am sorry.

1781 Mr. Ansell: "You, Major W. V. Radovich, are hereby released from confinement and placed under administrative restriction. The limits of restrictions will be Mitchel Field, excluding the officers' club, base operations, the flying line." Signed, "Douglas Johnston."

Q. On it there is a first endorsement which I assume you do not have, "Receipt and understanding of base communication acknowledged since. W. V. Radovich, Major, Air Corps." A. No, sir, I do not.

Mr. McGohey: I will stipulate that that endorsement was put on.

The Court: All right.

1782 Mr. Ansell: And there is right beneath that endorsement this, your Honor, which I imagine Mr. McGohey will stipulate (indicating to Mr. McGohey).

Mr. McGohey: Yes, I will stipudate that.

Mr. Ansell: "Major Radovich released from confinement and placed in administrative restriction by explaining the contents of the attached letter and obtaining his signature to the first endorsement. This done in the presence of Captain Chase, M. C."

The Court: What date does that have?

Mr. Ansell: That is undated.

The Court: Apparently it is the same date as this?

Mr. Ansell: I imagine it is, sir. Ordinarily it would be, of course.

The Court: Yes. It is dated the 17th of September.

Mr. Ansell: It is, sir. Now, continuing:

"Major John Miller, between 10.30 and 10.45, 17 September, 1944, Ward 15, New Cantonment Building." Signed, "Reuben Fingold, Captain Air Corps."

Q. Captain, may I ask you if among your records you have a release from confinement addressed to the Commanding Officer, Mitchel Field, by General Hunter? A. Yes, sir, I have. 1784

Q. After the United States Attorney looks at it, if he wishes, will you please read it into the record?

Mr. McGohey: All right.

A. (Reading) "2 January, 1945. Subject: Release from Confinement.

"To Commanding Officer, Army Air Base, Mitchel Field, New York.

"1. Reference is made to letter (confidential) this headquarters above subject, 16 September, 1944.

"2. Major Radovich will be informed that the restriction imposed in paragraph 2 of the letter referred to with the exception of the officers' club, Mitchel Field, is removed. 1785

"3. He will therefore be advised that he will secure the personal permission of the Base Commander, Mitchel Field, prior to his departure from the limits of the Air Base at any time.

"F. O. D. Hunter, Major General, U. S. Army, Commanding."

Q. Captain Fritchley, may I ask you how you spell your name? A. F-r-i-t-c-h-l-e-y.

Q. Have you among your papers there the official records concerning the resignation of Major Walter V. Radovich for the good of the service, tendered from Mitchel Field in 1944? A. Yes, sir.

Q. In August, 1944. A. Yes, sir, I have.

Q. And have you all of the correspondence, endorsements, actions taken upon it and so forth, concerning that tender of resignation? A. Yes, sir.

Mr. Ansell: If your Honor please, may I ask that that be read by this officer in the record?

The Court: All right.

1787 Q. Proceed, sir.

Mr. McGohey: Could I have a look at them first?

Mr. Ansell: Oh, yes. Pardon me.

Q. The United States Attorney would like to inspect them also. A. "Mitchel Field, New York, 21 August"——

Mr. Ansell: Has the United States Attorney inspected them all?

Mr. McGohey: Oh, no, just this one letter.

A. (Continung) "21 August, 1944. Subject: Request for Resignation.

1788 "To the Adjutant General through Military Channels:

"1. I, Walter V. Radovich, Major, Air Corps, AUS 0416891, have been informed that charges are pending against me for violation of the 95th and 96th Articles of War.

"2. Therefore, under Army Regulation 605-230, paragraph 14, I hereby voluntarily submit my resignation from the Army of the United States for the good of the service.

"3. I have been informed that a resignation for the good of the service does not imply discharge under honorable conditions.

"4. I understand that I am not entitled to a certificate of service nor to an accrued leave.

"(Signed) Walter V. Radovich, Major, Air Corps."

Mr. Ansell: Of course the Court would like to have the United States Attorney inspect each one of these documents, records, concerning this subject.

Mr. McGohey: I take it you want the endorsements read, General?

Mr. Ansell: I think so, sir. 1790

Mr. McGohey: Yes, all right, I have seen the next one.

A. (Continuing) "First endorsement, Headquarters, First Air Force, Mitchel Field, New York. To the Adjutant General, Washington 25 D. C., through Commanding General. Army Air Forces, Washington 25 D. C., 27 January, 1945.

"1. A copy of the charges referred to in basic letter and copy of the report of the investigating officer are attached. The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe 1791 money.

"2. I consider the charges against Major Radovich as serious. Nevertheless, for the reasons stated below, I recommend that in lieu of trial by general court-martial his resignation for the good of the service be accepted.

"(a) He was less than twenty-four years of age when the offenses were committed and has no record of any prior disciplinary punishment.

"(b) His efficiency record shown on AGO Form No. 66-2 is reported as excellent and superior. He served overseas and distinguished himself in combat against the enemy, as is shown by the following decorations awarded him: Distinguished Flying Cross with Oak Leaf Cluster, Air Medal, Distinguished Flying Cross awarded by the British Government.

"(c) He voluntarily admits his guilt, has fully cooperated with the investigating officers and has turned over to the investigating officer a sum equal to the amount of the bribes accepted by him, which has been deposited to the credit of the United States.

1793 "3. Major Radovich is not accounted for or responsible for public property or funds.

"(signed) F. O. D. Hunter, Major General, U. S. Army, Commanding."

Mr. Ansell: Off the record.

(Discussion off the record.)

Mr. Ansell: This is the second endorsement on it, Mr. McGohey. Your Honor, may I get some information, in the presence of Mr. McGohey, off the record, to get some explanation?

The Court: All right.

(Discussion off the record.)

A. (Continuing) The second endorsement: "Headquar-
1794 ters, Army Air Forces, Washington 25 D. C., 19 February, 1945. To: The Adjutant General, Washington 25, D. C.

"1. The attached charges against Major Walter J. Radovich, 0416891, Air Corps, include the unlawful acceptance of sums aggregating $7,000 from civilians as consideration for effecting the transfer of enlisted men and preventing their shipment overseas. Evidence of the commission of offenses is supported by a detailed confession. The fact that Major Radovich otherwise has a fine combat record

makes him nevertheless guilty, although due credit should be accorded that record in imposing punishment. Such conduct on the part of an officer warrants trial by court-martial because such offenses, if proved, carry severe penalties.

"2. It is therefore recommended that the resignation tendered by subject officer be not favorably considered.

"For the Commanding General, Army Air Forces, P. A. Laking, Lieutenant Colonel, Air Corps, Chief, Classification and Separations Branch, Office Assistant Chief of Air Staff Personnel."

Q. That officer is really representing General Arnold's Headquarters, isn't he? A. Yes, sir. 1796

Q. What is the date of that? A. 19 February, 1945.

Mr. Ansell: Your Honor, I know I am not going to get through with the records, and I don't want to disturb whatever plans your Honor had in mind.

The Court: I haven't.

Mr. Ansell: You haven't any. I was wondering if——

The Court: I did not have any plan. I did have a hope. I hoped that this question could be submitted this afternoon. I have since amended that to hope that the evidence might be submitted this afternoon.

Mr. Ansell: I do not believe it can be.

The Court: Do you want to stop now?

Mr. Ansell: Might I, without your Honor's feeling 1797
that I am disrupting the program?

The Court: I have no such feeling. Have you elicited from the witness all you expect to?

Mr. Ansell: No. But I have to call another witness with some more records, and this witness will have to come back.

The Court: What have you to say, Mr. McGohey?

Mr. McGohey: Well, your Honor, I was wonder-

ing if we could not get these endorsements in now with reference to this resignation. I don't know how much more we are going to go through with this witness, but I think it would be helpful if we could get finished with that much.

The Court: Suppose you take a look at all of them at one time.

Mr. McGohey: I will be glad to.

The Court: Off the record.

(Discussion off the record.)

The Court: All right, read them.

1799 A. (Continuing) Third endorsement: "War Department AGO 2 March, 1945. Through the Commanding General, Army Air Forces, Washington, D. C. To the Commanding General First Air Forces, Mitchel Field, New York.

"Inform Major Walter V. Radovich, 0416891, Air Corps, his resignation is not favorably considered.

"By Order of the Secretary of War." And the signature I am unable to read. "Adjutant General."

Fourth endorsement: "Headquarters, Army Air Forces, Washington 25 D. C., 8 March, 1945. Through Commanding General, First Air Forces, Mitchel Field, New York. To Major Walter V. Radovich, 0416891, Air Corps, Mitchel Field, New York.

"1. Attention is invited to preceding second and third endorsements.

1800 "2. Court-martial proceedings will be continued in this case by command of General Arnold.

"P. A. Laking, Lieut.-Col. Air Corps, Chief, Classification and Separations Branch, Office Assistant Chief Air Staff Personnel."

Q. That is General Arnold's headquarters. A. "20 March, 1945. Subject: Resignation for the good of the service. To: Major Walter V. Radovich, 0416891, Air

Corps. Through Commanding Officer, Mitchel Field, New York. The resignation submitted by you on 21 August, 1944, has been returned to this headquarters by third endorsement, War Department AGO, 2 March, 1945 (AgPO-S 201, Radovich, Walter V.), as follows:

"Inform Major Walter V. Radovich, 0416891, Air Corps, his resignation is not favorably considered.

"By Command of Major General Hunter, Raynor Garey, Colonel, AGD, Adjutant General."

Q. All right, sir.

Mr. Ansell: May I ask the witness, if your Honor please: 1802

Q. If there is anything on the record to show when that notification that the resignation was not approved reached Major Radovich? A. No, sir, I have no record.

The Court: Does that letter which you just read bear a date?

The Witness: 20 March, 1945.

Q. There are other record in the 201 file, are there not, Captain? A. Yes, sir, there are.

Mr. Ansell: That is right. Your Honor, this will be a beautiful place for us to stop.

The Court: All right, sir. You may be excused for the present. Except that I want to ask one or two things. Give me the citation to the McNab case, will you? 1803

Mr. Rudykoff: 318 U. S.

Mr. Robb: 332.

The Court: And the Anderson case?

Mr. Robb: 318 U. S. 350. And, if the Court please, might we also invite your Honor's attention to the

Bram case, 168 U. S. 532. My friend here (Mr. Rudykoff) says it is pretty old, but it is still the law.

The Court: It might or might not be. Then there is the Mitchell case.

Mr. McGohey: 322 U. S.

The Court: What page?

Mr. McGohey: I don't have the page, your Honor.

The Court: That is all right, I can find it. Possibly I can find this circuit's discussion of the McNab case and the Keegan case.

Mr. Rudykoff: They had something to say in this circuit about it.

1805 The Court: They had quite a lot to say. I think possibly I can find that. Now I take it that you are going to contend that the statement of September 15th, approximately, is inadmissible and that the vice therein affected the March statement—or is it March?

Mr. McGohey: Yes, sir, March 15 and 17.

The Court: Can you give me any authority on that proposition?

Mr. Robb: If the Court please, I may call your attention to the fact that the March 15 statement in its third line has this expression: "I, Walter V. Radovich, make the following voluntary supplementary statement." Of course, Agent Flynn testified that, in substance——

1806 The Court: I am familiar with what he said, but I want to ask if you have any authority which you can cite me on that proposition which I may be considering?

Mr. Ansell: As I remember, your Honor, in Wigmore, I have a note here, and you know the type of presentation that such writers get out, I have a citation here from Wigmore—I hope I have it. As I remember, it cited many, many cases.

Mr. Rudykoff: The Mitchell case is at page 65, your Honor, 322 U. S. The McNab case is page 332 of 318.

The Court: Do you happen to have in your memorandum the citation to the Keegan case, as decided in this circuit?

Mr. Rudykoff: Apparently not, your Honor.

Mr. Ansell: Well, your Honor, as frequently true of lawyers, I could have said that I had a citation in my little red book here from Wigmore, and I thought that would be sufficient as a reference to the cases. But it is to this effect, and I understand it to be the law, that if there was a condition of circumstances surrounding the making of a confession such as to 1808
render it involuntary and therefore inadmissible in the eyes of the law at one time, that subsequent confessions upon that subject would not be admissible because of the presumption that the state of mind continued over into the making of those confessions.

I find that statement made in some cases and in many textbooks, and I regret that I haven't the citation to that here. Of course, during the week-end we will try to get that. At the time we were preparing our law on this subject we had not supposed that this particular thing would come in, I mean that it would be proposed by Mr. McGohey.

The Court: All right, sir. Well, is there anything else that anybody wishes to do right now? 1809

Mr. McGohey: Your Honor, do I understand that this concludes the presentation of the evidence on this point?

Mr. Robb: Oh, no.

The Court: I regret to say that I understand to the contrary, that it is not concluded.

Mr. Ansell: I regret to say, your Honor, this is a vital, a crucial point, in the trial of this case, and,

while I wish we could abbreviate it, I see no way of doing it.

Mr. McGohey: I am not complaining about that. I just wanted to ascertain the fact.

The Court: In the expression of my regret I did not mean to imply any such thing.

Mr. Ansell: I know that, your Honor.

The Court: Pure and unadulterated regret. All right. Court may be adjourned until Monday morning at 10.30.

(Adjourned to Monday, October 15, 1945, at 10.30 A. M.)

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New York, October 15, 1945, 10.30 A. M.

TRIAL RESUMED.

(The following proceedings were had in the absence of the jury:)

The Court: Have you further evidence, gentlemen, on the question presently before the Court?

Mr. Ansell: I think Captain Fritchley was on the stand when we adjourned.

The Court: That is right.

1812 Mr. Ansell: May I have him recalled, if you please?

The Court: Yes.

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RICHARD G. FRITCHLEY resumed.

*Direct examination (continued) by Mr. Ansell.*

Q. Captain, I observe that I failed to identify on Thursday when you were on the stand the record that you had,

and from which you testified the other day. You are the official custodian for the present purpose of those records—A. Yes, sir.

Q. —and you were, were you not? A. Yes, sir.

Mr. Ansell: May I ask Mr. McGohey now for record purposes as to whether Major Radovich was ever taken before a committing magistrate?

Mr. McGohey: When, General?

Mr. Ansell: Ever.

Mr. McGohey: Oh, yes. He was arraigned before a District Judge in the District Court here. I think the indictment will show that. 1814

The Clerk: That is right, Mr. McGohey.

Mr. Ansell: Well, I ask particularly about his having been committed by a committing magistrate according to the usual procedure.

Mr. McGohey: Why, Major Radovich was arraigned on this indictment. He had never been arrested. He had never been picked up on any complaint, so that upon the filing of this indictment he was indicted, and with the filing of the indictment he came in and pleaded not guilty——

Mr. Ansell: That is quite all right, Mr. McGohey.

Mr. McGohey: —as the record shows, on July 16, 1945. I think he pleaded before Judge Knox according to this, isn't that right, Mr. Clerk?

The Clerk: Yes, sir, Mr. McGohey. 1815

Mr. Ansell: Mr. McGohey and I had some little colloquy, manifesting no disagreement about a paragraph found in this official record furnished to us under the appropriate Article of War, and particularly this paragraph. I thought, if your Honor please, and Mr. McGohey, that I read it into the record with Mr. McGohey's assent. I find now that I did not do so.

Mr. McGohey said that he admitted that this was an official record. He did not admit the truth of the statements contained therein. Here it is here (handing to Mr. McGohey).

Mr. McGohey: Yes. What is the point now, General?

Mr. Ansell: I failed to read it into the record as I had intended to do.

Mr. McGohey: Oh, I see.

The Court: All right. Go ahead and do so.

Mr. Ansell (reading): "Delay. The charges were preferred on 10 August 1944. Investigation completed
1817 about 24 August 1944 and received at this headquarters 25 August 1944.

"The delay referring them (charges) for trial was at the specific request of United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused."

That is all I have for this witness.

Mr. Keenan: Were there any exhibits introduced, General? I was away.

The Court: Certain records, Mr. Keenan, were read into the record.

Mr. McGohey: Pardon me, your Honor, may we ask the witness to stay for a moment?

The Court: I do not think anything was actually
1818 filed in evidence.

Mr. McGohey: There was one thing more, your Honor. I do not know that that document from which General Ansell has just read has been sufficiently identified in the record.

Mr. Ansell: I identified it the other day as the charge sheet required to be furnished with the court-martial record, which is itself required to be furnished the accused under the 111th Article.

The Court: Have you any questions of the witness?

Mr. McGohey: I have no questions of the witness, your Honor, but I asked that he come back because I thought it might be necessary to have that document identified. I do not believe it is the charge sheet.

Mr. Ansell: Well, it is a paper consisting of the report of the Staff Judge Advocate to the Commanding General which accompanies all papers thereafter referred to the court-martial and made a part of the court-martial records.

The Court: All right. Do you wish to ask this witness any questions, Mr. Keenan?

Mr. Keenan: Will you indulge me for just a brief 1820
moment?

The Court: Yes, sir.

Mr. Keenan: I have no questions.

Mr. Ansell: I have no further questions. It is entirely possible, if your Honor please, that these witnesses with the records will be needed or may be needed at a later stage of the proceeding by us. So I suppose t ey will not be discharged, depending upon this course.

The Court: I assume that they will not be.

Mr. Ansell: That is right.

Mr. Robb: I will call Mr. Wallace, if the Court please.

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1821

EDWARD C. WALLACE, called as a witness on behalf of defendant Radovich, being first duly sworn, testified as follows:

*Direct examination by Mr. Robb.*

Q. Mr. Wallace, for the record, would you give us your official occupation, please, sir? A. Assistant United States Attorney for the Southern District of New York.

Q. How long have you held that position? A. Since January, 1942.

Q. And did there come a time, Mr. Wallace, when you assumed charge of the case now on trial? A. Yes.

Q. And the investigation of that case? A. Under the direction of the United States Attorney.

Q. Yes. About when was that, sir? A. In the Fall of 1944.

Q. And did there come a time in the course of your work on that case when you interviewed certain witnesses, including Major Radovich? A. Yes.

Q. Do you recall when you first interviewed Major Rado-
1823 vich? A. I do not.

Q. Can you give us any estimate or approximation of that time? A. My guess would be that it was in the Fall of 1944.

Q. By the Fall, would you mean October or November? A. I would say the last three months of 1944. It may have been any time during those three months.

Q. All right. Where did you first interview him, Mr. Wallace? A. In my office.

Q. Here in this building? A. That is correct.

Q. And would you tell us whether or not you interviewed him from time to time after that time, whether you had a subsequent interview with him? A. Yes, I did.

Q. And can you tell us about how many? A. I would
1824 think about four or five.

Q. And those took place where? A. In my office.

Q. Could you give us the approximate dates of those? A. No, I couldn't.

Q. Could you tell us about when you had the last one? A. It would be some time prior to the day that you appeared with Major Radovich in my office, whatever day that was.

Q. By the way, Mr. Wallace, was any subpoena served on the Major to come to your office? A. I think there was.

Q. Could you tell if you served that about when you interviewed him (handing)? A. For the first time?

Q. Yes, sir. A. I don't know that a subpoena was served on him the first time he appeared.

Q. I show you this card, which is apparently a subpoena, and ask you if that refreshes your recollection as to when you saw him the first time? A. Well, that would be about right, November 10, 1944.

Q. November 10, 1944? A. But I don't know that that was the first time, but it would be about that time.

Q. About then, yes, sir. Mr. Wallace, did there come a time when an indictment was returned against the two Bayer brothers, who are on trial here? A. Yes. 1826

Q. About when was that? A. In March, 1945.

Q. How many times had you talked to Major Radovich between the date of your first interview and the time of that indictment, approximately? A. I would think about three times.

Q. Now, Mr. Wallace, by the way, he was not named in that indictment that was returned in March, was he? A. No, he was not.

Q. Mr. Wallace, did you have any conversation with Major Radovich about whether or not he was to be named in that indictment? A. I did not.

Q. Was there ever anything indicated to him as to whether or not he would be named? A. There was not.

Q. Was there any suggestion of any kind made as to whether or not he would be indicted? A. No. 1827

Q. Why didn't you have him indicted?

Mr. McGohey: I object to that, your Honor.

The Court: I will sustain the objection to that.

Q. Was it your policy to allow the military court to handle military matters and not to indict army officers in

cases such as this? A. I would say that that is frequently the case.

Q. Well, sir, was it your policy at that time? A. Usually that is the case.

Q. Yes, sir. By the way, on the occasions of your interviews with Major Radovich, who else was present? A. Usually Mr. Flynn. I think he may have been present on every occasion, but I am not certain of that.

Q. Now, Mr. Wallace, will you tell us whether or not it was understood at the time of the talk to Major Radovich that if he would help you in connection with making a case against the Bayers, you would help him in his troubles
1829 with the military? A. No, there wasn't such an understanding.

Q. There was no such understanding? A. No.

Q. Was there any understanding that you would make any possible representation on his behalf to the military authorities? A. Will you repeat that first part of that question?

Q. Was there any understanding that you would make any possible representation— A. There was no understanding.

Q. No understanding? A. No, sir.

Q. Now, Mr. Wallace, you recall testifying before the court-martial, do you not? A. Yes.

Q. That is, a court-martial of the Major? A. Yes, sir.

1830 Mr. Robb: At this time, if the Court please, I announce surprise, and ask that I may be allowed to cross-examine the witness.

The Court: All right, sir. You may proceed along that line without objection.

Q. Mr. Wallace, I want to read you certain questions and answers from your testimony before the court-martial:

"Q. You never heard Mr. Flynn tell the accused that if he did continue to help you and co-operate with you, you would help the accused with the Army? A. Did I ever heard Mr. Flynn say that?

"Q. Yes. A. I don't recall.

"Q. Well, that was the understanding, though, wasn't it, Mr. Wallace? A. I think that Major Radovich felt that we were very friendly toward him and if there was any representation on his behalf that could be made, it probably would be made.

"Q. Did you tell him that? A. I don't—as I said, I don't recall whether I told him that, but I would say that he would be justified in assuming that. 1832

"Q. That was understood, wasn't it? Isn't that a fair way to put it? A. I'd say it was."

Mr. McGohey: May I have the page?

Mr. Robb: Page 199-200.

Q. "Q. That if he helped you, you would help him? A. That—naturally, that we would say to the military authorities the fact that he had co-operated fully with the civilian authorities." Now, Mr. Wallace, was that testimony you gave before the court-martial the truth? A. Yes.

Q. And is it now the truth? A. Yes, sir, and I do not think there is any inconsistency between what I said then and——

Q. Mr. Wallace, I do not want to argue about that. Possibly we had better let the Court decide that. A. All right. 1833

Q. Now, let me read you this question and answer——

Mr. Robb: Page 196, Mr. McGohey.

Q. "Q. Your want to use Major Radovich as a witness against the Bayers, don't you? A. Yes.

"Q. Now, did you ever have any discussion with the accused as to whether or not you were going to have him indicted? A. No. I don't think I ever indicated

to him one way or the other, whether he would be indicted or not, although I think he would be justified in assuming at the time that he probably would not be indicted.

"Q. Why was he justified in that assumption? A. Because of the co-operation he showed us and the co-operation we showed him, and the fact that he knows, that he should have known, or I think he probably did hear, that it was our policy to have military courts or military tribunals take care of military personnel, and the civil courts take care of civil persons involved.

"Q. You could have had him indicted, could you not?

1835 A. You mean is it possible under the law?

"Q. That is right. A. Yes, of course you understand that it is the function of the grand jury to indict and not mine."

Now, that testimony was the truth, was it not? A. Yes.

Q. And still is, is it not? A. Yes.

Q. Now, did you ask the grand jury to indict the Major at the same time that they found the first indictment against the Bayers?

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection.

A. My recollection is that I presented the evidence, and

1836 whether I made any specific request as to who should be indicted or not, I don't recall at this time.

Q. Now, would you be able, Mr. Wallace, to refresh your recollection if you looked at the minutes of the grand jury? A. I assume I would.

Q. I beg pardon? A. I assume I would.

Q. Could you do that? A. They have not been transcribed, as far as I know.

Q. Mr. Wallace, there did come a time, did there not, when you asked the grand jury to indict the Major, is that right? A. I don't recall that I made a specific request.

Q. Well, there did come a time when you did obtain an indictment against Major Radovich, did there not? A. There did come a time when the grand jury indicted the Major.

Q. About when was that? A. July, 1945.

Q. And that, Mr. Wallace, was after Major Radovich had ceased to co-operate with you, isn't that right? A. That was after Major Radovich through you had stated that he was not going to be a witness in the case.

Q. Yes, sir. Now, Mr. Wallace, is it or is it not a fact 1838
that the reason why you had him indicted was that he had told you through me that he was not going to be a witness?

Mr. McGohey: Now, if your Honor please, I object to the form of that question, the reason he had him indicted. I think the Court will take judicial notice of the fact that the grand jury indicts.

The Court: I sustain the objection to that question.

Q. Did the fact that he had advised you through me that he was not going to continue to talk to you, or to make statements to you, have anything to do, Mr. Wallace, with the indictment of Major Radovich, so far as you know? 1839

Mr. McGohey: I object to that, your Honor.

The Court: I will overrule the objection.

A. You mean whether that fact——

Q. I will put it this way, Mr. Wallace: Did that fact cause you to resubmit the case to the grand jury? A. I was directed to resubmit the case to the grand jury.

Q. All right, sir. By whom? A. By the United States Attorney.

Q. All right. Now, would you answer my question: Was the failure of Major Radovich, or his refusal to continue to make statement to you, the reason why the case was resubmitted to the grand jury?

Mr. McGohey: Your Honor, may I at this time concede for the purposes of this hearing that the reason that the case was resubmitted to the grand jury was the statement by Major Radovich to me through counsel, Mr. Robb, that he would not testify?

1841 The Court: All right.

Mr. McGohey: I concede that.

Mr. Robb: Would your Honor indulge me?

The Court: Yes, sir.

Mr. Robb: That is all.

Mr. Keenan: Wait a minute, I want to ask a question.

The Court: All right.

*Cross-examination by Mr. Keenan.*

Q. Mr. Wallace, are we to understand that you do not recall now whether you indicated at the grand jury at the time that the indictments were brought in against Samuel Bayer and Elias Bayer and Murray Greenblatt,

1842 that you do not recall whether you indicated that you believed that an indictment should be returned also against Major Radovich? A. That is not what I said, Mr. Keenan.

Q. Well, what did you say to that question? A. I say I do not recall.

Q. Do you recall? A. I said I do not recall whether or not I made a specific request at the time.

Q. Well, let us see about the word "specific". Did you indicate to the grand jury, or did you request, specifically

or otherwise, that Radovich be not indicted, or be indicted, at the time the indictments were brought in against the Bayers and Greenblatt? A. I do not recall whether I requested that Radovich, Major Radovich, be indicted or not, although the evidence that was adduced before the grand jury I would think would lead to the conclusion that he, Samuel and Elias Bayer, and Murray Greenblatt, in my opinion, ought to be indicted.

Q. Thank you for that last answer, which is not exactly what I asked you. I asked you if you can recall whether or not, or whether you are going to tell us that you do not recall whether you requested in substance the grand jury to return an indictment against Radovich too, when 1844
they brought in their indictment on or about the 28th day of March, 1945? A. I would say that I did not specifically request——

Q. I did not say "specifically". A. —or any other way.

Q. I left the word "specifically" out. I am asking if your answer would be different if we take out the word "specifically". A. I would say that I did not request, although I haven't any recollection of the incident at this time.

Q. Well, is your memory faint about what happened in this case before the grand jury in the last week of March of 1945? A. No, not particularly.

Q. Well, is it at all faint? Is your memory good or poor about that? A. I think my memory is average about that. It is something that happened some seven months ago.

Q. How many cases have you handled since March 28, 1845
1945? How many cases have you tried in this Court? A. I would say that I have handled about twenty or thirty cases, and I have tried about two cases.

Q. Yes. And isn't this one of the most important cases in your viewpoint that you have had since you have been in the department? A. One of the more important cases.

Q. Have you heard Mr. McGohey make the statement in your presence that he considers this tantamount in substance to treason?

The Court: We have been over that.

Mr. Keenan: Your Honor, I am testing the veracity of the witness.

The Court: We have gone all over that.

Mr. Keenan: I beg your pardon.

Q. Was the subject matter discussed between the members of the grand jury and yourself as to whether or not
1847 Major Radovich should be indicted along with the Bayers in March of 1945? A. No, I don't recall any such discussion.

Q. Were you asked any questions; were you asked your views by any member of the grand jury as to whether or not Major Radovich ought or ought not to be indicted? A. I didn't recall being asked my views on that subject at all.

Q. So that as we leave the matter, in substance, if we understand the substance of your testimony, it is that you have no recollection of whether or not that matter was discussed, or whether you made any recommendations to the grand jury whatsoever with reference to indicting or not indicting Major Radovich? A. That is right. I have no recollection of it.

1848 Q. Of course, the evidence before the grand jury was indicative of his guilt, wasn't it?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: I am testing the memory of this witness. There is no jury present.

The Court: I will let him answer the question.

A. Well, I would think that it was, yes.

Q. Well, did it strike you that it was strange that the grand jury would not indict Radovich— A. No.

Q. —along with the other people that were indicted?

Mr. McGohey: I object to that, your Honor.

The Court: I will sustain the objection as to what he thought.

Q. I am asking you now, have you discussed with Mr. McGohey the question of whether or not an indictment should be sought from the grand jury against Major Radovich prior to the 28th day of March, 1945?

1850

Mr. McGohey: I am afraid that I did not get the full question.

A. I do not——

Mr. Keenan: Wait a minute.

Mr. McGohey: I would like to have the question read in full, your Honor, please.

The Court: Yes. Please read it.

Mr. Keenan: All right. Read it, and then the answer: "I do not——"

(Question and answer read.)

Q. Go ahead, please. Finish your answer, please. A. I do not recall at this moment.

1851

Q. Your memory isn't very good on that whole subject, is it? A. I think my memory is good.

Q. But you can't recall whether you ever discussed with Mr. McGohey the matter of whether or not an indictment should be sought against Major Radovich prior to March 28, 1945? A. I don't recall it at this moment.

Q. Well, by the way, you had discussed this matter with Mr. McGohey prior to March 28, 1945, hadn't you? I mean

with reference to the matter, the trial of the matter? A. Yes, and with his predecessor, Mr. McNally.

Q. I did not ask that. Just Mr. McGohey. And you were present at least on two or three occasions while I was there talking to Mr. McGohey in the office about this matter, weren't you? A. That is correct.

Q. And that was prior to March 25, 1945, wasn't it? A. That was both before and after March, 1945.

Q. Yes. Well, I brought the men into the office of the United States Attorney on or about the 7th of February, 1945, is that right? A. That is correct.

Q. And we had a rather lengthy interview at that time,
1853 more than an hour? A. At the time you brought them in?

Q. No, before I brought them in. A. Yes.

Q. And you were there during that discussion between Mr. McGohey and myself, and you participated in it to some extent, didn't you, some minor extent? A. Yes, very slightly.

Q. And you, of course, have been in charge of this particular matter, haven't you, and all phases of it? A. That is correct, sir.

Q. And you asked all the questions of Samuel Bayer, and of Elias Bayer, at the time that they were interrogated; that is, for the Government? A. Yes.

Q. I asked four or five questions of Elias Bayer? A. That is right.

1854 Q. Now, isn't it a fact, Mr. Wallace, that the policy of the Government was to allow the Army to take care of Major Radovich or—I withdraw that. The policy of the United States Attorney's office was to have the Army take care of derelictions of this type if such there be in the Army, and the United States Attorney to take charge of such matters as affected civilians?

The Court: He has been examined on that subject.

Mr. Keenan: I beg pardon?

The Court: He has been examined on that subject before.

Mr. Keenan: I have not asked him and I wanted to know about it. This is just preliminary, if your Honor please.

The Court: Sir?

Mr. Keenan: It is just a preliminary question.

The Court: All right.

A. That is usually the case.

Q. And that policy was not followed in this case, was it? A. I think that is obvious, too.

Q. Can you tell us why you departed from your ordinary policy in handling this matter? A. I think Mr. McGohey has already answered that question. 1856

Q. Well, can you tell us?

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: Mr. McGohey, I submit, has not told us that at all.

Mr. McGohey: I say, your Honor, that I conceded the reason that I directed Mr. Wallace to resubmit this case to the grand jury in July, which was because of the fact that Major Radovich through his counsel some time in June had informed me that he was not going to testify as a witness, as he had previously in the grand jury.

Mr. Robb: If the Court please, I thought that that statement included this fact: that we also told Mr. McGohey that the Major was not going to make any more statements to him, or to anybody in the United States Attorney's office. 1857

Mr. McGohey: That is correct.

Mr. Robb: Do you agree to that, Mr. McGohey?

Mr. McGohey: Yes; that was the understanding.

Mr. Robb: Yes?

Mr. McGohey: Yes.
The Court: All right.

Q. Did you not state to the court-martial some time——

Mr. Keenan: When was the court-martial?
Mr. Robb: June 27th.

Q. —in the latter part of June, 1945, speaking of the United States Attorney's office, that "it was our policy to have military tribunals take care of military personnel and civil courts take care of civil persons involved"? Didn't you state that? A. Didn't I say "as a rule" in
1859 answer to that question, or "generally", or some such phrase?

Q. I do not think so. I will let you read the statement if you wish. A. Well, if I didn't, I should have. I would say usually that is the case, although it frequently happens that we do prosecute military personnel in our courts.

Q. Well, the short of it is this, isn't it, Mr. Wallace: that as long as Major Radovich was willing to co-operate with the Government, you didn't care to have him indicted, but when you found that he was not going to co-operate with the Government you did resubmit the matter to the grand jury for the purposes of obtaining an indictment?

Mr. McGohey: I object, your Honor, to the form
1860 of that question, what we intended; whether we intended to have him indicted or not. All we have ever done was to present evidence to the grand jury.

Mr. Keenan: Your Honor, I do think we ought to deal in realisms to some extent, and this is cross-examination, and I am submitting as a matter of fairness that there may be justification for this, but I am entitled to bring out to this Court, and ultimately to this jury, that the pressure that was brought to bear

upon Major Radovich to get him to testify, which affects my clients more than anyone else, is such that certainly in a court of justice I think we are entitled to know what efforts were made. This is an open matter, and it is no personal attack, Mr. McGohey.

Mr. McGohey: I understand that.

Mr. Keenan: Mr. McGohey so understands.

The Court: Let me hear the question, please.

(Question read.)

The Court: Overrule the objection.

A. Well, I think it should be brought out that there was never any pressure brought on Major Radovich to testify or not to testify; that Major Radovich was never threatened with an indictment or that he wasn't going to be indicted. 1862

Q. Now, with that qualification, will you be good enough to answer the question?

Mr. Keenan: Read the question to him again, please, Mr. Reporter.

Q. (Question read.) A. My personal feelings, as far as Major Radovich's indictment, when I first presented the case, were that I did not—I hoped and did not wish to see the grand jury indict him.

Q. I am not interrogating you, Mr. Wallace, for any reasons as to your personal feelings; I am asking you for your conduct as Assistant United States Attorney by these questions, and with that point in view. 1863

Mr. Keenan: Now, will you again read the question to the witness and see if we can get him to answer?

Q. (Question reread.) A. All right. I presented the evidence to the grand jury as—I will not discuss what

the evidence was, but the evidence that was presented to the second grand jury was not, as I recall it, exactly the same as to the first grand jury.

Mr. Keenan: Now, will you please read the question to the witness a third time? I would like to have the Court, with great respect, direct the witness to answer the question, which you have already said he should answer.

The Court: All right.

Mr. Keenan: Read it again, please.

The Court: It is not such a question that requires a categorical yes or no answer. Go ahead.

1865

(Question again read.)

Mr. McGohey: Now, if your Honor please, I submit that that question is calling precisely for this witness' personal opinion as to what he wanted, and I think that the three attempts of Mr. Wallace were to make certain in the three answers, so that he has answered what I think Mr. Keenan is trying to get at with that involved question.

Mr. Keenan: Mr. Wallace is the United States Attorney's assistant, but he practices law with his head and not with his heart, and he ought to be able to speak the English language and answer my question.

Mr. McGohey: Now, I move to strike that out.

1866

The Court: I did not hear it. Apparently he has answered the question, but if you wish to add or subtract anything to what you said to the question, you may do so.

The Witness: I think I can answer it, yes, taking the first part of that question to refer to my doings, and as far as the attitude of the United States Attorney's office is concerned, I think that already has been stated by the attorney.

Mr. Keenan: I do not want to be offensive, your Honor, but I thought your Honor here directed him to answer it, and do I understand from the statement which your Honor has made that if there is anything more he wants to add or subtract, that that terminates the inquiry on that question?

The Court: I think that he did answer it.

Mr. Keenan: All right. I bow to your Honor's ruling on that.

Q. There is no question about it but that the Major was very co-operative with you for a considerable period of time, is there? A. There is no question about it. 1868

Q. And there is no question about it that you told him in substance that it would be better for him, in your opinion, to continue to co-operate with the Government, and that you so testified at the court-martial? A. That I told him that in substance?

Q. Yes, or indicated that to him. I think that was the word used, "indicated".

Mr. McGohey: Where?

Mr. Keenan: 194 is the page.

A. Well, I would like to answer that question in this fashion, that Major Radovich always had the attitude that he wanted to make a clean breast of the whole thing, that he was in a mess, and that the thing for him to do was 1869 to tell his story fully, letting the chips fall where they may. And I, of course—I don't know whether I expressed it to him—I felt that, I certainly felt that that was the correct thing for him to do.

Q. Were you asked at the court-martial by Mr. Robb,

"Did you have any discussion with him as to what might happen to him if he didn't talk to you about it

at any time?" and did you answer, "You mean if I made any threats to him as to——

"Q. I didn't ask you that. Did you have any discussion with him as to what might happen to him if he didn't testify before the grand jury?" And you answered: "No, it never arose because there was never any attitude on his part that would ever lead me to believe that he was not going to testify before the grand jury. He was quite co-operative."

Did you make those answers to those questions? A. Yes, sir.

1871 Q. "Have you since that time—since that time—had any discussion with him or made any statements to him as to what would happen to him if he didn't co-operate with you? A. No, I have indicated to him that I thought he might be making a mistake if he didn't, but that is as far as I went."

Did you make that answer to the question asked of you? A. Yes, I did.

Q. "When did you indicate that to him? A. That would have been, I think, in June or May." Did you make that answer? A. Yes, I did.

Q. So that you had a discussion with Major Radovich after the indictment was returned against him? A. I want to——

1872 Mr. McGohey: Would you read the following two questions, please.

Mr. Keenan: I would be glad to, Mr. McGohey, despite the fact that the Government seems to have a way of wanting to present its own evidence, but I will accommodate you. Which are they?

Mr. McGohey: The following two questions right after that last one. "I think it would have been in

June or May." The question was "Where?" The next question was, "Where?"

Mr. Keenan: "It was in the office of the United States Attorney.

"Q. Did you tell him why you thought he would make a mistake? A. No."

Is that it?

Mr. McGohey: Yes.

Mr. Keenan: Do you want me to go on there?

Mr. McGohey: No, I think that is sufficient.

Q. Now, we have the point that it was in the United States Attorney's office after he was indicted. Did you make the statement to him that you have— A. No, that is not so. It wasn't after he was indicted. 1874

Mr. McGohey: Now, if your Honor please, I object further to this line of questioning because it appears it happened in May or June of 1945, and the statement which the Government has offered in evidence and the admissibility of which I thought this proceeding was related to, was given by the defendant in March of 1945.

The Court: What is the date of it?

Mr. McGohey: The date of the statement is March 17th, 1945—15th and 17th. The testimony is that it was started on the 15th and finished up on the 17th. 1875

The Court: While I am making an entry about the date, does it not appear in the evidence when the first statement was? Wasn't it August 15th?

The Witness: September.

Mr. Robb: September, if the Court please. September 5th or 6th, Mr. Flynn testified. Is the first statement your Honor referred to the one made at the hospital?

The Court: Yes.

Mr. Robb: Yes. September 5th or 6th, 1944.

Mr. Keenan: If the United States Attorney is objecting——

Mr. McGohey: Yes. I made an objection in the ground that all of these questions we are talking about now are statements made in June, 1945, and I don't think they have any relevancy or materiality to the admissibility of the statement made in March, 1945.

Mr. Keenan: I want to state to this Court——

The Court: It might have some bearing. I am going to overrule the objection.

1877 Q. When were the statements made? After the indictment was returned against Major Radovich or before?

Mr. McGohey: Which statements, please?

A. Before.

Mr. Keenan: The statement, "No, I have indicated to him that I thought he might be making a mistake if he didn't——"

The Witness: In connection with that question, Mr. Keenan——

Mr. Keenan: "But that is as far as I went."

1878 Q. I am just asking—I was completely confused about that—that occurred before Major Radovich's indictment, isn't that correct? A. That incident occurred before he was indicted.

Q. All right. A. May I make a correction in that statement?

Q. You mean that you want to correct something that you stated before the— A. At the court-martial.

Q. At the court-martial? A. Yes.

Q. Mr. Wallace, I always believe in letting a man do that. Yes. A. That statement was made not by me but by Mr. McGohey in the presence of Mr. Robb, to Mr. Radovich in Mr. McGohey's office and in my presence, too.

Q. What statement was that? A. That I think when—when I said or quoted myself as saying to Major Radovich that I thought he was making a mistake. My recollection is now that it was actually Mr. McGohey who made that statement to Mr. Radovich in the presence of Mr. Robb, and that I was present there.

Q. That is, it was Mr. McGohey then who made the statement to Major Radovich— A. That is correct.

Q. —that he thought Major Radovich was making a mistake not continuing to give you people statements? A. No, I don't want you to add anything to it, Mr. Keenan. 1880

Q. I don't want to add. You are the one who asked the right to add. I will read the question: "Have you since that time had any discussion with him?"—that is, Major Radovich—"or made any statements to him about what would happen to him if he didn't co-operate with you?" Now, you give the answer before the court-martial which I have read: "No, I have indicated to him that I thought he might be making a mistake if he didn't but that is as far as I went." Now, you want to add to that, as I understood, to say that statement was not made by Mr. Wallace but was made by Mr. McGohey? A. That is right. 1881

Q. Was that statement made by Mr. McGohey to Major Radovich? A. Yes.

Q. Now, you were asked the next question, "Did you tell him why you thought he was making a mistake?" and you answered, "No." Now that you have refreshed your memory that it was Mr. McGohey that made the statement instead of you, I will ask you do you recall if Mr. McGohey asked Major Radovich—told Major Radovich why he felt he was making a mistake in not co-operating? A. No, he did not.

Q. Did Major Radovich ask? A. No.

Q. So it was just left at this, that the United States Attorney in the United States Attorney's office, some time in May or June, told Major Radovich that the United States Attorney felt that Major Radovich was making a mistake in not co-operating further with the Government, with the United States Attorney's office in this prosecution? A. Well, I think I ought—I don't like to add on anything. The statement, as I recall it, was that Mr. McGohey——

Q. I don't mind you adding on if it is true. A. The statement, as I recall it, by Mr. McGohey was, "I think you are making a mistake" or "I think you might be making

1883 a mistake."

Q. That was in reference to something, wasn't it? A. That is correct. It was in reference to a statement by Mr. Robb that Major Radovich was not going to be a witness.

Q. Was Mr. Robb present? A. Yes.

Q. And did Mr. Robb announce that Major Radovich was not going to co-operate further with the Government in these cases? A. Yes.

Q. It was after that that the indictment was filed? A. It was, in point of time.

Q. Now, Mr. Wallace, when you go into cases of this nature you keep a diary, don't you? A. No, I do not.

Q. Do you have a girl outside your office who keeps a diary? A. No.

1884

Q. Do you keep any notes as to the dates people come in to see you? A. I do not.

Q. Of course, you were in contact with the members of the armed forces that were investigating this case, were you not? A. I was not.

Q. You did have, however, this young man, Mr. Flynn of the F.B.I., he was working with you? A. He was.

Q. And under your direction? A. He was.

Q. And he had contact with the Army officers? A. I think he has so testified.

Q. No, I don't care about that. Please answer my question. He did have contact to your knowledge, didn't he? A. No, he didn't, to my knowledge.

Q. Oh. Then you don't know that Mr. Flynn was in contact with the Army people in this investigation? A. You said——

Mr. McGohey: Your Honor, I don't see the relevancy of it to this question at all.

The Court: I don't either. I sustain the objection to it. 1886

Q. How many statements did Major Radovich make, do you know, to any officers of the Government? A. You mean oral or written statements?

Q. We will take them both. First the written ones. A. I believe he made three or four written statements. I believe he did.

Q. Have you copies of them? A. I have copies of three statements, I believe.

Q. Do you know how many statements you have copies of? I don't mean the number of copies, I mean the number of statements. A. I am certain of two and I believe I have a third.

Q. You are not sure of that? A. I am not sure of that.

Q. What two are you certain of? A. The two that were 1887
taken by the Federal Bureau of Investigation.

Q. Those are the only two statements that you are sure you have copies of? A. That is correct. I believe I have a third.

Q. But that is just a belief. You are not certain of it. A. That is right.

Q. Have you present here in the courtroom a copy of the statement taken from Major Radovich in September, 1944? A. Yes, I believe there is one here.

Q. Did you ever read a copy of a statement made by Major Radovich or purporting to be made by Major Radovich to any officer of the Army? A. Yes, I did.

Mr. McGohey: Your Honor, I object to that. I don't see the relevancy of it——

Mr. Keenan: All right. I am trying to save time.

Mr. McGohey: —to the admissibility of the 1945 statement.

Mr. Keenan: I am going to ask these questions some time, perhaps I won't be permitted to have replies to them, but I am going to ask them in the pres-
1889 ence of the jury if we get that far. So it is a question of saving time on this. But if you want me to wait——

The Court: I think it has a bearing on the question or relevancy and I will allow you to answer it.

Mr. Keenan: Would you read the question?

(Question and answer read.)

Q. Did you ever have a copy of that in your file? A. I believe we did.

Q. But you don't know whether it is in your file or not? A. I don't know whether we returned it to the Army or not.

Q. When was the last time you looked at it? A. I don't know. It must be—it may be a year ago since I looked at it.

Q. Well, there may be a lot of things. What is your
1890 best recollection? A. I have no recollection of when I looked at it last.

Q. You didn't look at it in the preparation for trial in this case? A. No, I did not.

Q. Was there something in the statement that you wanted to forget about? A. No.

Mr. McGohey: I object to that.

Mr. Keenan: I have a right to ask that question, in the best faith.

A. (Continuing) No, there was not.

Q. Can you tell us why a second statement was taken by the F.B.I. agent of Radovich?

Mr. McGohey: I object to that, your Honor.

The Court: You are going awfully far, but I will let him answer it.

A. I think Mr. Flynn has answered that question when he stated that there were some additional matters that were not incorporated in the first statement that were incorporated in the second. 1892

Q. Were there some things in the first statement given before Bayer came into the United States Attorney's office in February that were left out of the statement which was taken the 15th of March following, in 1945? A. Not that I recall.

Q. By the way, Mr. Wallace, the statement of Major Radovich that was given or purported to have been given in August of 1944 was attached to the minutes of the court-martial proceeding, was it not? A. If it was I didn't see it, Mr. Keenan.

Q. Have you the copy of the court-martial proceedings in your files? A. Yes, we have a copy.

Q. Have you examined those proceedings with reference to any statement that Major Radovich gave the court-martial? A. No. 1893

Q. You did not consider them material to this lawsuit?

Mr. McGohey: I object to that, your Honor.

The Court: I sustain that objection.

Mr. Keenan: I am testing the credibility of the witness.

Mr. McGohey: I object to that, too. We have had that all morning.

Mr. Keenan: I am merely stating to your Honor why I am asking the question.

The Court: I sustain the objection. Have you any further questions?

Mr. Keenan: No.

Mr. Robb: If your Honor please, I have one question that I overlooked and that I would like to ask.

The Court: Yes, sir, all right.

*Direct examination continued by Mr. Robb.*

1895 Q. Mr. Wallace, do you recall any conversation with Major Radovich about whether or not he would be allowed to resign for the good of the service? A. I think Major Radovich told me that he had submitted his resignation.

Q. And did he not tell you that he expected to be allowed to resign for the good of the service? A. I think he told me that he expected that his resignation would be accepted.

Q. And that was in these conversations you had with him between your first talk in October or November and the time the case went before the grand jury the first time, isn't that right? A. He mentioned it during that period, I would think, yes.

Mr. Robb: That is all, thank you.

1896 Mr. Keenan: There is one further question.

The Court: All right.

*Further cross-examination by Mr. Keenan.*

Q. Mr. Wallace, did you not state at the court-martial proceeding that you told Major Radovich in substance that you would make some representations to the court-martial authorities as to any co-operation you received from Major Radovich? A. That I told that to Major Radovich?

Q. Yes. A. I do not think I said that at the court-martial, no.

Mr. Keenan: Just one moment.

Q. Reading from page 199: "Q. You never heard Mr. Flynn tell the accused, Major Radovich, that if he would continue to help you and co-operate with you, you would help the accused with the Army? A. Did I ever hear Mr. Flynn say that?

"Q. Yes. A. I don't recall."

Is that correct; did you say that? A. That is correct.

Q. You do not recall one way or the other? A. Well, now, is this a new question? 1898

Q. Yes. A. I recall making that statement in the court-martial, yes.

Q. "Well, that was the understanding, though, wasn't it, Mr. Wallace? A. I think Major Radovich felt that we were very friendly toward him and that if there was any representation on his behalf that could be made it probably would be made.

"Q. Did you tell him that? A. I don't—as I said, I don't recall whether I told him that, but I would say that he would be justified in assuming that."

Was that your testimony? A. That was my testimony.

Q. Is that correct? A. That is correct.

Q. And why do you say that he would be justified in assuming that? A. Well, I think he realized that I was— 1899
that I felt very badly about the situation that he was in because of his gallantry and bravery in action.

Q. Well, did the way you felt about his gallantry and bravery in action change in accordance with whether or not he co-operated or failed to co-operate with the Government? A. No.

Q. Has it? A. No, I still feel that way.

Mr. Keenan: That is all.
The Court: Is that all?

*Redirect examination continued by Mr. McGohey.*

Q. Mr. Wallace, at the session of the grand jury in March, 1945, when an indictment was returned naming the two Bayers and Greenblatt as defendants, did Major Radovich testify before that grand jury? A. He did.

Q. Did Samuel Bayer testify before it? A. He did not.

Q. Did Elias Bayer testify before it? A. He did not.

1901

Q. Did Greenblatt testify before it? A. He appeared before it, and, as I recall, refused to answer questions.

Q. But neither of the Bayers appeared before it? A. That is correct.

Mr. McGohey: That is all.
Mr. Robb: May I ask one question?
The Court: Yes.

*Recross-examination by Mr. Robb.*

Q. Mr. Wallace, Greenblatt, the man who appeared before the grand jury who refused to testify, was indicted, was he not? A. Yes, sir.

1902

Mr. Robb: That is all, thank you.

*Recross-examination by Mr. Keenan.*

Q. Those indictments, by the way, were all nolle prossed just before the trial started? A. Yes.

Mr. Keenan: That is all.

CLERK'S COPY.

Vol. II.

# TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. [illegible]

THE UNITED STATES OF AMERICA, PETITIONER

vs.

[illegible] BAYER, ELIAS BAYER, AND

[illegible] V. [illegible]

[illegible]

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The Court: Have you anything further?

Mr. McGohey: No.

The Court: You have no further testimony on this phase of the case?

Mr. Keenan: No, your Honor, we have no further testimony on this phase of the case.

The Court: All right. Do you wish to be heard, General?

Mr. Ansell: If your Honor please, your Honor has heard the evidence upon this independent issue. I should like to point out certain salient facts that vary in that evidence to which we think if the authorities be applied this statement taken from Major Radovich by Mr. Flynn should not be admitted. Those salient facts, as I see them, are these: Major Radovich reported at Mitchel Field on August 9th in the afternoon. By order of General Hunter, an order which, as I remember it, had been previously given, Major Radovich was immediately thrust into confinement in ward 15, a ward obviously designed and used for the confinement of insane military personnel who needed to be restrained from possible suicide or violence. That was August 9th.

In September, I think it appears to have been the 5th or 6th, Mr. Flynn, an agent for the Federal Bureau of Investigation, appeared in that ward, and in the cell, I so characterize it, where Major Radovich was, accompanied by another agent and also by an Army officer. There a statement was taken from Major Radovich.

Major Radovich had been held there for nearly a month under circumstances that I shall not rehearse to your Honor. You remember that.

There had been no action taken so far as Radovich knew looking to any kind of judicial proceeding, military or civil. I think it is a fair inference from the

record, indeed, I think it is a necessary inference, factual in every respect, that the military authority was engaged in holding Radovich in this confinement while the civil authorities operated on him. The military authorities from my point of view of the military law were certainly holding him unlawfully there. And the civil authorities were, from my point of view, engaged, by reason of the working arrangement that they had with the military authorities in using Radovich's confinement, there likewise unlawfully. The military authorities from my point of view were holding him there unlawfully and the civil authorities from
1907 my point of view were using that detention by the military authorities and not performing their duty under the law which governed the civil procedure.

I think, your Honor, that this case falls almost squarely, legally speaking, squarely within the Anderson case. I would like to discuss that case because I think it is so pertinent here.

In that case the authorities, the local authorities of the State of Tennessee, down near some of the TVA dams, had arrested and apprehended this man Anderson and others apparently for a violation of local law. And almost immediately the F.B.I. agent appeared. The offense charged there, as I remember it, ultimately charged, was that Anderson and others had
1908 engaged in the slowing up of the great power line down there, several of them, the TVA, and the Government in effect owns, of course, the TVA. And subsequently the indictment.

The F.B.I. man, with the State authorities, apparently sometimes all working together and sometimes all separately, but the F.B.I. authorities got a statement—we call them confessions and be done with it—out of Anderson before Anderson had been taken to a United States Commissioner or committing magistrate

and before the State officials had taken him before the State committing officials.

The Supreme Court of the United States in that case buttressed their decision upon the fact that he was held and detained there without having been taken as soon as might be to a federal committing magistrate. The Court said in that case—I haven't got it here——

The Court: Here it is, if you want it.

(Volume handed to Mr. Ansell.)

Mr. Ansell: Thank you very much.

The Court said in the effect that the detention of the defendants by the State officers in this case was in violation of the statute of Tennessee which provides that no person can be committed for any criminal matter until examination thereof be first had before some magistrate. They said in effect that the federal investigators and federal authorities were relying upon and really taking advantage of this defendant while he was being held by the State authorities.

They comment upon the fact—I think it was the detention, the detention without taking him before a committing magistrate—that is the basis of that decision.

There were other facts present not altogether dissimilar from the facts which are present here. They mentioned the fact that this man was unaided by relatives or friends or counsel, and that the men were unlawfully held for some days. I figure it out to be about thirty-six hours; it may have been longer. And that this questioning that he was subjected to was in a hostile atmosphere. The men were not arrested by federal officials until April 30th and they were not arraigned before a [illegible]eral commissioner until that date, the moment that the F.B.I. moved in and determined to make the arrest. Then they took them before

the committing magistrate, but not until after they had been held some thirty-six hours, I figure it out, by the State authorities, except one Ballou, who was held longer, apparently until May 2nd.

The Court uses this language: There was a working arrangement between the federal offices and the sheriff of Cook County which made possible abuses revealed by this record. Therefore, the fact that the federal officers themselves were not formally guilty of illegal conduct does not affect the admissibility of the evidence which they secured improperly through collaboration with State officers.

1913 Here I think the principle at the base of the decision and leading to the decision in this case is equally applicable here. I think, and I do not wish to misrepresent the United States Attorney, but I think it is a fair inference that the United States Attorney realized that the statement taken in this ward for the insane would not stand up under that decision. Then what was it that the United States Attorney did here? March 15th, 16th or 17th, somewhere along there, he has his agent bring Radovich in, or if they prefer, Radovich comes in. He comes in by an arrangement, as the result of an arrangement, between the office of the United States Attorney and the military authorities. He comes in and he makes another statement. I think the evidence shows that that statement was the

1914 same statement in every substantial aspect of it as the statement that has been made in this so-called "nut ward".

The agent, Flynn, never, to me at least, gave a reason or satisfactory explanation as to why a second statement was wanted. He testified that the second statement was basically the same as the one that was made in ward 15. This second statement upon its face shows that it was supplementary to the statement

that Mr. Flynn had first taken. There can be no question in the world but that these statements are the same in all substantial respects.

Now, I must be at liberty to indulge my thoughts to the reason why it was so, that the second statement was taken by Flynn. There has long been in the office of federal prosecutors the idea that the first statement or the first action taken by the federal authorities might be unlawful actions, but that anything derived out of and also a product of this unlawful action was all right.

As far back—probably twenty or twenty-five years ago—in the Silverthorne Lumber Company case 1916
against The United States, which your Honor may or may not have on your desk, 251 U. S. 385, the Supreme Court of the United States utterly disagreed and repudiated any such practice or doctrine.

That was a case where the federal authorities went out and seized unlawfully certain papers of this lumber company, and they admitted that that was an unlawful seizure, but they said in effect: "We can take photostatic copies of these things and run them before a grand jury."

Mr. Robb reminds me they tried to subpoena them, the originals, and then used, as I remember it, photostatic copies. But, however that may be, the Supreme Court of the United States, when upon a proceeding 1917
for contempt the lumber company's representatives and the company itself having failed to obey this subpoena, said that the first step was wrong and you admit it. The first step was the unlawful seizure of this company's papers, and there is nothing that you can do by taking a second step that will cure the invalidity of the action that you admit you took.

That is an interesting case to me. Justice Holmes said: "The proposition could not be presented more-

nakedly. It is that although, of course, its seizure was an outrage which the Government now regrets, it may study the papers before it returns them, copy them, and then may use the knowledge that it has gained to call upon the owners in a more regular form to produce them; that the protection of the Constitution covers the physical possession, but not any advantages that the Government can gain over the object of its pursuit by doing the forbidden act."

The Court said: "Weeks v. United States, to be sure, has established that laying the papers directly before the grand jury was unwarranted, but it is taken
1919 to mean only two steps are required instead of one. In our opinion such is not the law. It reduces the Fourth Amendment to a form of words. The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all."

The Anderson case is an effort, a decision, by the Supreme Court of the United States to prevent the use as evidence of statements made when the officers of the law have not done their duty in taking the suspect before a federal commissioner.

The Nardone case that went up, I suppose, from this jurisdiction——

The Court: That is right.

1920 Mr. Ansell: —involved the question of whether or not information derived from unlawful wiretapping was usable. There was a section which probably more or less with clarity forbade the use of wiretapping. The Government in that case contended, "Well, it is not the information that we got from tapping the wire; it is the information that we derived from the wiretapping."

There were learned opinions in that case by the Circuit Court of Appeals of this jurisdiction, and the Supreme Court of the United States said: "The issue thus tendered by the Circuit Court of Appeals is the broad one, whether or no Section 605 merely interdicts the introduction into evidence in a federal trial of intercepted telephone conversations, leaving the prosecution free to make every other use of the proscribed evidence. Plainly, this presents a far-reaching problem in the administration of federal criminal justice, and we therefore brought the case here for disposition.

"We are here dealing with specific prohibition of particular methods in obtaining evidence. The result 1922
of the holding below is to reduce the scope of Section 605 to exclusion of the exact words heard through forbidden interceptions, allowing these interceptions every derivative use that they may serve. Such a reading of Section 605 would largely stultify the policy which compelled our decision in Nardone v. United States. To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed"—quoting from the first decision—"inconsistent with ethical standards and destructive of personal liberty."

They go on: "What was said in a different context in Silverthorne Lumber Company v. United States is pertinent here: 'the essence of a provision forbidding 1923
the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court, but that it shall not be used at all.'

"A decent respect for the policy of Congress must save us from imputing to it a self-deceiving if not disingenuous purpose.

"Here, as in the Silverthorne case, the facts improperly obtained do not become sacred and inaccessible.

If knowledge of them is gained from an independent source, they may be proved like any others," and they say to the prosecutor, "You may go ahead but you may not use any that was gained as a result of this unlawful conduct."

The Court: We will take a ten-minute recess.

(Short recess.)

The Court: General, if it does not interrupt your presentation, I should like to ask you for some information as to military law here.

Mr. Ansell: To the best of my ability, of course, I shall answer your Honor.

1925 The Court: I am rather optimistic about your ability.

There are several statutes of the United States which in substance provide that when a man is arrested by federal officers he shall be promptly or immediately or forthwith taken before a United States Commissioner for arraignment or hearing. Is there any analogous provision in military law that a person held for a military offense be taken before any officer for arraignment? Is there anything analogous to the statute which I have just mentioned in the military law?

Mr. Ansell: Analogous in this respect, your Honor, if we can pursue an analogy so far, that the 70th—

The Court: I read the 70th Article of War.

1926 Mr. Ansell: That contemplates or provides, at least it was the intention of Congress to provide, that no man should be arrested or confined and held for any length of time other than a very reasonable time before the military proceeding should start. Your Honor was a distinguished officer in the last war, Mr. McGohey was also; there were others of us I see sitting here.

The Court: On behalf of all of us I thank you.

Mr. Ansell: But that is the truth. I am always pleased to see them, too.

But in the last war certain grave defects in the administration of military justice became patent to all, to thoughtful officers as well as to people in Congress. This 70th Article of War is one of the many articles enacted, for Congress to prevent that very thing, of holding a man and then delaying the trial. Therefore, it is provided in that article, it is reflected in others, that the commanding officer will at once "when any person subject to military law is placed in arrest or confinement, immediate steps will be taken 1928
to try the person accused or to dismiss the charge and release him." Prior to this time an officer could be kept under the old article eight days without much if anything being done about it. Unfortunately, in practice that extended in much greater time because there was no penalty to be visited upon a commanding officer who kept him in more than eight days. It was said to be simply directed. But here "any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct." That would be under the 96th Article, for neglecting his duty.

So, if you will take the 70th Article, it provides that the commanding officer will make an immediate investigation of any charge that is made to him about 1929
another officer or man, and that he shall then send that forward with a statement of his investigation, whatever it was, to the commanding general who exercises general court-martial jurisdiction; that then, while this commanding officer is conducting the investigation, he shall serve a copy of the statement of the charges upon this accused. And then the officer who convenes a court-martial refers the charge and its inves-

tigation accompanying it to his Staff Judge Advocate and his Staff Judge Advocate shall report back, and then the commanding General must proceed to dismiss these charges or to try them, and the words are "that it shall be done immediately, and any officer who is guilty of any unnecessary delay in that matter shall himself be triable."

The Court: But then the article goes on a little further and provides: "When a person is held for trial by general court-martial the commanding officer will within eight days after the accused is arrested or confined, if practicable forward the charges to the
1931 officer exercising general court-martial jurisdiction and furnish the accused with a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay."

What construction do you put upon the phrase "if practicable"?

Mr. Ansell: Well, your Honor, in all of these military statutes we all know that it is far from normal as we in civil life see it. "If practicable", it is my view—if I might digress a little bit, in this case your Honor noticed that the article mentioned "a commanding officer," and then "an officer with authority to convene the general court-martial." Your Honor observed that. We all do. In this case the commanding officer would
1932 have been Colonel Hildreth down there commanding the base. But General Hunter himself became the commanding officer ordering the arrest and ordering the charges, and he was also the authority to convene the court-martial. So it is not a case of where a commanding officer forwards charges up to a convening authority of a general court-martial.

Coming down more specifically to your question, your Honor, "if practicable", the whole purpose of the article and the report of the committee which is ad-

verted to in the beginning of that court-martial manual is we insist, says Congress, that you are not going to keep those men there, and I should say that the burden would be greatly upon any commanding officer who said, "Well, it was not practicable to try the man." Or, coming to this very case, this officer was put in this ward and kept there for about six weeks. Nothing done. Surely there could be no argument based upon practicability there. And General Hunter's staff judge advocate said, to which Mr. McGohey enters a mild demurrer I think, that the reason why we delayed the court-martial of this man is the fact that Mr. McGohey has made the specific request that he be not court-martialed, awaiting action to be taken against the civilians in this case. The delay in this case is due to that fact. It was practicable of course at Mitchel Field, not in immediate face of the enemy, to try a man any time after he reported that.

The Court: It appears that he applied for resignation within twelve days after his confinement. Would it have been practicable to try him until the resignation had been passed upon?

Mr. Ansell: I doubt that that has the slightest thing to do with it, but I will answer you in accordance with the fact as I understand it. He had been kept there. There is a great deal that is not here. He had been kept there. He did tender his resignation, a resignation for the good of the service, and that resignation was held by General Hunter for September, October, November, December, January, February and March before it was forwarded.

The Court: I beg your pardon, sir.

Mr. Ansell: Wasn't it, sir?

The Court: The 27th of January.

Mr. Ansell: Oh, pardon me. But it was returned to him in early March, March 2nd, as I remember it,

and was still held by General Hunter for some time after that. It took him twenty days to get it from his headquarters over to Radovich. In any event, I don't want to travel outside of the record, but he was being held there. He did tender his resignation, having been advised that it would be accepted, because General Hunter had full power, he knew the War Department would act on it, but the War Department didn't act on it. But it didn't go forward until, as your Honor says, three or four months after that.

There is a lot of this talk about co-operation, your Honor. It is here, it is before us. It has been said
1937 that my associate counsel, Mr. Robb, advised him to co-operate no longer. That is true, because every bit of the co-operation of Major Radovich got him in deeper and deeper and deeper. Whatever Mr. Wallace and the United States Attorney may think about the wisdom of counsel in advising Radovich as they did, to my way of thinking it was morally and legally offensive that this man should have been batted about between the civil and military authorities as he was in this case until at last, when he was not getting decent treatment, and he said: "There will be no more co-operation and there will be a trial if you insist, where we will get justice."

I do not suppose I answered your Honor very spe-
1938 cifically.

The Court: I have no complaint to make.

Mr. Ansell: Of course they did not have to try him within eight days, but they should have started the machinery, if practicable, forward the charges to the officer exercising general court-martial jurisdiction, furnish the accused with a copy of it, and make the statement. But surely you can't hold a man if the Army is to pay the slightest attention and respect to the Congress of the United States who, after all, under our

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Constitution make the rules and regulations for the Government and our Army, and hold this man there from August 9th to June 29th of the next year before they proceed against him.

The Court: You do not contend he was in confinement all that time, do you?

Mr. Ansell: I contend that he was in confinement, in this particular confinement, only for six weeks, and that thereafter—we have new language now in the Army, your Honor, and you have heard it—administrative restriction. It is unknown to the law. But he was in arrest after that, his limits being restricted to that post and his activities being restricted to that post until January 2nd, I think it was. He was in arrest with limits; he couldn't go to this place, that place or the other place, and there were great restrictions upon the scope of his communications; he had to get authority everywhere, he had to get authority to consult a lawyer, and it was denied in this very case. I say he was in confinement. That is not the term really; "confinement" means one thing to me, in the Army, too, but this was confinement under the conditions that we have seen here in this ward, this cell. And then after six weeks the Provost Marshal General feeling sympathetic with this man makes a report, as is shown on the record, advising the commanding general, who apparently had forgotten about it, and said, "This man has been in here six weeks," and then immediately the order came down to release him. And he was kept then under a strict arrest, not confinement; he was let out, your Honor, under a strict arrest until January 2nd, three or four months, and then he was kept under a less strict arrest; less strict. He could do some things around the post. And then when they made up their minds to try Radovich, of course he was again put in arrest, and then after he had been

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convicted he was then put in confinement, not in this ward, but in confinement. And then when something went wrong with the court-martial proceeding he was taken out and put under this restricted arrest again, and then after a while he was ordered to A, B, C, D, I don't know why. But now he is not under arrest. He came from a place of duty to duty under Mr. McGohey.

I have taken up an almost intolerable amount of time, your Honor, but there was one other case I wish to mention, then I shall be finished.

1943 The Watson case, Watson v. United States, down here in the Third Circuit, in New Jersey, one of these liquor cases. When the defendants were arrested, or shortly thereafter, their private papers were taken from them and turned over to a prohibition agent, and among those was Watson, the defendant's, pocketbook in which were private papers containing important information for the prosecution. On application Judge Lynch directed that they be returned and that the information there contained be suppressed. But the late Judge William H. Jeffery, United States Commissioner, issued a warrant for the arrest of the defendants and was present when they were arrested. He saw those private papers, he knew their contents. And after the defendants were taken to Toms River, down in New

1944 Jersey somewhere, he had them brought before him again and again and secured statements from them. And while he was testifying about certain initials which were on a receipt objection was made to his testimony on the ground that it was based on information which he had secured from these papers. The objection was overruled, apparently on the ground that Nicolnison had made certain statements about the receipt in response to questions by Judge Jeffery at the time the confession was secured.

The case of Weeks v. The United States established that private papers illegally seized could not be used before a federal grand jury. The Fourth Amendment, however, requires that evidence so secured shall not be used, not simply before a court, but not at all. The Government may not avail itself of knowledge obtained by its own wrongdoing. If they learned of this receipt through this illegal seizure it could not use this information to extort from Nicolaison the statement that those initials were his and then make that statement the basis of the admission in evidence. The objection to it was solid and it should have been sustained.

Now, your Honor, I failed to say that Mr. Flynn 1946
that he had this first statement, taken by him in the same ward, there when he took this statement that is proposed to be put in evidence here, and that he had it on his desk, and that both he and Radovich read it, and that before he began to write, in effect was his testimony, he talked over the statement, the first statement, and then he wrote the second statement, he himself—no stenographer there—he wrote it in his own hand. Beyond all question the second statement is really not a derivative of the first; it is more than that, it is the first.

Your Honor must have observed that I am intensely interested in this case, not that it will affect anybody else; but the Supreme Court is always saying, and 1947
quite properly so, and we need ever to be reminded of it, that that Court will insist upon establishing rules of procedure and evidence, where Congress has not done so, that will insure what it calls a fair and decent trial according to trials had in civilized communities. The conduct of the Government officials in this case, both military and civil, is in my honest opinion inconsistent with that fair and moral procedure that the

Supreme Court has lauded so much and done so much to impose upon the lower courts.

The Court: Do you wish to be heard?

Mr. Keenan: Your Honor, I believe that General Ansell, who has just addressed the Court, was an officer of the United States who actually drafted the Article of War in question, and I have no comments to add to his statements.

The Court: All right, sir.

Mr. McGohey: May it please the Court, the argument this morning is based, as I see it, entirely on the doctrine laid down by the United States Supreme Court
1949 in the McNabb decision and the Anderson decision, which came down about the same time. We do not quarrel with the decision of the United States Supreme Court in those cases. Our position is that the principles in the McNabb case do not apply to the facts as they appear in the case at hand.

Now, I don't concede for a moment that the statement that was taken from Major Radovich in September, 1944, while he was in the hospital at Mitchel Field violated any of the principles laid down in the McNabb decision. But I say that, for the purpose of our discussion here and the proceeding that your Honor is now conducting, it does not make any difference whether it was or was not in violation; and we could assume, purely for the purpose of the argument, that it did
1950 violate the principles of the McNabb decision and that if that were being offered the ruling of the McNabb decision might make it inadmissible. But the McNabb decision and the decisions that it quotes, and the Nardone case and all the other cases, this Watson case, and that whole line of cases, with which I think we of course are all familiar, have in them one factor which is absent in this case, and that is that in those cases, as in the McNabb case, where the statement was taken, as

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the Court said, illegally, when the man was under restraint, and in the Nardone and other cases where the papers were seized illegally, there was always this factor: the defendant in those cases, the defendants, rather, in those cases, maintained at all times that the original seizure or the original statement had been illegally taken and that at no time did their position ever change with respect to that fact. That is not the case here with respect to the defendant Radovich.

Now, this protection against self-incrimination is of course a privilege, a privilege which may be waived, and it is our contention that the defendant in March, 1945, the defendant Radovich, when by the admissions 1952
of everybody concerned he was completely and utterly free of all restraint of any kind, came into the office of the Federal Bureau of Investigation and stated—and his statement will so show—that he voluntarily made the statements which he made on March 15th and March 17th. Now I take it, your Honor, that that was a valid waiver of any right that he had, and I take it that none of the cases that have been cited, and no case that can be found will hold that because a man gives a statement at one time under circumstances which may be said as to make the admissibility of this statement improper, can never thereafter waive that privilege against self-incrimination when he is thereafter free and when he has had the opportunity, as this defend-
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ant did, to consult with counsel.

Now the evidence before your Honor here shows that even while he was in the hospital at Mitchel Field he asked for permission to see a Mr. Bradspies, or an officer or some man named Bradspies, and that he did see him. Now, that is before he gave the statement to the agents in the hospital. Now, coming to the end of September, he was released from the hospital, and the orders, which are in evidence, show that he was

restricted to the base, it is true, and he was excluded by the terms of the order from entering the officers' club on the base, but that is the only restriction that he had. As far as the order shows, he was perfectly free to communicate, either by telephone or, telegraph or by a personal visit by any counsel of his own selection; and certainly when the 2nd of January came he was perfectly free, and the evidence of Flynn is that the man came in to him on many occasions, at least on more than one occasion, without Flynn having called him or called anybody at Mitchel Field to have Radovich to come in to see him.

1955 Now, the General suggests that the September statement was on the desk at the time the March statement was given. Well, that in my opinion, is certainly no argument against the fairness of the agent; rather, I think it is an argument in favor of the fairness of the agent. He was not taking any advantage of Radovich; he was letting Radovich see exactly what he had said in September. And then he made this statement here (indicating), in which he says, "That he knows that these are special agents of the Federal Bureau of Investigation and that he makes the statement of his own volition, and that no threats of force, promise or favor, or duress of any type has been offered to me to induce me to make this statement, and I know that anything I say may be used against me in a criminal

1956 proceeding."

Mr. Robb: Does it say "against"?

Mr. McGohey: It is Government's Exhibit 25 for Identification I am reading from.

(Continuing) "And I have been told that I do not have to make this statement unless I desire to do so."

Now there is no question at all here, your Honor, but that that came up in seizure cases where evidence or

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materials are seized and then the information that appears on the papers is thereafter used in the case.

It is the contention of the Government here that regardless of what happened prior to the 15th of March, on that day this man completely free, under no duress of any kind whatever, of his own free will, waived any privilege against self-incrimination that he had and voluntarily made the statement, and that it is not tainted in any respect by what happened prior to that in the Army or any place else.

Mr. Keenan: Your Honor, I would like to make one observation for whatever rights I have to be heard in this matter.

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The Court: I wish you would exercise that right.

Mr. Keenan: Your Honor, I am glad you raised that, because I would not have said anything if it had not been for a remark made by the United States Attorney.

The Court: All right, go ahead.

Mr. Keenan: The United States Attorney said that everybody in this court room admitted that when Radovich made this statement he was absolutely and entirely free from any restraint of any kind. I would ask the record to show that I am in the court room and that I do not agree with that statement, and I violently disagree with it, especially in view of the fact that we are observing something which I think probably is without precedent in the annals of prosecution in the recorded history of the United States, namely, where a co-defendant in a conspiracy case is ordered by a military authority under whose jurisdiction he now is and who has held him in restraint in an insane ward, to report to the United States District Attorney for duty.

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Now I believe that is the statement. At least, report to him—and if I am wrong in the "duty," I would like to have the language of it read.

Mr. McGohey: May I inquire as of what time Mr. Keenan is talking?

Mr. Keenan: I am talking about the time when he appeared to you to take instructions from you at the beginning of this prosecution. I am saying that he certainly, in my opinion, is not free from restraint when his superior officer orders him, a defendant in a prosecution where punishment includes the right to send him to a United States penitentiary, and that the United States Attorney is representing that branch of the Government that is prosecuting him, that it is weird in the name of justice to order him to report to
1961 the United States Attorney and to remain under his instructions for a given period of time.

To say that that man is absolutely free of restraint, and that everyone so agrees, causes me to rise and deny for the record that I am included in those individuals who have arrived at that conclusion.

Now, at this time, since I understand it is a motion on a voir dire proceeding on the part of counsel for the defendant Radovich, ask that a given statement be excluded, although at all times I contend the authorities will support my position: that the defense is more apparent than real, that we have no interest in this statement. I have said it so many times to your Honor that I fear that I would be offensive if I would repeat it many more times, but just this once: I think the jury
1962 hearing a statement of Major Radovich about the very subject matter of which my clients are accused, and matters that might be determinative of their guilt or innocence, I regard it as requiring much of the human mind to ask that it set those matters aside, and for such reason I believe I have a right to be heard, but not any more at this time, on the technical matters, the cases that hold that this testimony is not admissible.

Mr. McGohey: I do not know that it is necessary, your Honor, to go into that question of this order that was given to Major Radovich.

The Court: No.

Mr. McGohey: Because it is long after the statement.

The Court: Yes. Do you gentlemen wish anything further?

Mr. Robb: No, your Honor.

The Court: We will take a recess now until 2 o'clock, and I will pass on the question at that time.

(Recess until 2 P. M.)

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AFTERNOON SESSION.

The Court: Gentlemen of the counsel, I am of opinion to admit the statement, and will admit it. I will state my reasons. An objection was made to the statement under consideration, the statement which has been offered in evidence on Thursday of March, 1945, and an attack has also been made on the previous statement made in September, 1944.

It is contended that the vice in that statement also vitiates the statement of March, 1945. It is contended that the statement made in September is inadmissible under the doctrine of the McNab case. I do not think that the doctrine of the McNab case renders that statement inadmissible. 1965

As is settled, and as is stated in the McNab case, the mere fact that a confession was made while in the custody of the police does not render it inadmissible. The McNab case is based primarily upon the statute of the United States which requires that a person arrested by a federal

officer must be taken promptly before a committing magistrate for arraignment or for hearing. In the McNab case that statute was not complied with, and the defendants were subjected to treatment which the Court considered improper, and thoroughly improper to have taken place prior to an arraignment.

The Anderson case is similar and analogous. Only there the actual custody was by State officers, but it was shown that the federal officers acted in concert with the State officers.

Under the circumstances here there is no statute applicable which is analogous to the statute under consideration
1967 and which was determinative in the McNab case.

There is no provision in military law requiring that a person charged with a crime be taken before a committing magistrate. There is no such thing as a committing magistrate in military law, just as there is no such thing as a grand jury in military law.

Article [redacted] of the Articles of War does undertake the guarantee [redacted] persons accused of prompt trials. It is provided that:

> "A thorough and impartial investigation must be made when the charges are preferred."

Then it is further provided:

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> "That when any person subject to military law is placed in arrest or confinement, immediate steps shall be taken to try that person accused, or to dismiss the charge and release him. Any officer who is responsible for unnecessary delays in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by a general court-martial, the commanding officer will within eight days after the accused is arrested

or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to his superior officers the reasons for the delay."

Therefore, there is considerable discretion, in my opinion, left to the commanding officer and the convening authority as to when a trial by court-martial shall take place. The phrase "if practicable", and the succeeding sentence providing that if there is delay an explanation shall be made why there was such delay, seems to me to invest in the military authorities considerable discretion in the matter of when a trial shall be had. 1970

Of course, the whole tenor of the article is to provide for prompt trial, but there is a discretion left as to just when that trial shall be had. In this case I cannot see that a trial immediately after the expiration of eight days was practicable.

It is true that this man was placed in confinement in this hospital ward on the 9th day of August. I take it that the evidence on that subject is clear that he was in confinement and awaiting trial by a court-martial. However, I do not think the effect of that is any greater than if he were placed in a house of detention or a jail. He was in custody of the authorities.

But, as I say, I am not prepared to hold that on the 5th of September, which I believe is the date of the statement, 1971 that his custody was illegal, and certainly I do not think that the doctrine of the McNab case applies to it.

The general rule is, as you gentlemen of counsel all know, that the test of a statement's admissibility is whether or not it is voluntary. I do not see anything in the circumstances here to cast any doubt on my conclusion that the statement of September 5th or 6th was an involuntary statement, and I am not prepared to hold and will not hold it inadmissible.

If I should be of opinion that it was inadmissible because of coercion, then it would be my duty, as I understand the law, to determine from the evidence whether or not such coercion has vitiated the first statement, continued through and applied to the second statement.

I find a statement to that effect in Wigmore, page 335, Volume 3 of the Third Edition. In other words, on a question of this kind, if the Court should be of the opinion that an earlier statement was coerced, then it is its duty, of course, to determine whether or not the second statement was induced by the same coercion or any coercion.

As to the statement made and which is now offered in
1973 evidence, the statement made in March, I am satisfied that if there had been any vice in the first statement, that it did not continue and did not apply to the second statement. The defendant had long since been released from confinement. He, in my opinion, was almost as free as any soldier is. If I recall it correctly, at that time he was at Mitchel Field and he was denied the privileges of the officers' club, and was required to get permission to leave there. Any soldier has to get permission, either general or special, to leave his post. So he definitely, in my opinion, was under no confinement or arrest, and, as I say, was about as free as any soldier usually is.

The testimony convinces me that the second statement was made entirely without coercion and was not induced by promises extended to him by anyone in authority. I
1974 would admit the statement of March even if I thought there was any question about the statement in August, although I do not think that statement was coerced.

The decisions indicate to me that the fundamental thought in the matter is that it is the duty of the Court to determine from the surrounding facts and circumstances whether or not there was any circumstance or any circumstances existing which would likely produce an untrue statement.

In other words, if a man is about to be lynched by a mob, naturally he would say anything that would prevent such a consequence, and a statement made under such circumstances would have no probative value.

Considering all the facts and circumstances which have been presented to me, I can find no fact or circumstance which would lead me to believe that the statement now offered was induced by anything which would tend to discredit the truth of it.

Consideration of all the facts and circumstances which I have heard lead me to believe that in making the statement and the prior statements, including the statement referred to in, I think, General Connor's endorsement to 1976
the defendant's resignation, everything leads me to believe that the defendant was actuated solely by a desire to tell the truth, take the consequences, and get the matter behind him as promptly as possible. So the ruling of the Court is to overrule the objection of the defendants and admit the statement.

Mr. Robb: May we have exceptions, if your Honor please?

The Court: You may. Are you ready to proceed?

Mr. McGohey: Yes, your Honor.

The Court: Call the jury. I might say that I will limit the statement to the jury's consideration of the charge against the defendant Radovich as I have to the other statements.

Mr. Keenan: We still want our exception noted. 1977

The Court: Yes, it has been. Where is your witness?

Mr. McGohey: Mr. Flynn was my witness, but I am just going to offer the statement. It has been identified. Yes, I think we had better call the witness Flynn.

The Court: Yes, I think you had better have him back on the stand.

(The following proceedings took place before the jury:)

GERALD J. FLYNN resumed the stand.

The Court: Ladies and gentlemen of the jury, when we parted company there had been offered in evidence a statement which this witness, Mr. Flynn, testified was made to him in March, 1945, and reduced to writing and signed by the defendant Radovich.

I charge you now in similar fashion to the way I charged you when I admitted statements made by the defendants Samuel and Elias Bayer. I am admitting this statement made by the defendant Radovich for
1979 your consideration of the charges here made against the defendant Radovich. I charge you specially that you should not consider this statement or anything in it in your consideration of the cases against the two Bayers. You may consider it and give it such weight as you feel inclined to in your consideration of the case against the defendant Radovich. All right, you may proceed.

Mr. McGohey: I now offer in evidence Government's Exhibit 25 for Identification.

Mr. Robb: If the Court pleases, may we have our objection and exception to this?

The Court: Very well.

Mr. Keenan: And I want to again renew my objection to a charge to the jury, to ask them to recall the
1980 incidents set forth in this paper that is introduced, or about to be introduced or received, as against Major Radovich only, and not as against the two defendants Bayer, on the ground of the practical impossibility of any jury being able to make such distinction and hold it throughout the course of a long trial to their ultimate deliberation.

The Court: Very well. The objection is overruled. You may proceed.

(Government's Exhibit 25 for Identification received in evidence.)

Mr. McGohey: I have no further questions of this witness, your Honor.

The Court: All right. Do you wish to cross-examine?

*Cross-examination by Mr. Keenan.*

Q. Mr. Flynn, you took this statement set forth as Government's Exhibit 25 in your own handwriting and you 1982
dated it March 15, 1945, is that correct? A. Yes, sir.

Q. But it is also witnessed by Mr. McCabe, another F.B.I. agent and yourself? A. Yes, sir.

Q. With a mark 3/17/45, which I assume is March 17, 1945, is that right? A. Yes, sir.

Q. Where was Major Radovich during that time? Did he stay in New York or did he make another trip back, or what happened to him in that period of time, if you can tell us? A. Between March 15 and March 17, I don't know where he was. He was in the office on March 15th and then he came back again on March 17th.

Q. Did you ask him to come back? A. Yes.

Q. Why? A. We had not finished the statement, as I recall it, and I believe Major Radovich had an appointment. 1983

Q. Where? A. I don't know.

Q. Did Major Radovich ask permission to leave? A. No, he just told me that he had an appointment. So I suggested that he come back the following day.

Q. And did he come back the following day? A. No, he told me that he could not come back the following day, but he would make it two days later.

Q. Now, at that time, this was not the first statement that you had taken from Major Radovich, was it? A. No, sir.

Q. You had taken a statement previously some time in September, 1945, is that correct? A. 1944.

Q. 1944, I beg your pardon. Is that right? A. Yes, sir.

Q. What was the date of that statement? A. I would say it was about September 6th, as I recall it.

Q. And where was that statement taken? A. That statement was taken at Mitchel Field at the Santini Hospital.

Q. A hospital for what? A. I don't know. All I know is that it is called the Santini Hospital.

1985 Q. Major Radovich at that time was under lock and key, was he not? A. I don't know that he was under lock and key; he was in the hospital.

Q. Well, do you know whether or not he had had his necktie taken away from him and his belt and other implements taken away from him? A. No.

Mr. McGohey: I object to this line of questioning.

Q. That might have led to his own self-destruction?

The Court: I overrule the objection.

A. No, I don't know.

Q. You had not heard anything about that? A. No, sir.

1986 Q. Do you not know that he was in the hospital for the insane? A. No, sir.

Q. Have you ever heard anything about that before now? A. That he was in a hospital for the insane?

Q. That is right? A. No, sir.

Q. For the psychopathic patients? A. I was taken to Santini Hospital by Lieut.-Col. Miller. I did not know what type hospital it was. I did not ask.

Q. Do you know now? A. I know that you are telling me that.

Q. Is this the first time you have ever heard about that? A. That he was in a hospital for the insane?

Q. Yes. A. Yes.

Q. Or the psychopathic patients? A. I don't recall having been told that before.

Q. Well, I am asking you to your best recollection whether or not this is the first time you ever heard of Major Radovich being in a hospital for the psychopathic patients in the Army? A. Yes, sir.

Q. Is that right? A. Yes.

Q. Do you know the number of the ward? A. No, I don't recall it.

Q. Did you ever know it? A. I may have noted it that 1988
day but I did not commit it to memory.

Q. Did you mark it down? A. No, sir.

Q. Don't you know that it was Ward 15? A. I don't recall whether it was Ward 15.

Q. Was there just one ward at the hospital where you went to see him? A. No, there were numerous wards. There are apparently wings that open off a common corridor.

Q. Do you remember a Mr. Pender out there? A. I don't recall ever hearing that name.

Q. A Sergeant Pender? A. No, sir.

Q. Do you know anything about the fact that he had a man come to take him out for a walk at a specified time in the afternoon? A. No, I don't recall that.

Q. That is all news to you? A. I don't recall that. 1989

Q. Do you know that there was a heavy gate about two hundred pounds swung to his door or outside his door?

Mr. McGohey: I object to this question.

The Court: What date are you referring to?

Mr. Keenan: I am referring to the time in September when he first went out there to see Major Radovich, when he got the first statement from him.

The Court: We have no September statement. The statement I admitted is the statement of March.

Mr. Keenan: Yes, but the witness has testified, I believe, already, that there was another statement that he obtained in September and that he had that statement in front of him at the time he obtained this statement, and I want to inquire about the circumstances.

The Court: All right, go ahead.

Mr. Keenan: I am prepared to show that Major Radovich was in——

Mr. McGohey: I object to that.

1991 Mr. Keenan: —a hospital for the psychopathic patients.

Mr. McGohey: I object, your Honor.

The Court: Wait until you get to it, and I will admit what I think is admissible.

Mr. Keenan: All right.

The Court: Go ahead.

Mr. Keenan: I am a little confused on the question, your Honor. May I have it repeated?

The Court: All right.

Q. (Question read) A. No, I don't.

Q. Did you ever see a key to lock a door before you went in to see Major Radovich at any time out in Santini Hospital? A. No. You mean to his room?

1992 Q. I mean any place out at that hospital. A. No, I don't recall any doors having to be opened.

Q. Having to be opened by keys, I am talking about. A. No, I don't.

Q. Of course you would remember that, Mr. Flynn, if it happened? A. Yes, I would.

Mr. McGohey: Your Honor, I object to this whole line of questioning as immaterial to the admission of

this statement which your Honor has admitted, the last statement.

Mr. Keenan: Your Honor, I contend I have a right to show this jury the circumstances under which it was obtained.

The Court: I will overrule the objection. Go ahead.

Mr. Keenan: May I repeat the question, your Honor?

The Court: Yes.

Q. I am asking you if you would not have remembered if there was a door unlocked before you went in to see Major Radovich? You would recall that, would you not? 1994
A. I think I would.

Q. And your statement is that there was no such thing happened? A. My recollection is that I have no remembrance of any door having to be opened for me to see Major Radovich.

Q. Now, what kind of wire was there outside of his room, if you know? A. I don't know. I believe it was just a common type of screen.

Q. To keep insects out? A. Well, I would presume that.

Q. It was not a heavy wire mesh? A. I don't recall a heavy wire mesh.

Q. About how big was that room? A. Oh, maybe about 10 foot square—I don't recall whether it was an exact square, but I would say about 10 foot. 1995

Q. Would you say that the room was larger than 6 by 9? A. Well, it seemed to be to me.

Q. Now, when you went out there and saw Major Radovich, you knew, of course, that he was in a hospital? A. I knew it after I got to Mitchel Field.

Q. And you would have been able to tell if he had been kept in confinement of the type where people are watched for psychopathic ailments, would you not?

Mr. McGohey: Now, if your Honor please, may I state that I think that this is now Mr. Keenan's witness. This is no cross-examination. I want the right to object to the introduction hereafter of any testimony to contradict what is being said now. I take it that this is direct examination of the witness by counsel for the Bayers.

Mr. Keenan: Your Honor, I have never heard of a witness under cross-examination becoming a direct witness for the cross-examiner.

Mr. McGohey: I have, your Honor, and I assume that your Honor has, too.

1997 Mr. Keenan: If I had a witness under direct examination and he was hostile, it might be permitted as cross-examination, but this is a novelty. I have never heard of the reverse, and he certainly is not my witness and we do not vouch for anything that he says in this case.

Mr. McGohey: Your Honor, there is not any evidence at all here of hostility. As I take it, we are going into something now that was not touched upon in direct at all, and I take it that the purpose is to lay a basis to contradict what is now being testified to by this witness. If that is the purpose of it, I certainly reserve the right to object to anything of that kind because it will be contradicting his own witness. I say that he is making the witness his own with this

1998 examination.

Mr. Keenan: Your Honor, if I might be permitted to observe very briefly, I have never known of cross-examination ordinarily to have any other function than attempting to lay the foundation for disturbing the credibility of the witness or the accuracy of what he says, and I have never known of a man, of a defense counsel, making a Government witness his own wit-

ness because of cross-examining him as to the accuracy of his statements.

Mr. McGohey: I submit that that is not what is being done here. The witness is being examined anew on matters that have not been touched upon on direct examination.

Mr. Keenan: I want to find out, your Honor, how this confession was received.

Mr. McGohey: I object to any statements about the purpose of this examination.

The Court: Will you take the jury out?

(Jury retired from the room.)

The Court: Mr. Keenan, the reason I sent the jury 2000
out is that I want to inquire with regard to this proposition: Inasmuch as I have admitted this statement for consideration solely against the defendant Radovich, have you a right to cross-examine him?

Mr. Keenan: I think, your Honor, under the decision of the Anderson case, that the Court recognizes what I have referred to informally as the realities of the case enough to put us all on notice that if there is evidence that is introduced against one of the co-defendants and that evidence is improperly so introduced, it could have a vital effect upon the deliberations of the jury and their conclusions.

The Court: Just one minute, while I read this. I understand in the Anderson case the criticism was 2001
made of the Court in not strictly in his charge limiting the statement of one in the consideration of the case of that one but permitting the jury to consider the statement as to the other. What do you consider authority for it in your contention right now?

Mr. Keenan: I consider the authority enough, your Honor, to put us on notice that on a vitally important statement of this nature, even though the Court does instruct the jury that it shall not be considered by the

jury excepting as against the defendant Major Radovich, that nevertheless there is enough realism in appraising and assessing the value of evidence that I believe that our Supreme Court will go the added step if required in exposition, that if such evidence is improperly introduced, it will contaminate the entire proceeding as a matter of law.

Furthermore, I want to examine this witness as to his bias or lack of bias, or his accuracy or lack of accuracy in taking this statement because it is going to be my contention that the attitude of the Government has had much to do with the attitude
2003 of Major Radovich in this case, and that we are vitally interested in him as a witness. We may even see fit to call him as a witness in this case, and for that purpose I want to know and I want the jury to know and be informed as to anything that locks the Major in a vise by taking a statement from him that affects our right to produce free and unrestrained all the evidence in this case from the witnesses who know best to the jury, and therefore I want the jury to know under what circumstances the original statement was taken.

The Court: But on this proposition, assuming that the statement has been admitted solely for consideration in the case against Radovich, then why have you a right to cross-examine him on that?

2004 Mr. Keenan: Because I think, your Honor, that the jury is going to consider what is stated in that confession regardless, and that the least we could do in attempting to deal with the situation practically is to let the jury know the circumstances under which it was received.

I assume that all these questions can be asked by the defendant Radovich's counsel, and I know that your

Honor is raising the point that technically, since that evidence is not admissible against or not to be considered in deciding the guilt or innocence of the two defendants Bayer, therefore I have not any right to bring out before the jury the circumstances under which it was obtained, and from a legalistic viewpoint, your Honor, if we were engaged in charting out some mathematical formula, and we had robots, with twelve or fourteen of them on the jury, there might be a good deal to that position. But I say to your Honor, and I maintain the position and I intend to pursue it to the highest authority, that there comes a time when asking the jury to do a useless and futile thing is an abuse 2006
of judicial process, with great respect to this Court that I know he would be following certain precedents in so doing, but I intend to leave no stone unturned to put before reviewing authorities, if the occasion arises, which I hope it never will, to examine into the circumstances, so that the reviewing court is going to see that we attempted and left no stone unturned to put before the jury all of the facts surrounding this so-called admission.

The Court: What have you to say on that particular proposition, Mr. McGohey?

Mr. McGohey: Your Honor, I am not addressing myself——

Mr. Keenan: Just one further word.

Mr. McGohey: Surely. 2007

Mr. Keenan: I just wanted to say one further word: I have a right to test the credibility of this witness. He is on the stand and he has testified also on matters pertaining to the defendants whom I represent. I want to cross-examine him about his credibility. When a man says that he went out to ward 15, under the facts and circumstances that have been ad-

duced in this court room, I think I have got a proper leg to stand on to ask this witness if he did not see anything there by way of a psychopathic ward. I want to raise the question of credibility.

The Court: All right, what have you to say, Mr. McGohey?

Mr. McGohey: I would like to address myself to the objection I made to the testimony, which was not precisely the same ground that your Honor picked up.

The Court: Yes, it is quite different.

Mr. McGohey: It is an entirely different ground. Let us assume for the sake of argument, or let us go back a moment. The point that I make is, if it be the right of Mr. Keenan to show these circumstances under which the September statement was made, if for whatever effect they might have on the March statement that is now in evidence, I submit that Mr. Keenan has to do that in his own case. I submit that he cannot do that under the guise of cross-examining this witness here and then produce, as he probably will, whatever witnesses he can to contradict what this witness says on the stand. He is going into matter which is entirely new. None of this was adverted to on the direct examination at all, and it seems to me that there is nothing strange about counsel making a witness his own on cross-examination if he goes into new matter. It may very well be that your Honor will say that he is entitled to show all the circumstances of the September statement, but I raise the point that it should be done in the orderly way, with his own responsibility for the witness by whom he intends to show those facts and circumstances and not this witness.

The Court: What have you got to say about the other proposition?

Mr. McGohey: Now, on the question of the right of the counsel for the defendants Bayer, I claim that he has no right whatever to cross-examine this witness under the instruction which your Honor gave to the jury at the time the statement was admitted. Your Honor clearly limited that, and that of course is only a reinforcement of the rulings which your Honor has given throughout this trial, that wherever a statement of a defendant was admitted, that the jury was to consider it only in its consideration of the case against that defendant.

Under that very clear limitation which your Honor gave just a few minutes ago, I maintain that there is 2012
no right on behalf of either Samuel or Elias Bayer for their counsel to cross-examine on that statement.

Mr. Keenan raises this question about what some court in the future may do about statements admitted under these circumstances, but your Honor is satisfied, and I am, that under the authorities as they stand today, the ruling of the Court is correct, that where the statement is admitted under a proper instruction that the prejudice that may come from it is not a fatal prejudice in any trial of this kind, and I maintain that there is no right on Mr. Keenan's part as counsel for these two defendants to cross-examine along these lines.

Mr. Keenan: I would say to your Honor that I 2013
think it would be logical that I ought here to pursue this line of inquiry of this witness or not be permitted to interrogate him at all at this time.

The Court: Do you wish to be heard further on it?

Mr. Keenan: No, that is all, your Honor.

The Court: Well, with a personal reluctance, but being satisfied of the legal correctness, I am going to hold that you have no right to cross-examine this witness because his testimony does not refer or apply

to the defendants whom you represent. It is my understanding that you do not represent the defendant Radovich.

Mr. Keenan: No, your Honor. That is very clear, I do not represent him. He is very ably and capably represented by the distinguished former Judge Advocate General, General Ansell, and Mr. Robb.

The Court: I concur in the last part of your statement entirely. It is the ruling of the Court that the counsel for the defendants Bayer may not cross-examine upon the statement just introduced, and I take it that you wish to except.

2015 Mr. Keenan: Yes, your Honor. Thank you for the exception.

The Court: All right. Do you wish to be heard on this matter?

Mr. Robb: No, your Honor.

The Court: All right. Bring the jury in.

(The following proceedings took place before the jury:)

The Court: All right, you may proceed, gentlemen.

*Cross-examination by Mr. Robb.*

Q. Mr. Flynn, who was present when you took the statement from Major Radovich on March 15 and 17, 1945? A. Major Radovich, and about half that time Special Agent
2016 McCabe.

Q. Coming to the March 15th interview, how long did that take? A. I would estimate it took maybe an hour and a half or two hours.

Q. By the way, that was in your office here in this building? A. That was on the 26th floor of this building.

Q. That was your office? A. That is right.

Q. The F.B.I. office? A. That is right.

Q. How long did the interview take on the 17th? A. I should estimate that it took possibly an hour or an hour and a half on the 17th to complete the statement.

Q. Who did most of the talking? A. I think that would be about equally divided between Major Radovich and myself.

Q. So probably the Major talked a couple of hours in all, is that right? A. No, I would not say so. There were pauses.

Q. There were what? A. There were pauses.

Q. Pauses? A. Yes.

Q. And you reduced his statement to a longhand statement of thirteen and a half pages, is that correct? A. That 2018
is right.

Q. By the way, Mr. Flynn, you had attached to that office plenty of young ladies who could take shorthand, did you not? A. Oh, yes.

Q. But you did not have Major Radovich's statement taken down stenographically, did you? A. No, I did not.

Q. Did you put in this longhand statement everything that Major Radovich said? A. No, I don't believe I put everything into it. I believe that I put most of what I considered important in there.

Q. When you left out something, did you leave it out purposely or inadvertently? A. Oh, I did not leave it out with any design.

Q. Yes. When you started to talk to him, did you tell him that any statement that he made might be used against 2019
him? A. Yes, sir.

Q. You said that it might be used against him in any criminal proceeding, did you not? A. Yes, sir.

Q. Did you put that in the written statement? A. I believe I put in that written statement, which I found out later on that it might be used, "in any criminal proceeding." I don't think the words "against him" are in there, though,

Q. Why didn't you put that in? A. I believe I got ahead of myself when I was writing.

Q. When did you discover that you had left that out? A. Well, I read it about two weeks ago, I believe. That was the first time that I discovered that.

Q. You did not leave that out, did you, Mr. Flynn, because you had assured Major Radovich that he was not going to be indicted? A. No, sir, I did not.

Q. You recognize, do you not, that there is a distinction between telling him that the statement could be used in a criminal proceeding and telling him that it could be used against him in a criminal proceeding? A. Oh, yes.

2021 Q. There is quite a difference, is there not? A. Yes, sir.

Q. You never had any discussion with the Major at that time as to whether or not he was going to be indicted? A. No, sir, I did not.

Q. Were you interviewing him at that time as a prospective defendant?

Mr. McGohey: I object to that, your Honor.

The Court: I will overrule the objection.

A. There was never any question at that time Major Radovich had cooperated, in my opinion, he was a Government witness.

Q. Was it not understood, Mr. Flynn, that since he had cooperated, as you put it, that he was not going to be made

2022 a defendant? A. I made no such understanding with him. Every time I spoke to Radovich, and I spoke to him actually as regards the taking of statements on only two occasions, I told him that anything he would say could be used against him.

Q. Yes, but now, Mr. Flynn, was it not understood between you and Major Radovich and Mr. Wallace, that he was not going to be indicated in this case?

Mr. McGohey: I submit that that has been answered, your Honor.

Mr. Robb: I submit that it has not, if your Honor please.

The Court: I will overrule the objection.

A. I don't know that there was any understanding on the matter, but I would say that I never did mention to him that he would be indicted.

Q. That he would not be? A. That he would be indicted.

Q. You did not expect him to be indicted, did you?

Mr. McGohey: I object to that, your Honor, what he expected. 2024

The Court: I will overrule the objection.

A. No, I did not.

Q. As a matter of fact, Mr. Flynn, he was not indicted in the first indictment which was returned against the Bayers, was he? A. No, sir.

Q. And he was not indicted because he cooperated, as you put it, isn't that right?

Mr. McGohey: I object to that, your Honor.

The Court: I will let him say if he knows.

A. I don't know why he was not indicted.

Q. You mentioned that you did not put in the statement that you wrote out in your handwriting everything told to you by Major Radovich. You discussed, did you not, Major Radovich's war record? A. Not at that occasion, as I recall it. We had discussed it on other occasions. 2025

Q. Yes. Were not some of the things in this statement matters which you discussed on previous occasions? A. Oh, yes.

Q. And you discussed how he had received the various decorations that he had, did you not? A. On other occasions.

Q. Yes. A. That is right.

Q. You discussed his exploits against the Japanese, did you not? A. Yes.

Q. But you did not put that in the statement, did you? A. I did not see that they entered into the materiality of the statement.

Q. That was a matter which might be quite helpful to the Major, was it not? A. What matter?

Q. The matter of his war record and his gallant war
2027 record? A. But it had no place in the statement.

Q. You thought that, did you not? A. I think anybody will admit that.

Q. So you put in the statement only those things which you thought had a place in it, is that right? A. I put in the statement the things which pertained to the case which was then under investigation.

Q. And you decided what pertained and what did not? A. I was conducting the interview.

Q. Was there any particular reason why you did not call in a reporter or a stenographer?

Mr. McGohey: I object to that.

Mr. Robb: May I finish.

Mr. McGohey: I am sorry; I thought you had fin-
2028 ished.

Q. Was there any particular reason why you did not call in a stenographer and have the statement taken down in shorthand? A. No.

Q. You knew that had been done in the case of the Bayers, did you not? A. Not in our office.

Q. It was done though, was it not? A. It was not done in our office.

Q. Won't you answer my question? A. It was done, but not in our office.

Q. Yes. Now, Mr. Flynn, at the time you took this statement from the Major on March 15th and on March 17th you had before you, did you not, the statements which you had taken from him in the hospital in September? A. The statement? Did you say statements?

Q. The statement. A. Yes.

Q. And before taking the statement from him in March you handed him to read the statement which you had taken in September, isn't that correct? A. I believe that is correct according to my recollection.

Q. And you read the statement, too, did you not? A. 2030
Yes, sir.

Q. Was there any substantial difference between the earlier statement and the one you took in March? A. Yes, there was at least one correction, I believe, on the name of the uniform company, and the one which I took in March I would say went into more detail.

Q. That went into more detail? A. That is right.

Q. The one you took in March? A. Yes.

Q. How long was the one you took in September; how many pages? A. I would say it was about six pages.

Q. Was that also written out in longhand? A. Yes.

Q. In your handwriting? A. Yes.

Q. Why did you think you had to take another statement in March? A. Well, that was just my personal opinion; that Major Radovich had told me many more in- 2031
stances or circumstances which I thought should go into the statement, and I decided to put it in and make it one complete statement.

Q. The two statements, though, were basically the same, were they not? A. Basically, roughly, yes.

Q. Now, where was the Major when you took that statement of September? A. At Santini.

Q. What ward was he in? A. I just stated that I don't recall the number of the ward. I know that he was in a private room in one of the corridors of Santini Hospital.

Q. How did you get in to see him? A. I was taken there by Lieut.-Col. Miller.

Q. Who was he? A. Lieut.-Col. Miller was then the assistant, I believe. He was the Assistant Judge Advocate of the First Fighter Command.

Q. That was the command to which Major Radovich was attached? A. Yes, sir.

Q. When you went into that ward did you have to go through a locked gate or not? A. Well, I don't recall going through a locked gate. As I said before, I followed
2033 Lieut.-Col. Miller and possibly Special Agent Brown. I don't know whether I was second or whether he was second, but I don't recall the gate being locked.

Q. Would you say that it was not a locked gate that you had to go through?

Mr. McGohey: If your Honor please, I object to this line of questioning on the same ground that I interposed before.

The Court: Overruled.

Mr. McGohey: That it is improper cross-examination.

The Court: I will overrule the objection. Go ahead. I think you answered the question.

2034 The Witness: No, I had not completed it. I would not say categorically that there was not a gate there. I would say that I do not believe that if there were a gate there that it had to be opened with a key to let me in.

Q. You don't remember that? A. I don't remember that.

Q. What kind of a room was Major Radovich in? A. He was in a small room.

Q. About how big was it? A. I have given my estimate on that here, about 10-foot square.

Q. And what kind of furniture did it have in it? A. Well, as I recall it, he had a bed, a table, and I think he had two chairs.

Q. Straight backed chairs? A. I couldn't recall that.

Q. There was quite a bit of vacant space in the room, was there not? A. Well, I don't recall that there was any void noticeable.

Q. That furniture took up the whole room, do you mean? A. No, I don't say it took up the whole room.

Q. Don't you know that room is about nine by six? A. I have not seen the room——

2036

Q. It was really a cell? A. I have not seen the room in over a year now. There was no particular reason for me noticing the room. I wasn't examining the room.

Q. You were examining Major Radovich, were you not? A. I was interviewing Major Radovich.

Q. Were you interviewing him as a prospective defendant? A. At that time I did not know.

Q. Did you have any discussion with him then as to whether or not he was to be indicted in a civil court? A. No, sir.

Q. That question did not come up? A. No, sir.

Q. Do you recall any conversation at the time you saw him in that room at Santini Hospital about his decorations? A. I don't recall any conversation. I recall that somebody brought a letter in to him concerning his decorations, and what was in the letter I don't know. I recall that Radovich told me that they wanted him to take the decorations off.

2037

Q. Who had told him? A. I don't know.

Q. It was not you? A. It certainly was not me.

Q. I do not mean to imply that it was. I merely want to have the record show that. At that time, Mr. Flynn, was there any hesitancy on the part of Major Radovich in giv-

ing you a statement? A. I recall no hesitancy on his part whatsoever.

Q. How long had you been there before you started to take this statement from him? A. Well, I couldn't recall that.

Q. Give us your estimate. A. My estimate, which must necessarily be rough, would probably be fifteen or twenty minutes.

Q. What were you talking about before you started to take the statement? A. The case.

Q. What were you saying about it? A. Well, I would say that I was listening to Major Radovich's story before
2039 attempting to reduce it a statement.

Q. He started to give you his story as soon as you came in there? A. Within a short time thereafter.

Q. Within how long? A. I could not estimate that.

Q. Don't you remember him asking you whether or not you were interested in prosecuting the civilians in the case or whether you were after the military personnel? A. No, I don't recall that.

Q. Would you say that didn't take place? A. I would say that I don't recall.

Q. Would you say that did not take place? A. I would say I would recall it if it had taken place.

Q. You do not recall about the gate either, do you, Mr. Flynn? A. No, sir, I do not.

Q. You don't recall that? A. I don't think the gate was
2040 in the statement.

Q. By the way, do you have that statement that you took from Major Radovich in the hospital? A. No, sir.

Q. Where is it? A. I think Mr. McGohey has that statement.

Mr. Robb: May I see it, Mr. McGohey? That is the statement I asked Mr. McGohey to give me the other day and I did not get it from him.

Mr. McGohey: I object to all this speech before the jury. The statement has not been offered by the Government. All this examination goes to the statement of March 19th or March 15th, which is in evidence, and I again make my objection to the line of examination.

The Court: What is your position?

Mr. Robb: Well, if the Court pleases, I think it is perfectly obvious, if the two statements are tied up together——

The Court: I am merely asking you what your position is and what you are asking for?

Mr. Robb: I am asking for the statement which was made in the hospital ward. Your Honor ruled on it 2042
the other day but I would like your Honor to rule on it again today. I think I have a right to ask for it again.

The Court: Do you want to be heard on it?

Mr. McGohey: Yes, your Honor, I do.

The Court: We will excuse the jury.

Mr. Robb: If the Court please, to save time, if Mr. McGohey still takes the same position, I will withdraw my request.

The Court: All right, go ahead.

Mr. Keenan: May the record show that we join in the request for that statement of September and that it is refused, to which we take exception.

The Court: Yes.

2043

Q. Mr. Flynn, let me go back for a moment to the ward in the hospital. Were there any bars or heavy grates on the windows? A. I don't recall any.

Q. Would you say there weren't any? A. I would not say there were and I would not say there were not.

Q. Did you see any screens on the windows? A. My recollection is that there was a screen there.

Q. What kind of a screen? A. An ordinary screen.

Q. An ordinary screen to keep out the bugs, you mean? A. I assume so.

Q. And you remember that but you don't remember any heavy mesh over that? A. I don't recall that.

Q. Let me ask you specifically. Do you remember any heavy grille over the door to go into this ward? A. No. The door? Over the door?

Q. Over the door to the ward. A. It seems to me that there was some sort of a gate or a door to the ward. What kind it was I don't recall.

Q. Mr. Flynn, your powers of observation are reason-
2045 ably good, aren't they? A. I think they are.

Q. You have been trained to observe, as a matter of fact, have you not? A. That is right.

Q. But your testimony is that you cannot recall what kind of a gate there was on that ward, is that right? A. There was no reason for my noticing it.

Q. Were you interested, Mr. Flynn, whether or not Major Radovich at that time was in confinement? A. Well, it never entered my mind at the moment that he might be in confinement or not.

Q. Were you interested in whether or not he was?

Mr. McGohey: I object to that, your Honor.

2046 A. I am afraid I did not notice.

Mr. McGohey: That is immaterial.

The Court: He has answered it.

Q. Now, Mr. Flynn, I want to ask you a general question. Did you ever have any conversation or make any statement to Major Radovich at any time to the effect that you, meaning the Government, the prosecution, were not

interested in trying him in this case? A. No, I do not recall ever telling him that we were not interested in trying him.

Q. Do you recall saying to Major Radovich that you were not interested in prosecuting him but you wanted to get those Jews, meaning the Bayers? A. No, I certainly did not say that.

Q. You never said that. Are you sure about that? A. I am.

Q. Your testimony is you don't recall saying anything about whether or not you were interested in trying Major Radovich? A. That is right,

Q. Pardon? A. I said that was right. 2048

Mr. Robb: That is all. Thank you.

The Court: Redirect?

Mr. McGohey: No further questions.

The Court: All right. You may stand down. Call your next witness.

(Witness excused.)

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Mr. McGohey: If your Honor please, I should like at this time to read to the jury the statements. I would like to read first the statement of Samuel Bayer and then Elias Bayer, and then the statement of Radovich.

The Court: All right, sir. 2049

Mr. Wallace: This is Exhibit——

Mr. Keenan: It is not necessary to repeat the objection that we have?

The Court: Oh, no, sir. You both stated your objection, taking an exception. This is simply the actual reading of what has been admitted.

All right, sir, proceed.

Mr. Wallace: This is Exhibit No. 8, your Honor. The statement of Samuel Bayer.

(Mr. Wallace commenced to read Government's Exhibit 8 to the jury, during the course of which the following occurred):

Mr. Keenan: May the record show that is one continual statement without interruption of questions and answers?

The Court: Yes.

Mr. Wallace (reading): "Q. That is the last time you have seen or heard of Radovich?"

Mr. Keenan: That is, questions by Mr. Wallace, I believe; isn't it?

2051 Mr. Wallace: Yes.

Mr. Keenan: Thank you.

(Mr. Wallace resumed the reading of the Exhibit 8 to the jury down to and including the following question and answer: "Q. How old is Justin? A. I don't know, sir.")

Mr. Keenan: I ask, in the interest of the economy of time, the questions with reference to these brothers, unless they are material to this lawsuit, should not encumber this record. If the Government contends they are material, very well.

The Court: Do you object to omitting it?

Mr. McGohey: Sir?

The Court: I ask if you object to omitting that part?

Mr. McGohey: No, I don't think so, but as I recall it

2052 your Honor suggested that the attorneys point out what they thought——

The Court: If there is no occasion to read it, I don't see——

Mr. McGohey: Have you any idea how far it goes, Mr. Keenan, that you think ought to be left out?

Mr. Keenan: I may say there is a good deal here that hasn't anything to do with what we are talking about.

The Court: Let us take a ten-minute recess, ladies and gentlemen. See if you can agree upon as much as you can that can be eliminated.

(Short recess.)

Mr. Keenan: Your Honor, this entire statement is in evidence by the Court's ruling.

The Court: That is correct.

Mr. Keenan: And there is only a question or two that do not follow along in continuity. I made an error in that. So there is no particular point in interrupting its proceeding at this time. I beg your Honor's pardon. There is nothing left out at all.

(Mr. Wallace resumed the reading of Government's Exhibit 8 down to and including the following answer: "A. As far as I live, the uniforms were returned anyway.") 2054

Mr. Keenan: That must mean "as far as I know," if it makes any sense. Do you consent to that?

Mr. McGohey: Yes.

Mr. Keenan: That would read then——

Mr. Wallace: "As far as I know, the uniforms were returned anyway."

(Mr. Wallace resumed the reading of Government's Exhibit 8 down to and including the following: "Mr. Keenan stated that he has advised Mr. Bayer for the time being not to reply to that question.")

Mr. Keenan: I think the record will show the Government knows all about that. I don't think it is material to this lawsuit. If it is, I am perfectly willing to have it all go in. 2055

Mr. McGohey: I make no point on that, your Honor, and it might just as well be left out.

Mr. Keenan: I haven't any objection to it.

Mr. McGohey: I understand that, but it has no bearing on this at all.

The Court: Leave it out and read on.

(Mr. Wallace continued reading the exhibit, beginning with the question "Where did you get the $5,000," down to the following: "Q. Did you ever meet any other officers at Middletown besides Colonel Clarke? A. No, sir.")

Mr. McGohey: Will your Honor excuse me for just a minute? I just want to see the rest of these.

All right. I think there is a page there, your Honor, that we might leave out. The Government does not claim that they are very material.

Mr. Keenan: At this point, your Honor, in view of the suggestion of moving to strike out parts that are not material, I think it is entirely proper at this time to ask the
2057 Government if it will state what officers it refers to in this indictment besides Radovich that these defendants conspired with to defraud the Government by influencing their judgment, by failing to have it free from impartiality and in direction and the like. I think that is a fair time to ask this, your Honor. Otherwise I won't know how to state what suggestions there may be about striking out evidence that your Honor has so kindly suggested we do with reference to this statement introduced by the prosecution.

Mr. McGohey: Your Honor, I will withdraw that suggestion that we leave out any part of the statement your Honor has admitted it all in evidence. We will go ahead and read it. As far as the declaration demanded by counsel, I don't think I have to make it and I decline to make it.

2058 Mr. Keenan: Regardless of any withdrawal or otherwise of Mr. McGohey, I suggest to your Honor that it is the timely inquiry of defense counsel, if the suggestion of your Honor that we move to strike out anything in these statements is to mean anything, that we ought to be apprised at this time what officers the Government contends these three so-called conspirators attempted to influence, whose judgment they attempted to influence, because I won't be able to properly move without having that information.

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And with great respect I point out to your Honor that the indictment uses just the word "officers". I have listened attentively to find out which ones they meant, and each one as they appeared on the witness stand, offered by the Government as witnesses I have asked them if any effort was made to influence their judgment and I have the reply —a negative reply from each one. I don't know how near the Government is to the termination of its case, but I do say there is a time when we should be advised what officers the Government claims we attempted to subvert, whose judgment we attempted to subvert.

The Court: The motion is overruled.

Mr. Keenan: I note an exception.

2060

(Mr. Wallace resumed the reading of Government's Exhibit 8 down to and including the following: "Q. On one occasion Radovich phoned Mitchel Field and promised he would bring him a flying jacket.")

Mr. Keenan: I ask that that be stricken out as not following the sequence; it doesn't make any sense. Perhaps we could have an agreement on it.

The Court: See if there can be any agreement.

Mr. McGohey: We will read it the way it is.

The Court: All right, read it just as it is.

Mr. McGohey: We will repeat it.

The Court: Read what you have.

(Mr Wallace resumed the reading of Government's Exhibit 8 down to and including the following: "A My brother Eli was not there——")

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Mr. Keenan: "was there."

Mr. Wallace: I think the stenographer corrected that.

Mr. McGohey: I think the stenographer corrected that and said that was one of the corrections she wanted to make in her notes, to read "was not there." The record will show that.

Mr. Keenan: Obviously if it was "Eli was there" it is a mistake, in any event.

Mr. Wallace: She stated that her notes read "he was not there".

Mr. Keenan: It is an obvious error with the next question.

The Court: All right.

(Mr. Wallace continued reading Government's Exhibit 8.)

The Court: That completes Samuel Bayer's statement, does it?

Mr. Wallace: It does, your Honor.

The Court: I think we had better stop here.

Ladies and gentlemen of the jury, I am going to excuse you until 10.30 tomorrow morning.

2063 I would like to see counsel here just for a moment.

(The jury retired from the court room.)

(Adjourned to October 16, 1945, at 10.30 A. M.)

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New York, October 16, 1945, 10.30 A. M.

TRIAL RESUMED.

The Court: You may proceed, gentlemen?

Mr. McGohey: The Government is about to read Exhibit 19 to the jury, your Honor.

The Court: Go ahead.

2064 (Mr. Wallace proceeded to read Government's Exhibit 19, statement of Elias Bayer, to the jury, down to the following answer: "Roeser and Vidal came in, I believe the following day, and I asked my brother if he would mind if I took them up to my brother so they could buy at wholesale price.")

Mr. Keenan: It is obviously a stenographic error in this record now, and I think it will be so conceded.

Mr. Wallace: I think it should be "brother-in-law" at one point.

Mr. Keenan: That is right.

Mr. Wallace: I will reread that sentence.

Mr. Keenan: It should be "my brother's brother-in-law", because it is not Eljas Bayer's "brother".

Mr. Wallace (reading): "Roeser and Vidal came in I believe the following day and I asked my brother if he would mind if I took him up to my brother's brother-in-law so they could buy at wholesale price.")

(Mr. Wallace continued reading the exhibit down to the following: "Did you speak to anybody up there? A. I don't remember if it was Mr. Phil Buss or Harold Buss.")

Mr. Keenan: That, the record ought to show, is Busch instead of Buss. Another stenographic error. 2066

Mr. Wallace: I don't concede that that is a stenographic error or not. We have just referred to I. Buss Uniform Company, and I don't know whether the answer was made "Phil Buss" or "Phil Busch," or Harold Buss" or "Harold Busch." I make no such concession.

Mr. Keenan: Is it the claim of the Government that that answer was "Harold Buss" or "Philip Buss," because if it is, I want to put some testimony on about it. It is obvious that there are no such individuals.

Mr. McGohey: We will concede that it is Phil Busch and Harold Busch being referred to, the two members of the firm.

Mr. Keenan: And that is a stenographic error in the record.

Mr. McGohey: I will concede that the correct answer is Busch, your Honor. 2067

The Court: All right, go ahead.

(Mr. Wallace continued reading Government's Exhibit 19, down to the following: "A * * * and I took him up and introduced him to the Busses.")

Mr. Wallace: I will concede that should be "Busses".

Mr. Keenan: You can have the Busses this time, but we have the Busches the other one.

(Mr. Wallace continues reading Government's Exhibit 19, down to the following: "A * * * I walked out with Solomon——".

Mr. Keenan: I think the record ought to show that he walked out with "Miss Solomon". I think that is a stenographic error, too, in forming the word. There is no "Solomon" there. It is "Miss Solomon".

Mr. McGohey: I take it that Mr. Wallace—I haven't seen this, but I am sure Mr. Wallace is reading what is in there. The testimony of the witnesses is that these are true and correct transcripts of their statements. And the accuracy was conceded. Now, this interpretation of whether it is
2069 Miss Solomon or Solomon, that is what the transcript says, "Solomon". It doesn't make any difference.

The Court: I want the transcript read as it is.

Mr. Keenan: Your Honor, may I have the record corrected? I have been misquoted unwittingly by Mr. McGohey. I did not concede the accuracy of that record. I conceded that if these little girls continued to come on the witness stand they would say that they had to the best of their ability accurately transcribed the record. But there are obvious mistakes in that record, and I never conceded them.

The Court: That is a matter for argument. Is it my understanding that your contention right here is that Solomon is actually Miss Solomon, a secretary?

Mr. Keenan: That is correct.

2070 The Court: That is my impression, that she is the only Solomon concerned. However, in making the statement it is entirely possible that Mr. Bayer referred to her as "Solomon". I don't know whether that is what he said or not, but the stenographer says it is.

Mr. Keenan: Might I state, I don't think it is serious because there are points here where we have been able to get together, but if it is necessary I will have of course the right to bring this girl on and ask her to show me her notes.

But I don't want any mistake before the jury, and I think it is so clear that it is Miss Solomon that it ought to be so read. But I am more interested in this, your Honor, that the record will show no such statement as that made by Mr. Wallace to Mr. McGohey, that I conceded the accuracy of this record.

The Court: I agree with you that that statement was unwittingly made. As I recall it, you conceded that the stenographer would testify that she accurately transcribed the record.

Mr. Keenan: I have had a lot of stenographess in my office and I never found one of them that could ever go along for a score of pages——

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The Court: You are making an argument now, Mr. Keenan, which is not proper.

Mr. Keenan: Well, perhaps.

The Court: I want the transcript read as it is. If you wish to make any concession——

Mr. Keenan: We will ask the right to correct it afterwards.

(Mr. Wallace continues reading Government's Exhibit 19, down to the following: "A * * * I explained that my mother was very worried about the boy.")

Mr. Keenan: Is that "mother"?

Mr. Wallace: I assume it should be "brother".

Mr. Keenan: Because his mother is dead.

(Mr. Wallace continues reading Government's Exhibit 19 down to the following: "Q. Did Rosa Vidal ever pay for the use of the apartment?")

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Mr. Keenan: Is it claimed that there is a Rosa Vidal, or is that a stenographic error?

The Court: Read the statement as it is.

(Mr. Wallace continues reading Government's Exhibit 19, down to the following:

"Q. Is that your first marriage? A. No.")

Mr. Keenan: I object to that unless there is some purpose in bringing out the fact.

Mr. Wallace: I have no objection to omitting it.

Mr. Keenan: It is only a question, your Honor, and then they will have it all.

Mr. Wallace: I am omitting certain parts of the exhibit, your Honor.

Mr. Keenan: I say, let us read it all now.

Mr. Wallace: I can read what part of the exhibit I want, if Mr. Keenan wants to read any part of it, he can do so.

Mr. Keenan: All I want to say is, we don't object to it.

(Mr. Wallace continues reading Exhibit 19 down to the
2075 following: "By G. J. F."——

Mr. Keenan: Can we have that person identified?

Mr. Wallace: Gerald J. Flynn.

(Mr. Wallace concludes with the reading of Exhibit 19.)

Mr. McGohey: If your Honor please, I would like to give Mr. Wallace a rest, and I will read the Radovich statement.

Mr. Robb: If the Court please, I notice there are a number of words in that statement that are misspelled. I wonder if they could be read to the jury as spelled?

Mr. McGohey: Which statement are you talking about?

Mr. Robb: The one you are about to read.

Mr. McGohey: Exhibit 25.

Mr. Robb: Yes. We could simply pass the statement to the jury, it might be easier than to read it.

2076 Mr. McGohey (reading): The statement is headed, "March 15, 1945, New York, N. Y. I, Major Walter V. Radovich, Air Corps, Serial No. 0416891, make the following voluntary supplementary statement to Special Agents E. J. McCabe and G. J. Flynn, who have identified themselves to me and whom I know to be special agents of the Federal Bureau of Investigation."

Mr. Keenan: May I ask the jury to be instructed at this time that nothing that is read in this statement is in any

manner or fashion to be considered by them in any way reflecting upon the guilt or innocence of the defendants Samuel and Elias Bayer? 2077

The Court: I have already so stated to the jury and I propose to state again when the time comes to charge, I don't think it is necessary to repeat it now.

Go ahead.

Mr. Keenan: I didn't hear your Honor.

The Court: What is that?

Mr. Keenan: I didn't hear you.

The Court: I said I have already so charged the jury and I expect to charge them again when the time comes to charge them to that effect. I don't think it is necessary to repeat it every time reference is made to it. Go ahead. 2078

(Mr. McGohey continued and concluded with the reading of Exhibit 25 to the jury.)

The Court: Has the Government further evidence?

Mr. McGohey: Your Honor, on that question, might we approach the bench with counsel? I have one witness that I have been trying to get since the beginning of the trial. He is in the service. He was overseas. I was informed last night that he would be here some time today. I sent telegrams and made telephone calls urging that he be here before noontime but I have not heard that he was here yet.

Mr. Keenan: Who is it, Mr. McGohey? Did you tell?

Mr. McGohey: No, I did not. I thought we might go to the bench, but I see no reason not to state it in open court. I would like to have the witness testify very much. 2079

(Short recess.)

(Recess until 2:00 p. m.)

AFTERNOON SESSION.

The Court: Are you ready to proceed.

Mr. McGohey: Yes, your Honor. The witness that I had hoped would be here has not yet arrived, and I have no word from the Army authorities as to where he is, except that he is on the way. So in conformance with my statement to your Honor before recess, as well as yesterday, the Government will now rest.

The Court: All right, the Government rests.

Are you gentlemen ready to proceed?

Mr. Keenan: Your Honor, we have some motions to interpose.

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The Court: All right, proceed.

Mr. Ansell: If your Honor pleases, at this time at the close of the Government's case I wish to renew defendant Radovich's plea in bar on the ground if the prosecution has proved anything here, assuming that it has proved something, it is either a conspiracy to bribe or bribery. Without entering into any argument, because I could add nothing to that, I would say to your Honor that it is my view that such was the charge before the court martial of which this accused was convicted.

The Court: All right, sir. I would take it that the effect of what you said is a motion for a directed verdict by reason of the plea in bar.

Mr. Ansell: If it is not technically that, your Honor, as

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to which I have some doubt, I will couple with it a motion for a directed verdict at this time. That, it seems to me, would be the proper procedure covering all the rights which I hope to save here.

The Court: I should think that would be the proper procedure.

Mr. Ansell: I thought myself, without knowing that I had better protect my rights here by making a formal renewal of the plea in bar, but I think your Honor's sugges-

tion is quite correct, and I couple with it, therefore, a motion for a directed verdict. Your Honor has heard all the evidence and he is familiar with this case and I do not care to consume time in the argument.

The Court: All right. The motion will be overruled and an exception may be noted.

Mr. Ansell: Thank you.

Mr. Robb: If the Court please, there are certain parts of the testimony to which we would like at this time to invite your Honor's attention.

The Court: All right.

Mr. Robb: And which we at this time move your Honor to strike as to the defendant Radovich. I do not have a 2084
transcript. We have not had one. However, I think I can indicate what that is from my notes.

The first portion of the testimony which I see here is the testimony of the witness, Major Morris H. Saffron, concerning a meeting which he had with Samuel Bayer and one Busch in December, 1942. He testified, as I recall, that they came down to the induction center where he was stationed, and I believe he also testified that he had luncheon with Samuel Bayer on one or more occasions. That all occurred late in 1942. The evidence has shown, if it has shown anything, that that was long prior to the time when the defendant Samuel Bayer, or any of the Bayers, knew the defendant Radovich.

We therefore think that should be stricken as to the defendant Radovich. 2085

Does your Honor wish me to take all these portions of the testimony at once and rule on them together?

The Court: Yes, I think so.

Mr. Robb: The next portion of the testimony, if the Court please, is the testimony of Harold Busch respecting a conversation which he said he had with Samuel Bayer in July or August, 1944. He testified that Samuel Bayer at that time asked him to change the records respecting who paid for certain uniforms, and he did so thereafter.

We move your Honor to strike that testimony as against the defendant Radovich upon the ground that if there had been a conspiracy, the evidence shows that there was not any at that time.

The next piece of testimony, if the Court please, is that of the witness, Captain Kogan, who testified concerning going to the home of Samuel Bayer, as I recall it, in the summer of 1942. He testified that Samuel Bayer asked him if his son would be eligible for enrollment in the air corps and whether he could get assigned to Mitchel Field. That of course, took place, if it took place at all, long before any conspiracy could be claimed to have been entered into by
2087 the defendant Radovich.

Again the same witness, Captain Kogan, testified that in December, 1942, Samuel Bayer called him and asked him if he, the witness, knew that the enlistments were closing at the end of that month, and Samuel Bayer asked him what happened to people when they were drafted, and the witness testified that he told Samuel Bayer that people who were drafted were assigned to the infantry, and Samuel Bayer responded that he wanted his boy in the Air Corps.

That incident, if the Court please, took place long before this defendant Radovich had been shown to have had anything whatever to do with the Bayers, and long before any conspiracy, if there was any, could have been entered into by this defendant Radovich.

2088 Again the same witness, Captain Kogan, testified that in March, 1943, Samuel Bayer told him that Colonel Jacobson had promised Samuel Bayer that he would get, I believe he said, a good assignment for Samuel Bayer's boy for about a year. That, if the Court please, if it took place at all, took place long before this defendant Radovich could be said to have joined any conspiracy.

We move the Court to strike all that testimony which I have tried to summarize or to indicate to your Honor upon

the ground that if the conversations and instances narrated ever took place, they took place long before it could be argued that the defendant Radovich ever joined in a conspiracy. And there is no evidence that if he afterwards joined any conspiracy he ever ratified or even knew about these statements and the things which had been done.

The Court: I do not understand that in a conspiracy case every bit of testimony has got to be related to every defendant. I think the testimony is admissible generally. I overrule your motion.

Mr. Robb: May we have an exception, if your Honor please?

The Court: You may. 2090

Mr. Keenan: Your Honor, in asking the Court to grant a motion for the jury to be instructed to return a verdict for the defendants Samuel and Elias Bayer, I wish to specifically point out to the Court our objection, which we think is seasonably made at some time during the prosecution's case, that we think that particularly important to make at the close, and that is: that the indictment does not charge an offense against the United States, and specifically that this purports to be a charge of conspiracy in violation of Title 18, Section 88, and that part of Section 88 which we may refer to I believe intelligently as two-pronged, the second portion of it, the first part of it being conspiracy to commit an offense against the United States and the second part conspiracy to defraud the United States in any manner or for any purpose. 2091

We point out briefly but with great respect to your Honor, that we believe this is a novel theory in prosecution where Section 88 of Title 18 is adverted to, where reliance for the subject matter of the crime is the bare use of the word "defraud" without reference to any other section of the United States Code. For example, in all other prosecutions that we know of, where we have been able to examine the authorities, the indictment specifies in one form or an-

other that even if Section 88 is adverted to and even if there is a departure from the usual course of specifying the section of the Code of the offenses against the United States by section number, such as, for example, in some of the preceding indictments, Section 91, that even when reliance is made upon defrauding the United States there is of necessity reference to some statute of the United States which describes what is meant by "fraud".

And we say to your Honor that we believe upon reflection it will become very clear that if this indictment be sustained in this manner and fashion as alleged in this case, it just means that anything which would come within the definition of the word "defraud", whatever it might be, and 2093 two people agreed or confederated to perform, to do that thing, whatever it would be, and a single act were taken in pursuance thereof, we would have as claimed by the Government in this case, as they must claim, a violation of Section 88 of the second what I might call prongs for want of a better expression.

Now, your Honor, reflection on that will show that here is a felony with a very substantial criminal sanction attached thereto, where citizens of the United States could go about with so many opportunities and occasions to run afoul of the law, that we would get to the most absurd, to say nothing of cruel, situations imaginable, resting entirely upon the good sense of the administrative or executive branches, in the first instance, of the Government. For ex- 2094 ample, under the statute, in an indictment it is alleged that merely speaking to the elevator girl on the way up purposely to get her to slow up an elevator to keep a lawyer from arriving on time before your Honor in this case, and coupled with a stick of chewing gum, would amount to a conspiracy to defraud the United States, punishable with a long term in the penitentiary.

The point I am making is this, your Honor, that to sustain the indictment in this form would be to establish a

pattern and type of crime where there would be no fabric, no clear-cut pattern that any citizen could ever know or anyone else ever know when he was within or without the law. And with great respect we submit to your Honor that the Congress of the United States never intended to create a mass, a class of crimes where the only limitation would be the limit to the fantastic, if he saw fit, notions of the prosecutor with the acquiescence of the grand jury.

So that, succinctly stated, or as clearly as we can, we think that there is a failure to state an offense without the entire conspiracy relating to some better defined offense or area of offense than the particular term "defraud", especially when the statement is made in the statute "Defraud the United States in any manner or for any purpose." 2096 We do not believe, your Honor, that it ever was contemplated or could have been in good sense by the Congress of the United States that the broad field of conspiracy, uniting with the broad field of fraud, with no definition of "fraud" excepting that found presumably in Webster's Dictionary or the Century Dictionary or that had come into usage through practice—that is the only way where a man can find now whether he is running afoul of the criminal statutes—we do not believe that it was ever intended that that field of crime should be established in the United States.

And so on that ground, with great respect, we ask your Honor to consider whether to direct a verdict on the ground that the statute is so vague and so uncertain, that the indictment is so vague and so uncertain that it contravenes the requirements in that respect. 2097

Now, secondly, we ask your Honor to consider our objection that there has been a failure dehors or aliunde, and let us call it independently of the so-called admissions —or admissions—to establish that which the law requires by way of data on the corpus delicti, which in this instance we claim, your Honor, is the conspiracy itself.

I think in a previous argument to your Honor I erroneously stated my position, and in a re-examination of the Forte case and allied cases, it became very clear that if whatever quantum of proof is necessary for the Government to meet to establish the corpus delicti, that the corpus delicti is more than the agreement; it would be enough, your Honor, we claim in this case to require a directed verdict for the defendants Bayer if the corpus delicti were synonymous with the agreement. But very specially, in cases of conspiracy, we contend that that is the one crime where there is an exception to the rule, and the corpus delicti in a charge of conspiracy is the conspiracy itself,
2099 and of course every part of it.

Therefore, we do not know, with great respect, whether your Honor is following the Forte case or whether your Honor is following the Kertess case, if there be a difference in the two. And, very candidly, the Kertess case is in the Second Circuit. I know that it is familiar to counsel for the Government because the distinguished Assistant United States Attorney Mr. Wallace was counsel in that case, if my memory serves me correctly, or of counsel.

And there, your Honor, we seek at this time, if there is any way we can do it on such highly important matters as those touching admissions or confessions; and I think it can be conceded that we are on fundamental ground for the reservation of the rights of the defendants in Anglo-Saxon courts, in contradistinction to those of foreign nations in
2100 that regard—it is well settled in our court that we do have certain safeguards that are foreign to the ideas of people that live in other groups, other parts of the world; but here we have some rules that are laid down; we have the requirements with reference to the corpus delicti——.

The Court: You express a doubt as to which case I was following. I am in equal doubt and I would be grateful if you would elucidate a little on the two cases and the distinction, differentiation between the two.

Mr. Keenan: I think your Honor has posed a pretty good question to me, but let me state first what I believe the Forte case, written by the distinguished Justice Stevens, who happened to be an associate of mine in the Department, also a classmate in law school, so I am quite familiar with his views and those expressed—the Forte case is plain and clear authority for this. First, that if a confession or admission—confession or admission—is to be considered there must be some evidence aliunde of the corpus delicti. Now the Forte case follows the Eighth Circuit—there are two chief cases there, they are grouped together—and the Forte case claims that it states the overwhelming weight of authority in this country on that subject. 2102 It holds that the corpus delicti is not alone the agreement but is the conspiracy, with the anomaly that I have mentioned before. And it holds, therefore, that before a confession can be considered adequate, the fact determining body must find in outside evidence substantial evidence of the conspiracy. And "substantial evidence" the Forte case says, is the conspiracy or the corpus delicti, which it identifies, one or the other, and every part of it. That is the language of the Forte case. There is no blinking. The Forte case is as clear as a bell.

So that under the Forte case, and it doesn't make much difference, your Honor, in my opinion, whether there would be a independent ascertainment of the aliunde quantum before it was sent to the jury or not; it would still be the duty, with great respect to the court, to make its finding 2103 to be the determination of the Government's case. That must be there. And the Court itself, not being desirous to evade the duty, never could anyway because it had a plain function it has to perform.

Now it gets down to this, that before the Bayers can be found guilty by the use of these statements that they made, if they be guilty admissions or confessions, and I am not going to differentiate for the moment between the two,

whatever they are, whatever they may be—that there must be proof offered of every single part of this conspiracy. And, your Honor, it must be the conspiracy that is alleged in this indictment. It can't be any other conspiracy and it must be the whole of it. They can't divide it into two parts or it can't be the more particulative; it must be that this was the whole thing, because that is what the authority says—the corpus delicti is the whole entire conspiracy and it should be from—from September 1, 1942, until July 15, 1945; and the Forte case says that that outside any admissions or confessions there must be evidence supporting every single essential element of that entire conspiracy,
2105 every part of it as alleged in the indictment.

The Court: Do you construe that "every part" means that the Government has to prove everything complained of in the indictment, the dates and everything else?

Mr. Keenan: Exactly, your Honor. That is the burden the Government undertook and that is the conspiracy that it has described.

The Court: I do not believe the Forte case holds that, and I am not going to suppose——

Mr. Keenan: The Forte case—I say that point was not before the Forte case. That case was not before the Court on this precise question.

The Court: I do not believe the Court would have held the Government to as strict a requirement as that.

Mr. Keenan: I do not have the Forte case before me at
2106 the moment; but the language is very clear.

As your Honor will recall the language, every part of it—so that the Forte case is talking about the conspiracy alleged in the Forte case. It is not talking about any other.

Now, your Honor, I think that we have got to get to a point—getting a little bit ahead of our subject—that in fairness a defendant ought to be apprised of what the Government does claim the conspiracy was. And it is not sufficient merely to say it is a conspiracy to defraud. That

would be hideous. It must be some kind of a conspiracy to defraud, starting with a certain time and ending at another time. I do not see why the time of the beginning and the time of the ending does not identify the conspiracy.

I do not think the Government has any opposition to spreading itself all over the lot and then saying, "Well, if I can dig out any kind of a conspiracy from this proof that is offered, we are going to substitute that."

Nor do I think that the Government can just allege a certain date and ignore it entirely. But, however that may be, certainly we have a right at some time or other, your Honor, to be informed what is it that the Government does claim in this case is conspiracy. 2108

Now, I know that they might come back and say, "Well, they claim there was a conspiracy on the part of the two Bayers and Radovich.

Your Honor, they do not describe any other conspiracy between the two Bayers. They say there was a conspiracy between the two Bayers and Radovich. They might have alleged that there was an initial agreement between the two Bayers subsequently joined into by Radovich, but that is not what is alleged in this indictment. Not at all. They allege a conspiracy and an agreement between the two Bayers and Radovich.

Now, to come back to the law question, your Honor: Certainly, the Forte case says that whatever the conspiracy is that the Government is resting upon, and there must be some agreement, there has got to be some conspiracy. It 2109 must be defined in some manner; that some time the Government must say, "Well, we claim there were three in it, there were four in it, or five." I do not understand that the claim is any more than three individuals in this conspiracy.

And they say that it was a conspiracy to defraud the United States Government out of the fair and impartial services of officers.

Your Honor, some time or other in a court of justice we are entitled to have the United States Attorney tell us who the officers are that he claims that we were attempting to defraud. Or name them or describe them in some manner or other. And we have not had it or heard it yet in the indictment, unless it is all the officers.

Now, in any event, under the law of the Forte case, there must be substantial evidence aliunde of every essential part of the conspiracy. That is what the Forte case says. So, therefore, in this case there must be substantial evidence aliunde of some conspiracy which is reasonably to be interpreted, I hope, within the confines of the general
2111 language used in this indictment.

Now, I say to your Honor that I do not know that the Kertess case goes that distance. I think the Kertess case—I do not want to say and I have no right to interpret it—that the Kertess case says that we are differing from the Forte case, but Mr. Justice Frank——

The Court: In what particulars?

Mr. Keenan: I say—I am not making that claim that it so states, but the language of the Kertess case is that even if we were to follow the Forte case—that is the language of that decision, which leaves it delightfully indefinite as to whether they are following it or not, to say the least.

I am saying to your Honor that if we arrive at such an important point in matters of confessions and admissions, and I am not going to waste the time of this Court in
2112 urging the importance, that the law be clear with reference thereto, and that in this great United States of ours that it be not any different treatment for someone who lives in the District of Columbia and someone who lives out in the Eighth Circuit and someone who lives here. There is a higher court above all of those circuits, and we are entitled to have the interpretation of that court on this all important subject matter. It ought to be left out of

the vagaries of Wigmore and Greenleaf and brought finally so that the citizens of the United States can look at some single authoritative work and say "This is the law."

So that is why I am saying that under the Forte case we contend and we urge with great earnestness, not sufficient perhaps to convince your Honor, that the quantum of proof aliunde offered in this case extra these admissions or confessions, so-called, does not rise to the standard required to meet the requirements set forth in the Forte case, to wit: we claim that there is not substantial evidence of a conspiracy without these confessions.

Now the Kertess case refers to the Dykes case, I think it 2114
is called. We say that the Kertess case has not attempted to overrule or depart from the Forte case, but it does leave counsel, and it is humanly possible, the learned District Courts, not too clear as to whether the departure has been made from the rule in the Forte case.

I have not any right to urge any more to your Honor than I think that the Forte case is the law of this country; and I do not think that the Kertess case has attempted to create any new rule or different rule. It does not say so. There was an entirely different set of facts quite sufficient, I think, to meet the requirements as set forth in the Forte case.

But in any event I want to confine my argument at this time to your Honor to state that we think that if the 2115
Forte case is the law, that we do not believe that there is substantial evidence of all of the essentials of the conspiracy or any conspiracy—we go that far.

I am not going to take the time to review all the evidence, but I will say in passing that they have brought witnesses and put them on the stand, the Government. I do not think the Government can call a witness like Colonel Jacobson to the stand and offer him to your Honor and to the jury as a Government witness and then just laugh

about his statements. They vouch for his, generally for the truth of what he says when they put him on the witness stand as a witness. And every single witness I have asked the question whether or not Samuel Bayer or Martin Bayer in any manner did anything to attempt, as far as he could observe, to affect his judgment as an officer adversely, from the standpoint of bias and disinterestedness and faithfulness and conscientiousness and so on and so on, and all these words that are in the indictment, and each one of them answers in the negative.

So that from the witnesses who have been called, I do not recall a witness—it isn't Colonel Vidal. I asked him as
2117 broad a question as counsel could ask, perhaps most offensively broad: if in any manner, fashion or nature they tried to affect his judgment. I have asked him if they tried to affect his judgment wrongfully, or if they tried to get him into some scheme to affect someone else's judgment. I suppose it won't be binding, his statement, but it ought to be highly persuasive, an officer of the United States Army who has been tendered to the Court and the jury as part of the Government's case.

This whole case divides itself, your Honor, from the standpoint of common sense, into two episodes: one is the uniforms and one is the money. And when you come to the uniforms, your Honor, if it were to be a fact to be argued to the Court and not to the jury, we would not
2118 hesitate to embrace that alternative as showing that if there was anything clear in this case it is that there was no conspiracy to go out and buy uniforms for these officers.

The mountain came to Mohammed, your Honor. The officers came down for the uniforms and they asked for them. There was no one who dangled uniforms in front of them and said "Have a uniform and do something for it."

Now I do not say it is vitally essential that in anything by way of gratuities and the like that the initiative come

from the other side, but it is a pretty good indication as to whether or not there was a plan, or whether or not there was an agreement, because if this evidence is coming in at all properly about these uniforms and the amounts, I can get all through with it. The uniform business must be related to some agreement and it must be an agreement reached by and between, let us say, Samuel Bayer and Elias Bayer: "Well, what will we do in order to affect adversely"—I am going to use that phrase—"the judgment of these officers? We are going to do what? We are going to get them uniforms."

Your Honor, that is just plainly doing violence to the record in this case. That is not true. The evidence in this 2120
case does not prove it is true and the evidence offered by the Government shows it is not true.

The evidence in this case shows, as far as these uniforms are concerned, that never were individuals more innocent of getting into difficulty. It took a little probing in cross-examination of one of the Government's witnesses to find out really what happened, as far as even the statements of so-called admissions were concerned. And I find myself, your Honor, constantly, like a cat chasing its own tail, unable to differentiate the aliunde testimony from these admissions, and I am trying to keep these separate.

But even assuming that the admissions here, as far as the uniforms are concerned, it is the plainest thing in the world that first of all the uniforms came up because Vidal 2121
or Roeser said to Elias Bayer, "What business are you in? I am in the thread business."

"Well, you must know tailors? Yes, I do.

"Well, can you get us a uniform at discount, at cost?" Now, your Honor, that is not our side of the testimony: that is the whole testimony. There is not any other testimony on that point. Well, that is a long distance, your Honor, if we took the theory of the Government that this was some kind of a conspiracy of these two Bayers to be

lurking around in order to find out what night clubs they might find officers from Mitchel Field.

It is a long distance from saying that this was a plan outlined in the beginning to go and debauch the judgment and the honesty and the service of the United States officers by giving them uniforms, when the evidence offered by the Government clearly shows that it was the officers themselves. I do not think it was in any venal manner. I say evidence of gentleness on the part of these officers. I can understand how it could happen. They looked rather shamefaced when they came into this court, men of distinction and rank, talking about uniforms.

2123 Or they may try to pass it off by saying "I heard there was a bit of good gabardine." But the fact was that we were in war times. It was a time when Edward G. Robinson was announcing a $100,000 gift of his own to the U.S.O., and times of generosity and entertaining men in uniforms in canteens, and everybody for the time being was doing everything for the soldiers.

And in that atmosphere they have a drink around a bar, and a man says, "Are you in the business of thread?" "Yes." "Do you know some tailors?" "Yes." "Can I get a uniform at cost?" And that is supposed to be evidence of a conspiracy to corrupt this man.

Your Honor, I perhaps will have gone too far in discussing the evidence, with the great respect I have for this
2124 court, but I cannot refrain from adverting to it. If you get into this evidence and if you analyze every section of it, and if you go all the way with the uniforms, what do you find? You find that the men would not pay for the uniforms. Why? You find that most of them, the uniforms were not any good. They went to these three tailors who attempted to make them look like Fifth Avenue tailors would. They were three little tailors sitting cross-legged on a bench, and they had some material and they did not know how to make the uniforms.

It is not very much of a joke if you had to earn your living that way, and had people from the Army come in and take your time.

The evidence in this case with reference to uniforms shows that the officers came in and they asked for that courtesy, and there is no evidence, your Honor, of anything with reference to these two boys that are the subject matter of this lawsuit.

Perhaps this thing ought to be laughed at. It is perhaps a funny joke at the cost of men's reputation and a lifetime of probity and decency, which are going to be smashed to pieces, but to me it is a mighty tragic affair I can't squeeze any laughter out of any part of it at all. 2126
I think it is a desperately important thing to analyze this evidence and I am trying to do my duty as a lawyer in doing it, and I cannot find where there is any evidence aliunde of a substantial nature to show any kind of a conspiracy at all.

If they came in and showed that they bought uniforms for people, but that is not the evidence, your Honor, in this case. And if it turns out to be a joke or a picayune affair of a few dollars for officers that are fastidious out there at Mitchel Field, acting like a lot of WAC's about different shades of uniform, we cannot help that.

When you get all through, it is a tempest in a teapot and it does not rise to the dignity of substantial evidence to support any charge of corruption, because that is really 2127
what it is.

Your Honor, when it comes to the matter of the payment of the money, there is not evidence, your Honor, of the payment of a five-cent piece in this case aliunde of the admissions or confessions. There is no evidence of the payment or the passing of any money at all. Not a speck. Not a scintilla. There is evidence of the uniforms, whatever that means. I am not responsible. I do not know why the United States Attorney did not see fit to

call witnesses that perhaps could have been called and put on the stand to proye that money was passed. There were other indictments that I cannot close my eyes to, but all I know is that in this case there was no evidence whatsoever of any kind, nature or description of even as much as a five-cent piece passing, unless you take these admissions and these so-called confessions.

Of course we can talk about conspiracy to defraud the United States Government out of the honest and conscientious service of their officers, but everyone in this courtroom knows that as piously as we say it to this jury, this is not a question of bribery; it is not a question of
2129 conspiracy to bribe—everyone in this courtroom knows that in his heart and soul that in essence it is nothnig but that.

Because what is the charge of the Government? The charge of the Government, if we can make head or tail out of it, is that there were things of value given to officers of the United States Government to affect their judgment and thereby obtain substantial favors for members of the families of the Bayers, and that the officers got the money and the Bayers paid it.

If that is not a good Anglo-Saxon description of the crime of bribery, I would like to know what it leaves out in the process.

Whether you call it bribery or—your Honor, you might
2130 just as well come before this jury and say, as they might consider one to another, or among each other: "Well, John Smith, my neighbor, got into trouble last night." "Well, what happened to him?" "Oh, there is something terrible. They have taken him away from his home. He is in a court room." "What is he charged with?" Wait a minute. They look and see. They read it: that the said John Smith did take the said John Brown and his right forearm and his right wrist and his right thumb and his index finger, and did press the same with great force and

violence against the treachea and the windpipe of the said John Brown for a sufficient length of time that it defrauded him out of nitrogen and oxygen for a period of hours, so they had to bury him under terra firma.

About that time someone would say, "Well, they killed the man, didn't they?" "Yes." "Why don't they say so then?"

Your Honor, in this case, of course the United States Attorney has the right to prosecute for an offense of any kind against the United States Government, but if he is prosecuting for bribery, he has not proved it. And I say to your Honor that to get any substantial evidence of the offense charged in this case in the manner in which the Government has outlined its case to the jury, you have got to 2132
get the essentials of bribery in the case. But whatever name you call it, the Government has not produced any such evidence aliunde these confessions.

They have shown—they have not, your Honor, shown any entertainment excepting of a trivial nature. And to be square about this, to enforce the law as it is enforced in our own courts, and not in the French fashion that has been in vogue recently of charging him with being guilty and make him prove his innocence in this case, they show that people were taken to restaurants and bought meals. They have shown that people were given a drink now and then, but they don't connect those individuals with anything concerned with the essence of the corpus delicti, which is
Martin Bayer, for example, in this case. 2133

It is of more than passing importance, your Honor, that we don't even hear these boys mentioned until Colonel Jacobson walks into the office of Samuel Bayer, his little shop, and sees the pictures of these boys on the wall and says, "What are they doing?"

They met Vidal and Roeser and Jacobson before these boys are known by these men to be out at Mitchel Field,

before there is anything hooked up, unless we are going to have flights of fancy imagination.

Well, your Honor, I don't know whether it will serve any particular purpose to attempt further to analyze the evidence. I would like to go down one witness after another, and after all, we don't get evidence out of thin air, and I hope the time has not come where we call atmosphere substance.

If the Forte case is the law, you have got to have more than atmosphere and you have got to have more than a trickle of a suspicion here and there. You have got to have your proof rise to the dignity of substantial evidence.

2135 Your Honor, I think it might be a fair question to ask of the United States Attorney, what does he claim outside of these so-called admissions or confessions by way of proof that rise to the dignity of substantial evidence to prove the existence of any conspiracy of the type set forth in this indictment? It is always a difficult thing attempting to prove a negative, but I think the Government—it is not up to us—at this stage to show that we have proved our innocence. I think we have a right to challenge this Court's attention to the peculiarities of this case, and it means something, your Honor. I don't think anyone has the right to laugh at my argument when I say——

The Court: Why do you keep referring to people laughing? I have not noticed any evidence of that.

Mr. Keenan: Well, I have.

2136 The Court: I have not noticed any evidence of jocular conduct.

Mr. Keenan: I have.

The Court: Well, I have not.

Mr. Keenan: Well, that perhaps is a little feeling of my own. I ought to be experienced enough in the courtroom to throw it aside. I beg your Honor's pardon for repeating that.

But I say, with all the seriousness at my command, that if we are going to get away from atmosphere and we are going to take away these confessions and admissions, it is a pretty difficult thing, I think, for trained legal minds to do. We have got to do it, and I know, with great respect to this learned judge, that he has laws laid out for him to follow that he must charge to juries. Every court has to act in accordance with the law and precedent. They are mighty difficult things to do. It is the law and it has to be done, but we are entitled to come to your Honor at this time and ask for a careful examination and an analysis of the aliunde evidence under any rule.

There is some requirement. You just cannot come in 2138
today with an admission or a confession and just entertain a conviction in a courtroom. You have got to prove a corpus delicti, and it has got to be something. I believe the rule is substantial evidence. It is not beyond a reasonable doubt. That is certain. It is more than a scintilla. And that, your Honor, I think is the office and function and obligation of the court, to measure up this evidence outside of these admissions and confessions, with the conscience that I know is possessed and exercised by everyone of authority in this courtroom, to determine whether or not under such circumstances there is any evidence at all that arises to maintain suspicion.

For example, the only way we can determine that is to forget entirely these admissions or confessions and then look at this evidence. We find evidence of what? Of the 2139
Busch man called on the witness stand. He says that Radovich came there to get a uniform. He is asked a question, your Honor—all Government witnesses; we put on none—and he is asked the question: "What did Elias Bayer say about who is going to pay for this uniform?" He said, "Why, Radovich is going to pay for it." And who says "No," your Honor. Nobody says to the contrary. That is the testimony that comes from the witnesses.

If the evidence is that these officers asked the courtesy of coming in and having their uniforms at cost—and, your Honor, it is also significant that there is not one single witness who has testified to these uniforms that ever hooked them up in any way with the giving of a gratuity or a favor or any consideration of any venal or venial complex. Nothing.

You cannot convict men of a conspiracy and say there is a substantial conspiracy to adversely affect the judgment of officers of the United States because they ask you if you know where you can take them to get uniforms at cost and you say, "Sure, I will try to do that."

2141 If we were to do that, your Honor, we would have to build concentration camps in this country and fill them with everybody that could be accused of affecting the judgment of officers.

Then the cruel thing comes in: that we all know that all types of gratuities and considerations were extended toward men in the armed services, not alone to enlisted men but to officers. People were rather proud of doing those things. You can take these matters which were perfectly innocent, your Honor, and then hook up something that happened later of which there is no evidence at all, your Honor, excepting in these extrajudicial affairs—I think I will so describe them—and then try to hook those on to conduct that is absolutely compatible with innocent conduct, and is the rule rather than the exception, and then

2142 say, Now, that all fits into a nebulous conspiracy to affect the judgment and defraud, with the wide use of the definition of the word. And the bright aurora flushes of crime start to come. From what? From picking a soldier out and giving him a meal. From taking an officer, who lives on limited pay in an inflationary period, even the officers, who have to go out and dandify themselves pretty well, living in the environs of Greater New York, Copacabana, etc., and taking them out to a meal at the Hickory

House, where they don't feed you at the same prices as they do at Childs Restaurant. All of those things went on, and that is all the evidence that you have in this case. 2143

It is true that you have Major Saffron, a doctor. He says that he had a talk way back, months and months before, with Sam Bayer, where Sam Bayer said that he would give anything in the world if his boy would not have to go overseas.

Well, your Honor, I had a boy that I lost a little while ago, and I want to tell you that I could have sat right at the table with Mr. Bayer and said—I mean, I would not have considered myself a criminal in so stating, or on my way to a career of crime. 2144

And I say that anyone that takes a perfectly innocent statement, with nothing more to it than "I would give anything to see my boy not have to go overseas," the expression of an honest man and nothing more? It is just like a man who said that he was afraid when he was going into battle. The greatest generals tell us those are the men who told the truth.

I say, your Honor, that a careful examination of all the evidence that has been introduced by the Government in this case, excluding these extra—that is, so-called admissions of Radovich and of the Bayers, and you find nothing that rises above the dignity of loose suspicions and conduct that not alone is equally compatible with innocence as with guilt, but is almost compelling in the circumstances of the times in which we were living, to compel a finding of honest rather than dishonest conduct. 2145

So therefore, your Honor, I, with great earnestness and at the risk of being quite tedious, I am afraid, ask your Honor, with all the sincerity at my command, to carefully examine the evidence aliunde to see that a great mistake is not being done and a blow being struck at something more important than reputations of individuals or obtaining successes or victories in courtrooms, but the lives of

Samuel Bayer and Elias Bayer and their liberty—the fundamentals of liberty that says that "better that 99 guilty escape than one just man be convicted." That is the philosophy behind it.

Now I have expounded at some length my views on what constitutes admissions. This is all hearsay that is coming before your Honor—every single part of it. It is all objectionable under the hearsay rule, and it was let in only on the basis of being given in circumstances that a man knows that he is telling something that hurts him and hurts his position.

I say to your Honor that reading the whole statement of
2147 the Bayers—and I think you cannot do anything else; you cannot read statements out of the context; you cannot interpret them. You have got to have the whole statement. And when you do, then I think we find in this case, as far as the two Bayers are concerned—again, your Honor, I find myself wandering into the vagaries of these so-called admissions and statements. I cannot keep away from them. I cannot separate them.

So therefore, your Honor, I am going to ask that a great effort be made to separate, to see what is the testimony outside of these so-called admissions that arise to the height that could be called substantial evidence of the commission of a crime of defrauding the United States Government. Therefore, your Honor, I make a motion that the verdict be directed for the defendants Bayer.

2148 The Court: I do not care to hear the Government's side. As to the basis of the motion assigned by counsel that the indictment does not state a crime, I am satisfied that the indictment does state a crime and that the indictment is sufficient, and that basis is not sufficient for granting the motion.

As to the other basis of his motion, which counsel has argued at some length and with great ability, I simply cannot agree with the contention of counsel.

At the time the admissions were tendered I then very carefully reviewed in my own mind the evidence which had been introduced up to that time. I do not think it appropriate, and certainly not necessary, and I think it would be inappropriate for me to undertake to summarize the evidence, as I recall it, up until the time the admissions were tendered, but I have it very clearly in mind, in my opinion it is amply sufficient to prove a conspiracy under the strictest rules contended for by counsel for the defendants.

Of course there is no proof that at the opening of business on September 1, 1942, a conspiracy was entered into which terminated at five p. m., July 2, 1945, nor is there 2150
any proof that there was a directors' meeting of any kind, a formal gathering of any kind in an office, and a minute entered that "We do hereby establish a conspiracy." Of course there is no such proof as that. And it is not novel to hear the defense made that, as to certain details of testimony, those details are not sufficient to constitute a conspiracy. But in a conspiracy charge all the evidence must be considered which is proper evidence and the circumstances, and all of them taken together, and the necessary and proper inferences to be drawn from those circumstances. And taking all the evidence which has been introduced in this case prior to the admission of the admissions or confessions, I am satisfied that that evidence was sufficient to justify the jury in believing that there was the conspiracy alleged in the indictment, and to be convinced of 2151
that beyond a reasonable doubt.

So the motion is overruled and an exception may be noted.

Now are you ready to proceed, gentlemen?

Mr. Ansell: If your Honor please, I grew a bit apprehensive lest it might be said that my motion for a directed verdict might be found to be deficient as too narrow, and I should like your Honor to grant me leave to amend that

motion by inserting therein the additional grounds that the evidence was not sufficient to constitute prima facie proof of the charge.

The Court: Very well. The motion of the defendant Radovich by his counsel may be considered as so amended, and as amended is overruled, and an exception may be noted if so desired.

Now are you ready to proceed, gentlemen?

Mr. Ansell: We are ready, your Honor.

The Court: Which one of you wants to put proof in first.

Mr. Ansell: It seems to be agreeable that we will proceed.

2153 The Court: All right, sir. Call your first witness. Call the jury, please. First, let us all take about a ten-minute recess.

(Short recess.)

(The jury returned to the courtroom.)

Mr. Ansell: May I have Major Price, of the War Department.

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MYRON H. PRICE, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

*Direct examination by Mr. Ansell.*

2154 Q. Major, may I ask you, sir, in testifying, will you lift your voice so that the jury and the gentlemen at the counsel table and at this table also may hear.

Major, you are appearing here in obedience to a subpoena, bringing with you some War Department records, are you not? A. Yes, sir.

Q. Have you those records with you now? A. I have those records with me now.

Q. In the course of my examination I probably will have to walk over to you to inspect those records, and Mr. McGohey, the United States Attorney, will probably do likewise. I should like to ask you, sir, whether you have there among your records the orders ordering Major Walter V. Radovich from the States here overseas to Burma or India probably in the very late part of the year 1943? A. No, sir.

Q. You haven't got that, sir. Would you be kind enough to tell me whether that——

Mr. Ansell: You will not object to this, Mr. McGohey.

Q. (Continuing) —order would be found, you think, in 2156
any of the Bureaus of the War Department or here at Mitchel Field? Would you be kind enough to tell me where you think such an order might be found? A. I don't believe I could state where that could be found, sir.

Q. May I ask you, sir, what branch of the Army you are a member of? A. The Adjutant General's Department.

Q. And you don't know whether that order would be found in the Adjutant General's Department or not? A. I do not know.

Q. May I ask you, Major, whether you have among your papers what is commonly referred to in the Army, and now elsewhere, as a 201 file of this officer? A. Yes, sir.

Q. May I ask you to look over that 201 file and see 2157
whether you can discover from that file any reference to the time that Major Radovich left this country in the late months or days of 1943 for overseas service in Burma or India? A. No, sir.

Q. May I ask you, sir, if you have among your papers there orders ordering Major Radovich from Burma or India some time near midyear 1944, to our country, the United States? A. There is a reference in an endorsement in these papers.

Q. Would you be kind enough, sir, to let me look at that? A. (Witness shows paper.)

Mr. Ansell: Will your Honor bear with me a little bit, sir?

The Court: Certainly.

Q. May I ask you, Major, to read this record that you have just pointed out to me, omitting insofar as you can the symbols and make it an easily understandable document, with all the substance except the symbols, etc? A. (Reading) "Headquarters First Air Commando Group, APO 690, 23 September, 1944. To: War Department,
2159 Adjutant General's Office, Washington, D. C.

"1. Major Walter V. Radovich, 0-416891, was returned to the United States from this theatre in accordance with letter order No. 302 Headquarters Army Air Force, India-Burma Sector, China-Burma-India theatre, dated 11 May, 1944, with instructions to report to the Commanding Officer Airport of Debarkation, for further orders."

Mr. Ansell: Do you wish to inspect this, Mr. McGohey?

Mr. McGohey: No, I will accept Major Price's reading of it.

Q. This communication then recites that Major Radovich
2160 was ordered to return from that foreign theatre to this country by communication dated 11 May, 1944, is that right, Major? A. Yes, sir.

Q. You have not, however, sir, any further orders ordering or suggesting the ordering, by reference, of this officer from the Burma theatre to the redistribution center at Santa Monica? A. No, sir.

Q. May I ask you, sir, if you have the orders ordering the defendant Radovich, Major Walter V. Radovich, from

Santa Monica redistribution center, to Mitchel Field? I would suggest that that will be found in Special Order No. 201, August 3, 1944. A. No, sir.

Q. You have not that? A. No, sir.

Q. May I ask you whether in the file which you have before you, the 201 file, as I understand it, there is any reference indicating when this officer was ordered from the redistribution center at Santa Monica to Mitchel Field? A. Yes, sir (indicating on record).

Q. Who signed that? Off the record.

(Discussion off the record between Mr. Ansell and the witness.) 2162

Q. May I ask you, sir, whether this document that I am looking at now indicates anything about the order ordering Major Radovich from Santa Monica to Mitchel Field? A. No, sir.

Q. May I ask you, Major, whether you have any report upon Major Radovich made out upon him at the redistribution center at Santa Monica? A. No, sir.

Q. May I ask you, sir, whether you have among your records there any record or statement showing the age of Major Radovich? A. Yes, sir.

Q. Will you indicate that to me? A. (Witness indicates.)

Q. You are exhibiting a record which contains a birth certificate and also the accompanying statement showing the age, rather the date of birth, of Major Radovich. Will 2163
you please state what is shown there as the date of birth? A. 16th day of November, 1919.

Q. Major Price, may I ask you, sir, whether you have among your files any reference to any military decorations or citations awarded to Major Walter V. Radovich by our Government as well as by the British Government? A. There is a record of some decorations awarded by our Government.

Q. By our Government? A. Yes, sir.

Q. You have nothing, however, with respect to any award made to this officer by the British Government? A. No, sir.

Q. May I ask you, sir, whether the mention made of the awards made by our Government to this officer recites the citation that was given to the officer and made at the time of the award of the particular military decoration? A. I believe so.

Q. Have you there, sir, the award of the decoration and the citation accompanying the award of what is known as the Air Medal to this officer? A. Yes, sir.

2165 Q. May I look at that?

Mr. Ansell: Mr. McGohey, would you like to look at it?

Mr. McGohey: Will you pardon me for just a minute?

Mr. Ansell: Certainly. You pardon me, will you?

(Mr. McGohey then stepped up to the witness stand.)

Mr. McGohey: May we approach the bench, your Honor? I have asked for a conference at the bench.

(The following took place at the bench:)

Mr. McGohey: I haven't objected to the materiality of this up to this point, but, as I understand it now, we are going into the reading of citations that were issued to Major Radovich.

2166 Mr. Ansell: That is right.

Mr. McGohey: Now the Major is in court, he has his decorations on him, nobody has questioned them; but I doubt the materiality of the detail of the citations, your Honor, and I object to the introduction of it on that ground.

The Court: Upon what theory do you contend that they are admissible, General?

Mr. Ansell: On this theory, your Honor. This officer is charged with defrauding the United States, really betraying his duty as an officer of the United States while he was in a military status. It seems to me that anything which shows him to have been a good officer, of unquestioned ability and up to this time integrity, is admissible as very enlightening.

Mr. Robb: It has a bearing upon the officer's military character, which is part of the issue here.

The Court: Now, of course, I am familiar with the rule permitting a defendant to offer testimony of his general good character, but I am not familiar with any rule of evidence which permits particular and definite 2168
good deeds and meritorious action to be proved in the defense of a man charged with an offense. For instance, if a bank cashier were charged with embezzlement, you would not be able to prove that he was a very beneficent gentlemen and had done a great many fine things for the community, would you?

Mr. Ansell: No; I agree with that. But I don't think that is an analogous situation to this.

The Court: Why isn't it, sir?

Mr. Ansell: Suppose, for instance, your Honor, that there were an enlisted man here with a certificate of honorable discharge. That does not have reference to a particular exploit, but covers a period of service in the Army, and probably, the way it seems to me, it 2169
would be the very best evidence of his actual character while he was performing that service. Now this case, your Honor, it doesn't mean—while it recites a particular incident or episode, all of them will cover the service, the entire service of this man as an air service officer.

Mr. McGohey: Your Honor, may I suggest there, I think all this shows is that this man was a brave officer and a good flyer. And, as your Honor indicated,

it indicates that he did particular acts which the Government deemed to be acts of a high value from a military standpoint. But I don't think it is at all arguable from that that the man was an honorable person in the sense that he is charged here with having violated his oath. As a matter of fact, I think it is common knowledge of all of us that many men of great bravery have either before their acts of bravery or after their acts of bravery, been rogues. I remember one of the most notorious gangsters of New York, a Monk Eastman, was out on parole and was in our 27th Division in the last war and performed great
2171 deeds, great heroism. As a result of that General O'Ryan petitioned for the restoration of his citizenship. I don't know that anybody would argue that the fact that he was a brave man eliminated his record.

The Court: There is no suggestion that this man was not a brave and gallant soldier.

Mr. Keenan: I would like to say that it was claimed in the Government releases that were made to the general press, to the country, that these transactions were conspiracies to deprive the Government of the faithful services of Radovich and made a poor flyer out of him.

Mr. McGohey: No, your Honor, that is not so.

The Court: We are not trying him on what appeared in the press.

2172 Mr. Ansell: Regardless of that, your Honor, and of course I am not so inept as not to appreciate the point made by Mr. McGohey. I only say that I can't possibly agree with it, first, as a matter of technical law, a rule of evidence——

The Court: What is that, sir?

Mr. Ansell: The rule that a man when he is charged with a lack of patriotism, is what it means, a betrayal of his Government, in that aspect at least, is not en-

titled to prove not only his military service, but the valiancy of that service. As a matter of policy, I wish your Honor would reflect upon this: after all, people in the Army, indeed I must say a lot of us outside the Army, work for what amounts in a way to nothing but a bauble, but it means much; it is what men strive for, and it seems to me that it would be taking a narrow view for a court to say that if a man were charged with a lack of patriotism, he was not permitted to show that he had not been a brave patriot during war, or peace.

Mr. McGohey: That is not challenged, that is not challenged, your Honor. There is nothing in the Government's evidence or the indictment that charges that 2174
he was not a gallant soldier.

Mr. Ansell: I did not say that, sir. I say, and I think, Mr. McGohey, you ought to heed at least my suggestion, that the charge is that he betrayed his duty and thereby defrauded the United States.

Mr. McGohey: To the extent charged in the indictment.

Mr. Ansell: One moment.

Mr. McGohey: I am sorry, General, I thought you had finished.

Mr. Ansell: Pardon me, sir. Mr. McGohey—I did not charge him with it, I know that in argument counsel, even the United States Attorney, frequently says 2175
what he would not say if not spurred by the spirit of advocacy, but Mr. McGohey, and probably there is some suggestion of truth in it, said that this was of a nature of treason. Now, of course, that is a vast overstatement.

The Court: That is not in this lawsuit.

Mr. Ansell: Oh, no. That was on a motion for continuance here. I have said I am not charging Mr. McGohey; we make statements sometimes loosely, but

here is, your Honor, a very serious charge against a soldier of the United States Army for a betrayal of his duty to the defrauding of his Government.

Mr. Robb: If your Honor please, might I suggest also that these citations are dated during the term which is alleged in the indictment as a term of this conspiracy, when this man is charged with conspiring with the co-defendants on the very dates that these citations are dated.

The Court: I understand that. But I am frank to say you arouse my sympathy in the matter, but I am unaware of any rule of law which would permit
2177 the introduction of testimony of this kind.

Mr. Ansell: Does your Honor base that upon the ground that the awards are made of specific incidents rather than covering a considerable period? Or might I ask your Honor——

The Court: I don't think there is any distinction. I just don't see the materiality. You say you can't give an analogy, but it seems to me that it is quite analogous to where a bank cashier is indicted for embezzlement and he undertook to prove that he has done many fine public spirited acts for the community.

Mr. Ansell: Of course, I follow your Honor on that.

The Court: That would not be admissible, would it?

2178 Mr. Ansell: I do not know. And I do not think, your Honor, that you have a correct analogy. Let me take the case of an enlisted man, and this has been before the courts of several states.

The Court: And he has a discharge certificate?

Mr. Ansell: He has a discharge certificate.

The Court: There is a specific notation of his general character.

2179

Mr. Ansell: But it has not always been so. Even in my own time, we have had discharges that didn't carry that but just simply said he will be enlisted, re-enlisted I mean, your Honor; that did imply something else. But some of the courts started in to hold, State courts—that that discharge certificate was not admissible. The great majority of them held that it was, saying that it was the very best evidence. And the other States have passed statutes—I won't say all of them, your Honor——

The Court: You will not admit my analogy, with undue deference?

Mr. Ansell: You are not——

2180

The Court: I understand that. I can't see yours. Because there is a specific notation on a discharge certificate covering a specific period of the man's general character during that period, and it is the report of a constituted authority as to his general character during that period.

Now it seems to me quite different to admit that and to admit besides a citation of that very soldier for a gallant act during his enlistment in the Army.

What is your—you just came up here very politely and tactfully voiced some views, but do you wish to actually object on the record?

Mr. McGohey: Oh, yes, I intended to. I thought I did. I did object to the introduction of it on the ground that it is immaterial.

2181

The Court: I would like to give the matter a little consideration. I am going to sustain the objection at this time. This officer won't go away tonight, or don't let him go away tonight. And if I change my mind I will notify you in the morning.

Mr. Ansell: Would your Honor bear this in mind? I don't want to beseech you except in this respect.

The Court: I really feel very sympathetic about this thing; there is no question about my duty to rule as a matter of law.

Mr. Ansell: I do not know of anything that means so much to a soldier as these citations.

The Court: You do not have to write a brief to convince me of that. I am thoroughly familiar with that.

Mr. Ansell: And I would regret to see a Federal Court, a United States Court—as a matter of policy I am addressing myself to, to which rules of evidence very frequently bend; I dislike to see a Federal Court
2183 hold that a discharge certificate or any part of that certificate or any medals awarded to an enlisted man, an expert rifleman, sharpshooter, etc., or in the case of an officer—your Honor yourself has certain decorations; I would hate to see a court of the United States say that that statement made by the highest authority of the Government of the United States was not admissible because it was immaterial in a case of this kind to prove his good military character.

The Court: All right, sir. I am going to sustain the objection at this time but I will give it further consideration and let you know in the morning.

Mr. Ansell: Thank you, sir. I am afraid that this has probably torn up the order that I was proceeding with. Your Honor will give me a little time to go back.

2184 (The following proceedings were had before the jury:)

Q. Major, among your records there, have you a record showing the home address of Major Walter V. Radovich, I mean the address before he entered the Army of the United States? A. Yes, sir.

Q. Will you please state what that address is? A. No. 1208 West 52nd Street, Los Angeles, California.

Mr. Ansell: If your Honor please, may we have this witness step down while I call another witness?

The Court: There is no cross-examination on what he has testified to so far?

Mr. McGohey: No, your Honor.

Mr. Ansell: It will be subject, of course——

Mr. McGohey: I have no cross-examination.

The Court: Call the next witness.

(Witness temporarily excused.)

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WILLIAM J. PENDER, having been previously sworn, resumed the stand and testified as follows: 2186

Mr. McGohey: Now, your Honor, may I ask again, leave to approach the bench before this witness is examined?

The Court: All right, sir, come up.

(The following proceedings took place at the bench.)

Mr. McGohey: Now, your Honor, I don't know, no questions have been asked of this witness yet, but I assume that the purpose of this witness is to introduce before the jury now the character of the confinement of Major Radovich at the time he was at Mitchel Field, from August 5th or 6th in 1944——

Mr. Ansell: August 9th.

Mr. McGohey: August 9th, 1944, or until he was released. Now I object to that on this ground, your Honor. If I understood your Honor's ruling, it was that as a matter of law, the statement offered by the Government was a voluntary statement free from duress, and that being so, I think the question of the circumstances which were urged by the defendant to indicate its involuntary character may no longer be pursued. 2187

As I understand the rule, if there is a conflict in the evidence that may then be brought before the jury. But there was no conflict here. The Government offered no evidence at all to the testimony offered by the defendants in support of their claim that the statements were gotten under duress, or the statement of September. And your Honor, as I understood, had ruled that, accepting all of that testimony as true, as a matter of law you held that the September statement was not a statement obtained under duress. But, of course, at no time did the Government offer the September statement. It was only the March statement
2189 that was offered in evidence. And I further understood your Honor's ruling to be that as a matter of law, even if you had found that there was some vice attaching to the September statement, taking all the evidence offered and no controversial evidence being offered, your Honor was of the opinion that the March statement was completely free from duress and was a voluntary statement.

Under that state of the record, I don't believe it is permissible to go over this again before the jury. I think it is now determined as a question of law. There is no question of fact for the jury to determine.

The Court: What have you gentlemen to say?

Mr. Ansell: I say this, your Honor: I find myself in utter disagreement with the United States Attorney
2190 in this. Of course we all concede that the question before your Honor is, whether the statement should be admitted for the consideration of the jury or not. But my contention is that I believe, which I believe to be backed by authority, that having gone to the jury it goes to the jury of course as evidence to be considered by the jury, but the weight to be given to the statement requires a consideration of all the circumstances under which the statement was taken.

The Court: On that proposition I find myself completely in accord. On the question of the admissibility of the statement, that has been passed upon. But I gather from Professor Wigmore that on the weight of the statement the defendant is entitled to introduce evidence as to the circumstances under which it was given. And as to the statement here, it is conceded that the March statement was taken after both the witness Flynn and the defendant Radovich had reviewed the September statement. And I must therefore hold that they are related, and I therefore overrule the objection because I think the defendant under the rule has the right to show the circumstances under which both 2192 statements were taken. Off the record.

(Discussion off the record.)

(The following proceedings took place before the jury:)

*Direct examination by Mr. Ansell.*

Q. Mr. Pender, where and how are you employed now? A. I am employed by the Mitchel Field Fire Department.

Q. You are then in the employ of the Government? A. I am, sir.

Q. You served in the last war, the one that has just ended? A. Yes, sir.

Q. Where did you serve, Mr. Pender? A. I served at Santini Hospital, Mitchel Field. 2193

Q. At Santini Hospital. May I ask you, sir, where is Santini Hospital? A. At Mitchel Field, Long Island.

Q. How long did you serve at Mitchel Field, all told? A. Fourteen months, sir.

Q. How long did you serve at the Santini Hospital? A. Thirteen months, sir.

Q. I understand then the whole time that you were in the military service out there you served as an attendant in this hospital? A. Yes, sir, I did.

Q. May I ask you, sir, whether you were specially assigned as an attendant in this hospital? A. I was, sir.

Q. Had you had in civil life any experience that would seem to qualify you as a hospital attendant? A. I did.

Mr. McGohey: I object to that, your Honor. It is immaterial.

The Court: I overrule the objection. Go ahead.

A. I worked in Kings Park State Hospital, Kings Park, Long Island.

Mr. Keenan: I didn't hear that.

2195 (Answer read.)

Q. I have to ask it again. A. I worked at Kings Park State Hospital, Kings Park, Long Island.

Q. May I ask you what kind of hospital that is?

Mr. McGohey: I object to that.

The Court: Objection sustained.

Q. May I ask you, Mr. Pender, whether prior to the time that you became an attendant at Santini Hospital, you had had any experience as an attendant in a hospital for the insane? A. Yes, sir, I did.

Mr. McGohey: I object.

2196 The Court: I overrule the objection. Go ahead.

Q. Will you tell me what your duties were, briefly and succinctly, but telling us, nevertheless, what your duties were as an attendant in Santini Hospital? A. At Santini Hospital when a patient was admitted we removed all his clothing, left him with no clothing at all, belt or shoes or anything else; razor blades and everything else is taken off him; provide him with pajamas and pajama top, without any rope or cord. Also a bathrobe without any cord.

Q. I fear I must interrupt you. What part of this hospital was it that you were an attendant in? A. I worked in Ward 15.

Q. Ward 15? A. That is right, sir.

Q. Will you tell me what was the purpose and function of Ward 15 in Santini Hospital?

Mr. McGohey: I object, your Honor.

The Court: Overruled.

A. Santini Hospital, in Ward 15, was alcoholic, battle fatigue, nervous condition, and drug addicts.

Q. Those were the patients put there? A. Yes, sir, they were. 2198

Q. May I ask you, sir, whether it was a hospital designed for insane people, either permanently or temporarily? A. It was.

Mr. McGohey: I object to that, your Honor.

The Court: I am going to sustain the objection. I don't think an attendant is qualified to testify what the purpose of a hospital is.

Strike out his answer. Go ahead, sir.

The Witness: Did your Honor sustain the objection?

The Court: Yes, sir. And struck out the answer on the ground that an attendant is not qualified to testify as to the purpose of a hospital. 2199

Q. But you were in what is known as Ward 15 there? A. I was, sir.

Q. And you have testified to the kind of patients, as I understood you? A. I did, sir.

Q. That you received in that ward? A. That is right, sir.

Q. Did you know anything about the other wards of the hospital and the kind of patients that they received in the other wards?

Mr. McGohey: I object to that, your Honor.

The Court: Objection sustained. We are interested only in this ward.

Q. In this ward. Were your duties confined as an attendant to the patients in this Ward 15? A. It was, sir.

Q. May I ask you to describe briefly but succinctly this Ward 15. A. As you enter Ward 15, you went through a big iron gate, locked by keys; you went into a ward with rooms on both sides, you passed through another gate, went to a day room; you passed through another gate and you pass through a 13 bedroom. That was one big room.

Q. And all of this constituted Ward 15, is that right? A.
2201 It did, sir.

Q. Were you on duty in that ward when Major Walter V. Radovich was brought there? A. I was, sir.

Q. And confined? A. I was, sir.

Q. Can you tell me the date? A. Around August 8th or 9th of 1944.

Q. And you were on duty there at that time? A. Yes, sir.

Q. And you were there and saw Major Radovich as he was brought in? A. Yes, sir, I was.

Q. Do you know the room that Major Radovich was assigned to or confined in? A. He was assigned to room No. 5, on the right-hand side of the ward.

Q. That is one of these smaller rooms? A. Smaller
2202 rooms, yes, sir.

Q. Will you describe that room? A. In this room we had an iron bed, mattress, sheets, blankets; the window in the room was covered by 7-8 screen—well, heavy wire.

Q. I didn't get that. A. Cast steel iron.

Q. Covered by what? A. Iron or cast steel. I just don't know what the gate is made out of. Then the glass window come, and then a screen to keep the mosquitoes out or flies out, whatever insects may enter. On the right side of the

room it had a bathroom, consisting of regular bath, standing bath.

Q. How large was the room? A. The room was about 6 by 9.

Q. What furniture was in that room? A. Just one chair, sir, and the bed, that is all.

Q. Did the door that entered that room—there was a door, wasn't there, entering the room— A. Yes, sir.

Q. From the hallway? A. That is right, sir.

Q. Was that a door that was locked or not? A. That door was open.

Q. Did it have any lock on it? A. It has a lock on it, to be locked in case it is necessary. 2204

Q. I didn't get that, sir. A. To be locked in case of necessity.

Q. Locked from which side? A. From the outside only.

Q. Who kept the key to the lock? A. The attendant on the ward.

Q. What were your hours of attendance in that ward? A. From 8 in the morning until 8 at night.

Q. I understood you to say that there were what I would describe as grilles— A. That is right.

Q. (Continuing) —over the window? A. That is right, sir.

Q. And that, in addition, there were screens to prevent the entrance of insects and so forth, is that right? A. That is right, sir.

Q. You mentioned a bathroom. A. Yes, sir. 2205

Q. There was a regular toilet seat, was there? A. No toilet seat, sir.

Q. No wooden part that fitted over the porcelain? A. No, sir.

Q. Who brought Major Radovich to Ward 15? A. Major Radovich was entered through the gate, through the First Lieutenant nurse. I don't know who brought him there at the time.

Q. When you first saw him then he was in charge of a First Lieutenant nurse? A. That is right, sir.

Q. And the First Lieutenant nurse brought him to this—A. Gate.

Q. (Continuing) —small room. A. That is right.

Q. Now, Major Radovich being confined in the room, tell me what your duties were with respect to his clothing and adjusting him, preparing him for this confinement? A. He was relieved of all clothing, including shoes, socks, belt; razor, razor blades, pencils—anything that would go to harm himself he was relieved of; and his clothes were taken off and locked up in another room. He was given pajamas,
2207 a pajama coat, and a bathrobe without cord to tie them up.

Q. By reason of your instruction do you know why he was deprived of these things which you have mentioned?

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection. Go ahead.

A. He was relieved of those things on—any patient admitted to that ward is relieved of everything. It doesn't make any difference who he is or what he is.

Q. Relieved of everything. A. That means he is relieved of all his clothing, belt, razor blades, shoes, or anything else.

Q. Why should he be relieved, so far as your instruc-
2208 tions were concerned, of his belt, for instance?

Mr. McGohey: I object to that, your Honor. I submit the question has been answered.

The Court: I overrule the objection. I think he has answered it, but I will let him answer it again.

Mr. McGohey: I didn't hear your Honor.

The Court: I overrule the objection. I think he has answered it, but if he has not let him answer it again.

A. He is relieved of his belt, clothing, everything else so there is no possible chance of him committing suicide.

Q. How did Major Radovich get his food while he was confined there? A. His food was placed to him on a platter, on a tin platter, with no knife, just a fork; and he was given a cup of coffee or a cup of milk, whatever he desired to drink.

Q. Did he have a fork? A. He did have a fork.

Q. Spoon? A. Spoon, yes.

Q. Did he always have a fork? A. No, sir.

Q. What happened to the fork? A. The fork was taken away from all patients at an order of 24 hours or some time before that. I just couldn't think of it now. 2210

Q. Then what did he have to eat his food with? A. Just a spoon.

Q. Sometimes he was served beef, I assume Major Radovich was? A. Yes.

The Court: I don't think that makes much difference, whether he had beef or not.

Mr. Ansell: I will not transgress upon your patience, but I still think that these circumstances are vastly important.

The Court: Whether he had beef or something else I think is not too material.

Q. What were your instructions with respect to any visitors visiting Major Radovich while he was there? A. 2211 From the orders of the First Lieutenant nurse, no telephone calls or no visitors while she was on duty, no visitors whatsoever to be entered without permission of the nurse, the First Lieutenant.

Q. I didn't get your answer. A. (Answer read.)

Q. How long did these orders obtain—last? A. These orders lasted for about eight or ten days.

Q. When Major Radovich was brought there did you or did you not see some Army officers with him, bringing him in? A. I didn't see that, sir.

Q. Being deprived of a razor, how would he shave? A. At the request of the Major or the patient, if he wanted a shave he would go out and get his razor and razor blade and insert the razor blade in the razor and go in the washroom and let him shave in the bathroom, with a guard standing over him.

Q. When he visited the toilet was a guard required to keep him in sight all the time? A. For the first eight or ten days, yes.

2213 Q. Even when he visited the toilet? A. Yes.

Q. How did Major Radovich take his confinement? Did he make any complaint or comment of any kind? A. I heard Major Radovich complain three or four times about telephone calls, wanting to get in touch with somebody; he was crying and fretting. But I couldn't do anything for him. I told him to speak to one of the higher-ups when they come in.

Q. Did he complain to you about having no friends thereabout? A. He wanted to get in touch with some friends, he said, maybe on the field, but I couldn't help him out, with a telephone call.

Q. Did you ever hear him make any comment about having an attorney? A. He would like to get in touch with an attorney if——

2214

Mr. McGohey: I ask that the witness be instructed to answer the questions directly. I submit all these questions are——

The Court: I think he is doing the best he can. Go ahead, sir.

Q. Did he make any comment about the absence of his wife and baby? A. He did. He said he wanted to make

a telephone call to get in touch with an attorney or his wife and baby and see what he could do. I said, "I can't do nothing for you." I couldn't let him make no telephone call.

Q. Where did you understand his wife and baby to be at that time? A. Out of town some place. I couldn't tell you where.

Q. You don't know whether they were in or near New York or on the Pacific Coast? A. I couldn't tell you the first thing about where his wife was.

Q. Mr. Pender, I have not examined you I think as to how long Major Radovich stayed in that Ward 15. Could you tell us, please? A. About four or five weeks to my esti- 2216
mation.

Q. That is your estimate? A. Yes.

Q. It might have been longer? A. It could have been longer.

Q. Would you tell me whether or not throughout that time he had any visitors except military people? A. He had military people, and then he had two other civilians with an Army officer.

Q. Could you tell us about when you observed that he was being visited by a party composed of two civilians and an Army officer? A. This day he was supposed to go out for a walk, I gave him his uniform around 12.30 or a quarter to one. In the meantime he had visitors, these two civilians and an Army officer.

Q. Did you know at that time who those civilians were? 2217
A. I do not.

Q. Do you know now? A. No, sir.

Q. Did you know who the Army officer was? A. No, sir, I don't.

Q. Did you know his rank? A. To tell you the truth, I don't.

Q. You had just about got him ready to go out for exercise; did you say that, Mr. Pender? A. I just gave him his clothes, sir.

Q. He was in uniform then at the time you saw the civilians and the Army officer being present? A. Yes, sir.

Q. Do you know who it was that opened the gate leading into this Ward 15 for the admission of this Army officer and the two civilians? A. No, sir.

Q. Do you know whether you yourself did it or not? A. I don't know, sir.

Q. When an Army officer, one in authority, came there to visit this cell, who usually opened the gate for him? A. Either the nurse in charge, or he would see the Captain of the ward and they would open the gate.

Q. So, when an Army officer wanted to seek or wanted
2219 to visit anybody in Ward 15, he was admitted by a person in military authority, a commissioned officer in charge of that ward, is that right? A. That is right.

Q. May I ask you, sir, what opportunities for exercise were afforded Major Radovich? A. The only exercise that was afforded to Major Radovich was when the Provost Marshal sent up somebody to take him for a walk.

Q. When you say somebody from the Provost Marshal's office, you mean an armed man to act as his guard? A. That is right, sir.

Q. Do you know how often he could be exercised? A. He had permission I understand to go out at least once a day.

Q. Do you know whether he went out once a day or not? A. I couldn't say.

2220 Q. I want to revert briefly to the door at the entrance of this Ward 15, and ask you to describe that door. A. It is a big heavy iron gate with bars on it, with a key attached, a key kept by the attendant. It is a regular jail door.

Q. A regular jail door with regular jail keys for the lock? A. Right.

Q. Possibly I don't know what a regular jail is. Describe it. A. It is about——

Mr. McGohey: I object to this, your Honor.

The Court: Objection sustained. He has described the door at least twice.

The Witness: Well, I did not hear you, your Honor.

The Court: I sustain the objection, because he has described the door at least twice.

Mr. Ansell: He had not discussed, if my memory serves me, the kind of lock, which has something to do with the gate.

The Court: I sustained the objection.

Mr. Ansell: I beg your pardon.

The Court: I sustained the objection.

Mr. Ansell: Will your Honor permit me to ask him the weight of the door, his estimate of the weight of the door. 2222

The Court: I will permit you to ask him if he knows the weight of the door.

Q. Do you know the weight of that door, Mr. Pender? A. Around 300 pounds.

Q. I wanted to ask you a question: Do you know anything about any restrictions upon the mail coming in to Major Radovich or going out either? A. All mail in that ward is censored, in or out.

Q. Who censored it? A. The nurse in charge or the officer in charge.

Mr. Ansell: Your witness, Mr. McGohey. 2223

The Court: Cross-examination.

Mr. McGohey: Pardon me for just a minute.

The Court: Certainly.

*Cross-examination by Mr. McGohey.*

Q. Did you see Major Radovich every day while he was in Ward 15? A. I seen Major Radovich every day when I was on duty.

Q. That is what I mean: While you were on duty. A. Yes, sir, I did.

Q. And how many days a week would you be on duty? A. 15 days.

Q. You would be on duty for 15 days on a stretch before you had a day off? A. That's right. It was a swing.

Q. Would you have 15 days on these day hours? A. That's right; sometimes 30 days.

Q. Always during, I think you said, eight in the morning— A. Eight in the morning until eight at night.

Q. Until eight at night? A. Yes.

Q. And at the times you were on duty you saw Major
2225 Radovich every day? A. Every day.

Q. Do you know whether or not he was visited by any doctors during that time? A. He was visited by the Captain of the ward.

Q. Do you know whether the Captain prescribed any treatments for him? A. No, not that I know of.

Q. If treatments had been prescribed for him would it have been part of your duties to give him those treatments? A. It would, sir.

Q. Did you give him any treatments? A. No, sir.

Q. He got no treatments then of any kind during all the time he was there, is that correct? A. That is right, sir.

Q. You talked to Major Radovich, did you, every day? A. I didn't put any confidence in the man at all, sir.

2226 Mr. McGohey: I move to strike that, sir, as unresponsive.

The Court: The motion is sustained. Answer the question.

Q. I asked you, sir, did you talk to him? A. No, sir, I didn't talk to him.

Q. Did he ask you any questions? A. No, sir.

2227

Q. Well, he asked you sometimes for his razor, did he not? A. He would ask for the razor, but that's all. I would never talk to the man.

Mr. McGohey: Pardon me just a minute, your Honor.

The Court: Certainly.

Q. During the time, I think you said it was probably five or six weeks— A. That's right, sir.

Q. That Major Radovich was there while you were on duty did you see any evidence of insanity in Major Radovich? A. To my estimation, no.

2228

Mr. McGohey: I have no further questions.

The Court: All right, sir.

Mr. Keenan: I would like to ask a question, your Honor.

The Court: I will have to deny you that privilege, sir, if it bears on Radovich's statement.

Mr. Keenan: We feel that it bears on the whole case, the type of man that the Bayers were dealing with.

The Court: I have ruled on that.

Mr. Keenan: All right. Note my exception, please.

The Court: Very well.

Mr. McGohey: I have no further questions.

The Court: All right, stand aside. 2229

Who would your next witness be if we called him?

Mr. Ansell: I would rather none at all.

The Court: Very well. Your motion is granted. We will take an adjournment now until 10:30 tomorrow morning.

(Whereupon an adjournment was taken to Wednesday, October 17, 1945, at 10:30 a. m.)

New York, October 17, 1945,

10:30 o'clock a. m.

Trial resumed.

Mr. Keenan: May I approach the bench a moment, your Honor?

(The following proceedings were had at the bench, not within the hearing of the jury:)

Mr. Keenan: May the record show, your Honor, that Mr. Samuel Bayer was ill this morning with this virus cold that is going around and has a slightly elevated temperature. He is up in my room. And I felt, after talking to the doctor, he would be all right at
2231 noontime, and the present evidence that is put in is not such as he needs to participate in. And I am willing to stipulate with the United States Attorney that the trial may go on for this morning in absentia, and we will bring a stipulation properly signed which will be presented. I think that is acceptable——

Mr. McGohey: A stipulation signed by the defendant himself.

Mr. Keenan: Yes, he will do that.

Mr. McGohey: Waiving whatever rights he had to be present during this morning's session.

The Court: I see no objection to that.

Mr. McGohey: I have no objection.

Mr. Keenan: He has a fever of about 100 now. I
2232 am doing that to save time.

The Court: As a matter of fact, the rule here is quite different from state courts in Virginia, anyhow. The trial may go on, any part thereof, in the court in the absence of the defendant if he is not prevented from being here. If he wishes to absent himself there is no rule requiring his presence.

Mr. Keenan: We are not claiming that he is prevented.

The Court: Our Virginia rule is quite different. Now, of course, if his illness should continue or grow worse and he feels that there is any prejudice to him by reason of his absence, we would have to——

Mr. Keenan: We don't claim that situation. It may develop——

The Court: While I have you here, gentlemen, I want to make another statement while in the absence of the jury. I have reflected more maturely on my ruling about those citations yesterday afternoon and have come to the conclusion to reverse myself and admit the citations.

(The proceedings were resumed in open court within the hearing of the jury, as follows:) 2234

Mr. Ansell: Will your Honor indulge us while we get those citations together?

The Court: Yes.

Mr. Ansell: And may Major Price be recalled to the stand?

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MYRON H. PRICE, recalled, further testified as follows:

Mr. Keenan: Just a moment, General. Would you come up just a moment.

(The following proceedings were had at the bench, not within the hearing of the jury:) 2235

Mr. Keenan: I have a general exception, I believe, to all this testimony concerning any statements of Major Radovich outside the record, but I would like to include at this time——

Mr. McGohey: I didn't hear that.

(Record read.)

Mr. Keenan: Or any so-called admissions. (Continuing) —but I would like now to have an exception

to the reversal of the Court's ruling on the ground that eventually the real question of issue in this case before this jury may be that of veracity between Major Radovich and the two defendants Bayer as to whether or not this constituted extortion or bribery. And in that event it may well be that any evidence that is not relevant in the case to the issues as presented would be prejudicial to the interest of the Bayers, and therefore I take an exception to the Court's ruling in that regard.

The Court: Very well. Proceed, gentlemen.

2237 *Direct examination resumed by Mr. Ansell.*

Q. Major Price, when the Court suspended your examination yesterday afternoon I was questioning you, or was about to question you, about certain decorations that I contemplated in my question to have been awarded to defendant Radovich in this case. Do you remember that? A. Yes.

Q. I would like to ask you, sir, whether you have among your records there the award and citation accompanying the award of what is known as the Air Medal to defendant Radovich? A. Yes, sir.

Q. May I look at it, if you please, sir? A. (Witness exhibits paper to Mr. Ansell.)

2238 Mr. Ansell: If the Court please, may I ask that the witness read the citation to the jury?

The Court: Yes, read it.

The Witness (reading): Citation. Served as pilot. For meritorious achievement in aerial flight displayed on a bombing mission in Northern Burma on 13 March, 1944, during which exposure to enemy fire was probable and expected. The mission was extremely dangerous due to heavy ground fire encountered and hazardous

flying due to surrounding mountainous terrain. Enemy storage installations, trucks and barracks area were definitely destroyed.

"Destruction of this great amount of enemy material seriously hampered the operations of the enemy in this sector and materially aided the allied effort in this theatre.

"The successful accomplishment of this mission by these officers with a display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects great credit upon themselves and upon the Army Air Forces of the United States."

2240

Q. May I ask you, sir, the date of that citation? A. It is dated 24 April, 1944.

Q. May I look at it a moment, sir? A. (Handing paper to Mr. Ansell.)

Q. And that is the citation of an award of the Air Medal to defendant Radovich in this case, is it, Major? A. Yes, sir.

Q. Have you with you, sir, the general order publishing the same citation? A. No, sir.

Q. Do you know whether or not it was published in general orders of the War Department? A. No, sir.

Q. You don't know, is that what you mean? A. It was not published in general orders of the War Department.

Q. May I ask you, sir, if you have there among the records with you the award of the Distinguished Flying Cross together with the citation accompanying that award? A. 2241
Yes, sir.

Q. May I ask you, Major, to read the citation of that Distinguished Flying Cross to the jury? A. (Reading) "For extraordinary achievement in aerial flight by participating in more than 50 flights over the combat areas of Northern Burma, where exposure to enemy fire was probable and expected. These flights performed in direct support of a new type of air-ground operations were largely

instrumental in the successful operations of the (deleted) air commando group in this theatre. Close coordination was maintained between the bomber, fighter, glider, transport and light plane sections and the ground crew operations of the British, Indian, Chinese and American armies, when critically needed troops and supplies were flown in with both gliders and transports to the vital areas. This close liaison between air and ground operations was primarily responsible for our successes in the Burma area, with destruction of large numbers of enemy aircraft and critical damage to his installations, material and equipment, with a considerable loss of personnel which has ma-
2243 terially reduced his effectiveness and ability to conduct any offensive action against the Allied forces.

"These officers and enlisted men have displayed a devotion to duty and a degree of efficiency above and beyond that normally expected, thereby reflecting great credit upon themselves and upon the air forces of the Allied Nations.

"Pilot from 26 December, 1943, to 25 April, 1944. Home address, 912 East 87th Street, Los Angeles, California."

Q. When you started in reading, if you will pardon me, did you start in by saying in effect that that was addressed to Major Radovich? A. No, sir.

Q. Well, is it addressed to him? A. This was addressed to a number of individuals, sir.

Q. Is Major Radovich included among them? A. Yes, sir. Major Radovich is included. This is his copy of it.

2244 Q. Was Major Radovich awarded the medal with that citation? A. Yes, he was awarded the medal with that citation.

Q. And I shall have to revert to the first citation, the air medal, and ask you if the same thing is true about that? A. Yes, sir.

Q. Have you there, Colonel, a second award, whatever it may be termed in military terminology, the award of a

second Distinguished Flying Cross to Major Radovich? A. Yes, sir.

Q. For my own information, and maybe for that of the Court and jury, is that what is known as a Cluster? A. An Oak Leaf Cluster.

Q. Which means a second one of the same kind? A. Yes, sir.

Q. May I look at this, sir? A. (Witness exhibits paper to Mr. Ansell.)

Q. With the permission of the Court and the parties hereto, will you please read in evidence this Oak Leaf, or second Distinguished Flying Cross citation, from the beginning, if you please, sir. A. (Reading) "Radovich, Walter V., Serial No. 0416891, Major, Air Corps, Headquarters, Army Air Forces, India-Burma Section, China-Burma-India Theatre. APO 671. General Orders No. 99, Section 1. Dated 25 June, 1944. 2246

"Oak Leaf Cluster to the Distinguished Flying Cross by command of Major General Stratemeyer.

"Citation:

"For extraordinary achievement in aerial flight displayed on 8 March, 1944. Major Radovich was a member of a 21-plane fighter sweep over the enemy air field at Anasean, Burma, several hundred miles from home base. His plane was loaded with a large auxiliary fuel tank and one 500-pound bomb.

"With complete disregard for the enemy antiaircraft and ground fire, he successfully bombed the objective and then joined the strafing pattern. In the successful accomplishment of this mission they destroyed 35 enemy planes, strafed ground personnel, trucks and antiaircraft positions, set the gasoline dumps afire and all buildings surrounding the field were completely burned. 2247

"This display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects

great credit upon Major Radovich and upon the Army Air Forces of the United States.

"Home address, 912 East 87th Street, Los Angeles, California."

Q. How long have you been attached to serving in the War Department? A. I have been on duty in the War Department since November 28, 1942.

Q. May I ask you, sir, as such whether you are familiar with that campaign in Burma conducted by us to prevent the Japanese invasion of India? Are you familiar with the progress of that campaign and when it reached its high water mark? A. No, sir.

2249 Mr. Ansell: If your Honor please, I have here a presidential citation of the First Air Commando group, published in General Orders of the War Department.

The Court: That is only the unit citation?

Mr. Ansell: A unit citation.

The Court: All right. It is printed in the official publication?

Mr. Ansell: Quite right.

The Court: All right, you may read it.

Mr. McGohey: No objection.

Mr. Ansell: May I read it to the jury, if your Honor please, sir?

The Court: Yes.

Mr. Ansell (reading): "An Extract from General
2250 Order 26, War Department, Washington, D. C., 9 April 1945.

"The First Air Commando Group is cited for outstanding performance of duty in action during the period 1 December 1943 to 20 May 1944. The First Air Commando Group was given a mission so unusual that few individuals outside the organization considered it feasible. Lacking proper military facilities

for the assembling of their equipment and deprived for security reasons of native labor, officers and enlisted men assembled and tested the airplanes and equipment of the Group in record time. Fighter Pilots loaded bombs and refueled their own airplanes while enlisted personnel unloaded strings of box cars for future operations.

"The task performed by the group normally called for strength of five times their personnel. The comparatively small assault force of the group flew as many as 682 missions in one month, and on one mission, on 8 March 1944, destroyed 20 per cent of the known Japanese aircraft in Burma. The liaison section of the group evacuated as many as 700 sick and wounded in less than three weeks. 2252

"On D-Day the group displayed exceptional team work, destroyed the enemy positions, carried assault troops and engineers behind the enemy lines and supplied them until their mission had been accomplished.

"This display of group heroism and devotion to duty reflects highest credit on the First Air Commando Group and the military forces of the United States."

If your Honor please, I have here a citation issued by the British Government to this officer, an exemplified copy of the citation, that is, under the Great Seal of the British Government, and the certificate of the Ambassador here. 2253

The Court: All right, you may read it.

Mr. McGohey: No objection.

Mr. Ansell: I read to the jury and exhibit the paper. At the top of it there is the seal of the British Empire, and then this:

"Citation. Major Walter V. Radovich, United States Army Air Forces, distinguished flying corps.

"This officer showed the highest courage on D.1 Day when he volunteered to fly in daylight in an undefended

light plane across 180 miles of enemy-occupied Burma to Broadway, where a number of our troops had been wounded and where we appeared to have lost communication. He carried out this task successfully, delivered an operator with a radio set and ciphers and brought out a wounded man. Throughout, Major Radovich displayed complete disregard for his own personal safety and great devotion to duty.

"Certified true and correct copy, the seal of the British Embassy in Washington. (Signed) W. Roxberg, Squadron Leader, Assistant Air Attache."

Your witness, Mr. McGohey.

2255 Mr. McGohey: I have no questions, your Honor.

The Court: You may be excused. Call the next witness.

Mr. Ansell: May I ask the bailiff to find an officer in the witness room from the office of the Adjutant General, a First Lieutenant, who has some papers with him? I don't know his name. I am sorry at the little time I am taking to put on these witnesses.

The Court: All right.

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ABRAM L. WHIPPLE, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

2256

*Direct examination by Mr. Ansell.*

Q. May I for my information ask you your name, sir? A. Whipple, sir.

Q. Mr. Whipple, you have been sent here, as I understand it, from the office of the Adjutant General with certain records that were subpoenaed from or through the Secretary of War; is that correct, sir? A. I represent the Secretary of War, sir.

Q. The Secretary of War? A. Yes, sir.

Q. May I ask you, sir, if you have among your papers that you brought here with you an order, probably in September, 1943, which orders Major Walter V. Radovich from somewhere in this country to overseas, I think the Burma-India-China front? A. Yes, sir, I believe I have (showing paper).

Mr. Ansell: May I, with your Honor's authority and with Mr. McGohey's consent, without reading all this on the record, state that it is an order dated 18 September 1943, ordering then Captain Walter V. Radovich overseas. For reasons that we all can assume, the destination is not specified.

Mr. McGohey: I will stipulate that that is the order.

The Court: Very well.

Mr. Ansell: I have no further questions to ask this witness, if you please, sir.

The Court: Have you any cross-examination?

Mr. McGohey: Your Honor, what is going into the record now is an order dated some time——

The Court: 18 September 1943.

*Cross-examination by Mr. McGohey.*

Q. That order does not indicate when he actually left? A. No, sir.

Mr. Ansell: I think, Mr. McGohey, I speak subject to correction of course, that the time is more accurately fixed in the evidence of record already, and it was later than that.

The Court: All right. No questions——

Mr. Keenan: Do I understand, your Honor, that I am not permitted to ask questions?

The Court: No, sir, I did not say that.

Mr. Keenan: Oh, then I would like to ask a question.

*Cross-examination by Mr. Keenan.*

Q. Can you tell me when Captain Radovich or Major Radovich was ordered to overseas exactly? A. No, sir. This paper we are referring to orders him to an overseas replacement depot for movement overseas.

Q. And that order orders him to go to what overseas replacement depot, Lieutenant? A. Goldsboro.

2261 Q. What is the date of that order? A. 18 September 1943.

Q. 18 September 1943— A. Yes, sir.

Q. —he received an order to go to Goldsboro? A. Yes, sir.

Q. For overseas, for preparation for going overseas, or what? Perhaps you would not mind reading the order to us. That might be the shorter way to get it. A. (Reading) "Captain Walter V. Radovich, 0416891, Air Corps, is relieved from assignment and duty with the First Air Forces, Mitchel Field, New York——"

Q. Not so fast, please. A. "—and from temporary duty at Headquarters, Army Air Forces, Washington, D. C., and is assigned to Project CA-281, and will proceed immediately to Hartford, Connecticut, and Elgin Field,
2262 Florida, for temporary duty of approximately five days at each place for the purpose of coordinating matters pertaining to the AAF Special Project. Upon completion of his temporary duty he will proceed to Washington, D. C., and report to Headquarters Army Air Forces, Lieutenant Colonel Allison, Army 3D819, the Pentagon, for temporary duty not to exceed ten days for the purpose of receiving special instructions with regard to overseas matters, upon completion of which he will proceed to Goldsboro, North

Carolina, and report to the Commanding Officer, Overseas Replacement Training Center, for further temporary duty pending movement overseas, semi-tropical climate."

Then there is some other paragraph about how he is to travel.

Q. You can omit that. A. Another paragraph about immunization.

The Court: You need not read those.

Q. Does that order show where he was stationed at the time that this order was received to make these various stops along the road? A. At that time he was stationed 2264 at the First Air Force, Mitchel Field.

Q. And the date again was September 18, 1943? A. Yes, sir.

Q. Have you the previous order—have you the one previous to that where he was assigned to Mitchel Field? Have you that? A. I will have to look and see.

Q. By the way, what is this file that you are looking at? A. This is known as an Officers 201 File. I don't believe I have that order.

Q. Shouldn't the 201 file of an officer contain data of his movements? A. Not necessarily. There are several 201 files.

Q. Which 201 file is this? Well, wait a minute. A. This is the 201 file that is maintained by the Army Air Forces 2265 Headquarters.

Q. What other 201 files are there? A. There is a 201 file for an officer at every station he is assigned to.

Q. Well— A. A new one is started every time there is a change of assignment.

Q. As long as he remains in the Air Force wouldn't there be a 201 form there for him? A. Yes, but sometimes copies of all orders don't get to the file we keep in Washington.

Q. I am a little bit confused. I would like to ask you again, is there any other distinction between 201 files excepting there may be a succession of them as an officer leaves one place and goes to another? A. No, sir.

Q. Is that the only distinction between them? A. That is correct.

Q. Well, when does this 201 file start, what period of time? A. There is a new 201 file starts for an officer as soon as he gets to a new station.

Q. When does the 201 file start that you have here? A. This started way back at the time he enlisted in the Army as an enlisted man.

2267 Q. Doesn't that continue on as he goes—wait a minute. Withdraw the question. When does it end? A. That is when he is separated from the service.

Q. When does the 201 file that you have start? A. When does it start?

Q. Yes. A. When he——

Q. Take a look at it and see, if you don't mind. A. November 19, 1940.

Q. What was that, the date of his— A. The date of his entry in the service.

Q. What is the last entry that you have in the file, the date of it?

Mr. Robb: What was the date again?

Mr. Keenan: November 19, 1940.

2268 Mr. Robb: 1940?

Mr. Keenan: Yes.

Mr. Robb: Thank you.

A. The last entry I have is 6 July 1945.

Q. Doesn't that 201 file purport to have all the records of the different assignments from one place to another, one camp to another— A. No, sir.

Q. Of this officer? A. No, sir.

Q. Well, I am still confused. Tell me why not, if you can, briefly. A. The assignments—what assignment stations that an officer might have been sent to during his career in the Army appear in another form. It doesn't appear in the 201 file. This is his personal file. It is another word for it.

Mr. McGohey: If your Honor please, I am going to object to any further questions along this line. I don't see that anything that is asked here is material to the issues on trial.

Mr. Keenan: I would like to be heard on that.

The Court: Have you further questions? 2270

Mr. Keenan: Yes, I have.

The Court: All right, go ahead.

Mr. Keenan: Was there a question before the witness at the time of the interruption?

Mr. McGohey: I object to that, that there was an interruption. I have a right to file an objection.

Mr. Keenan: I didn't say there was anything wrong in the interruption, but it certainly was one.

The Court: Don't let's quibble, gentlemen. I don't think any innuendo was implied there. Go ahead. Let us proceed and get along with this case.

Mr. Keenan: What was the last question and answer?

(Record read.) 2271

Q. Well, the personal file here contained the order of his transfer from Mitchel Field down to Goldsboro, does it not? A. Yes, sir.

Q. Well, then, tell me why the file does not contain the order of his transfer, wherever he came from, to Mitchel Field?

Mr. McGohey: I object to that, your Honor.

Q. If you can.

The Court: Overruled.

A. I can't answer that.

Q. Are you sure that it has not been extracted from the file by anyone? A. I have no knowledge of that, sir.

Q. Is there any reason you can tell us why this record should show the date of Major Radovich's transfer to Goldsboro for some overseas duty or perhaps for commando work and would not show his transfer to Mitchel Field? A. No, I cannot.

2273 Q. Certainly this 201 file entry that you have just read of the transfer was to a project of a highly secretive nature, was it not? A. That is correct.

Q. So that as far as the evidence of the transfers of Major Radovich are concerned, this 201 file is not complete, is it? A. Will you repeat that question?

Mr. Keenan: Repeat it to him, Mr. Stenographer. (Question read.)

A. I would say it is complete as far as it goes. All transfers will not appear in any 201 file.

Q. I assume that there is some system to this business of 201 files, is there not? A. Yes, sir, there is.

2274 Mr. McGohey: I object to this, your Honor.

The Court: Overruled.

Q. If you can, explain to me what is the basis upon which you would show a transfer from Mitchel Field to Goldsboro, the one you have read from, and omit in the same file the transfer record from some other place to Mitchel Field?? What is the logic of it? If you can, tell us, briefly. A. Yes, I can.

Q. All right. A. The transfer—every transfer that affected Major Radovich appears in another set of records, not in this set.

Q. Why does this transfer appear in this record when the other transfers do not appear there? A. I can't answer that.

Q. Has any special treatment been given to this 201 file, that you know of? A. No, sir.

Q. There is some evidence of the removal of data from this file on the 5th day of March, 1945, is there not?

Mr. McGohey: Pardon me. Your Honor, may the record show that Mr. Keenan has examined the file 2276
prior to asking that question?

Mr. Keenan: Just a minute. Then the record will show that I have taken not more than five or ten minutes in examining about ten or twelve pages at the top of the file, and it is a very thick list of data that I am unable to describe, more than it would cover about an inch and a half, that I have not had time to examine, and I never have been permitted to have access to this before.

The Court: All right, go ahead.

Mr. Ansell: I wanted to say, if your Honor please, that I regret any apparent discourtesy upon my part for that having referred that to Mr. Keenan. It was purely inadvertent upon my part.

Mr. Keenan: I am very sure, General Ansell, it 2277
was, upon your part.

The Court: All right, go ahead.

The Witness: What is the question?

Mr. Keenan: Read the question, Mr. Stenographer.

(Pending question read.)

The Witness: Yes, sir.

Q. And that comes from the Medical Corps? A. Yes, it is removed from one department of the Air Force to another.

Q. It is requested that the flight surgeon's records requested in the attached correspondence be removed from 201 files and forwarded to address indicated. No record should be maintained as to the disposition of these files. Is that contained in this record? A. Yes, sir.

Q. Why is that, that no record is to be maintained in the 201 file as to the disposition of these medical records of Major Radovich? A. I can't answer that. That letter came from the Air Surgeon's Office.

2279 Q. Came from where? A. The Air Surgeon.

Q. Who is the Air Surgeon? A. The Air Surgeon is a branch of the Army Air Forces, a division.

Q. Is that usual, Lieutenant, as far as your observation is concerned? A. Oh, that is very frequently done.

Q. And do they say that no record of this transfer should be kept? Is that usual? A. That is correct.

Q. Why? Do you say it is usual or unusual? A. I will have to explain that this 201 file, if you care to have me explain it to you——

Q. Yes. A. (Continuing) —is a personal file of an officer. Any correspondence or any letters received by the War Department, if it is an Air Corps man, or any replies that are sent out, any personal matter dealing with an officer, eventually gets into a 201 file. As I said

2280 before, when Major Radovich was assigned to Mitchel Field they started a 201 file there. If he is assigned to Washington, they start a 201 file there. If he is assigned to Utah, they start a 201 file there. Every time a man is transferred they start a new file for matters that pertain to that officer.

If you are talking about orders, official orders that affect him, that is in a record known as 66-2, which shows

every assignment that officer has had since he has been an officer.

Q. But there is a record shown of the assignment from Mitchel Field to Goldsboro, is there not? A. Yes, sir.

Q. And that is an official record, is it not? A. That is correct.

Q. And it is of his movement? A. That is correct, but at that time he was assigned—that order came out of Headquarters, Army Air Forces.

Q. Wouldn't the order transferring him to Mitchel Field come out of Headquarters, Army Air Forces, too? A. Oh, no.

Q. What is the difference, now? Perhaps we will get 2282
some light on it. What is the difference? Why? Where would that come from? A. If the Headquarters, Army Air Forces, was to transfer a man or if they instituted the transfer from one command to another, then it can be directed by Headquarters, Army Air Forces; but a command like Mitchel Field has a right to transfer a man to some other command without permission of Headquarters, Army Air Forces.

Q. Mitchel Field would have the right to command him before he got there? A. That is correct.

Q. It would not be Mitchel Field; it would be somebody else at Mitchel Field? A. It would be the commanding officer.

Q. The commanding officer? A. Everything is under the 2283
commanding officer's signature.

Q. Can you show me any other record in this file—I want to withdraw that question for a moment.

Tell us who a flight surgeon is, please.

The Court: I will sustain the objection previously made to this question. I cannot see any possible materiality to this case.

Mr. Keenan: Well, your Honor, I did not know that there was an objection made to this question.

The Court: An objection was made previously to the whole line. I think now you have reached a point where it is not material and I sustain the objection previously made.

Mr. Keenan: I would like the record to show that we are making this inquiry, your Honor, on the basis of determining why Major Radovich was sent to an insane hospital, and if the flight surgeon would have any reference to that.

The Court: Objection sustained.

2285 Mr. Keenan: Exception.

The Court: Very well.

If you wish time to examine that file, I will take a recess now.

Mr. Keenan: I can tell your Honor that I will not have the time that I would like to in a short recess in an important matter of this kind. I would rather proceed with something else, if time is of the essence, and look it over at a time when I can do justice to it, because I cannot look this file over during any short recess, and if that is in the Court's mind, I would ask permission that this witness come back at a later time and I will look over the file in the meantime.

The Court: All right.

2286 Mr. Keenan: Would that be done?

The Court: Thank you, sir.

Are there any questions of this witness?

Mr. McGohey: No, I have no questions.

The Court: All right. Will you stand down?

Call the next witness.

(Witness temporarily withdrawn.)

Mr. Ansell: Captain Fritchley.

RICHARD G. FRITCHLEY, recalled, further testified as follows:

*Direct examination by Mr. Ansell.*

Q. You have already been sworn, Captain? A. Yes, sir.

The Court: Yes, he has been sworn.

Q. Captain Fritchley, have you among the papers that you have been directed to bring before the Court here an order ordering Major Walter V. Radovich from Santa Monica Distribution Center, California, to Mitchel Field? A. Yes; I have. 2288

Q. I have in my notes here a special order No. 201, dated August 3, 1944. A. That is correct.

Q. Will you let me look at that order, sir? A. (Witness exhibits paper to Mr. Ansell.)

Q. May I ask you, sir, to read the first two lines of paragraph 19, which seem to be all that could be informative to us, omitting symbols or translating them into a language that we all can understand.

Mr. Ansell: Mr. Keenan, would you want to look at this?

Mr. Keenan: I am occupied for the moment, General. Is there something you wanted?

Mr. Ansell: I wanted to know if you want to look at that order ordering Radovich from Santa Monica? 2289

Mr. Keenan: Yes. Was there some question asked of this witness?

The Court: He was asked to read it.

Mr. Keenan: I have no objection to that.

The Court: Proceed.

A. (Reading) Paragraph 19, Major (1055) Walter V. Radovich, 0416891, Air Corps. Relieved from assignment

duty AAF, RS No. 3 Assigned and will proceed Headquarters, First Air Force, Mitchel Field, New York, on or about 4 August 1944 (Requisition RS——

Q. That is unimportant.

The Court: You do not need that.

Q. Will you state the caption of that order, showing the headquarters and date of its issue, please? A. Yes, sir. (Reading) Headquarters, Army Air Forces, Redistribution Station No. 3, Santa Monica, California. 3 August 1944, special orders No. 201, paragraph 19.

2291

Mr. Ansell: I have no further questions of this witness at this time, sir.

The Court: Does anyone else have any questions?

Mr. McGohey: Will your Honor excuse me just a moment, sir?

The Court: Yes.

*Cross-examination by Mr. McGohey.*

Q. Captain, do you have an order there issued at Mitchel Field at or about the time that Major Radovich arrived there, an order directed to Major Radovich or to anyone else, concerning Major Radovich? A. No, sir.

Q. Haven't you an order there some time——

2292

Mr. Ansell: Mr. McGohey, might I interrupt you, sir, to make this suggestion, and also to his Honor: There were introduced in the independent issue before this Court a good many orders having to do with the subject about which you are now going to interrogate this witness. At that time, as I remember, the United States Attorney stipulated with us that they could be read into the record for that purpose, and the ques-

tion that I am asking now is whether for the present purposes these records might not again be read before the jury?

Mr. McGohey: Oh, yes, I want everything, all of this.

Mr. Ansell: You will pardon the interruption. I thought that is what you were going to adduce out of this witness, and we might save time by proceeding——

Mr. McGohey: Do you want to take the witness again and put them in General?

Mr. Ansell: No, I thought we would do it just as we did before, 2294

Mr. McGohey: Let me read from these?

Mr. Ansell: Well, I was going to introduce them. It makes no particular difference, but I introduced them before and I had hoped that I could introduce them by the same stipulation here before the jury.

The Court: Have you a stipulation?

Mr. Ansell: We had one in the independent issue trial, sir. We have not here.

Mr. McGohey: Your Honor understands that I understood when the General said he had no further questions of the witness that he was through with this subject and with this witness.

Mr. Ansell: I am.

Mr. McGohey: Do I understand now that the General now wants to stipulate to read to the jury all 2295 of those orders affecting the confinement and release from confinement?

Mr. Ansell: That is right.

Mr. McGohey: That were put in in the special proceeding?

Mr. Ansell: That is right.

Mr. McGohey: Your Honor, I am perfectly willing to stipulate that and have the General proceed.

The Court: All right.

Mr. McGohey: Your Honor, right in the transcript——

The Court: We will take a ten-minute recess, ladies and gentlemen.

(Short recess.)

Mr. Robb: If the Court please, we have talked this over and we have agreed with Mr. Wallace and Mr. McGohey that these papers may be read to the jury as they are now.

The Court: Very well. Proceed.

Mr. Ansell: "August 10, 1944. Subject: Confine-
2297 ment of Major Walter V. Radovich. To Commanding Officer, Mitchel Field, New York.

"1. On August 9, 1944, the Commanding General directed that the above officer be confined at your base pending trial by general court-martial for violation of the 95th and 96th A. W."—meaning articles of war.

"2. The Commanding General directs that Major Radovich be kept in confinement until further notice.

"(Signed) Charles H. Caldwell, Brigadier General, General Staff Corps, Chief of Staff."

The second document is an endorsement on that document and is as follows:

"Subject: Confinement of Major W. V. Radovich. To the Commanding General, First Air Force.

"1. Reference is made to letter your HQ"—Head-
2298 quarters—"above subject on file dated August 10, 1944.

"2. It is advised the subject officer was confined 9 August 1944 and remains in confinement as directed.

"(Signed) Douglas Johnston, Colonel, Air Corps, Base Commanding Officer."

The third communication is dated September 16, 1944.

"Subject: Confinement of Major W. V. Radovich.

"To Commanding General, First Air Force.

"Pursuant to instructions of the Commanding General, First Air Force, contained in letter dated 10 August 1944, the above officer is still being held in confinement.

"(Signed) Douglas Johnston, Colonel, Air Corps, Base Commanding Officer."

The fourth communication is dated September 16, 1944.

"Subject: Release from confinement.

"To Commanding Officer, Mitchel Field, New York.

"1. Effective this date, Major W. V. Radovich will be released from confinement and placed under administrative restriction. 2300

"2. The limits of the restriction will be Mitchel Field, excluding the officers' club, base operations, the flying field (and line).

"3. The limits of the restriction will be carefully explained to Major Radovich.

"(Signed) F. O'D. Hunter."

The fifth communication, September 17, 1944.

"Subject: Administrative restriction.

"To Major W. V. Radovich.

"1. Pursuant to confidential letter Headquarters First Air Force, 16 September 1944, F. O'D. Hunter, Major General, United States Army, Commanding:

"You, Major W. V. Radovich, are hereby released from confinement and placed under administrative restrictions. The limit of the restriction will be Mitchel Field, excluding the officers' club, base operations and flying line. 2301

"(Signed) Douglas Johnston, Colonel Air Corps, Base Commanding Officer."

The first endorsement on the communication just read is as follows, first endorsement:

"Receipt and understanding of basic communication acknowledged.

"(Signed) W. V. Radovich, Major, Air Corps."

The next communication is this:

"Major Radovich was released from confinement and placed in administrative restriction by explaining contents of the attached letter and obtaining his signature to the first endorsement. This done in presence of Captain Chase, M. C."—Medical Corps, I suppose—"and Major John Miller, between 10.30 and 10.45, 17 September 1944, Ward 15, New Cantonment Hospital."

That is signed, "Reuben Fingold, Captain, Air Corps."

The next communication, the seventh, dated January 2, 1945. "Subject: Release from confinement, Commanding Officer, Mitchel Field.

2303

"1. Reference is made to letter (confidential) this Headquarters above subject 16 September 1944.

"2. Major W. V. Radovich will be informed that the restrictions imposed by paragraph 2 of letter referred to with the exception of the officers' club, is removed.

"3. He will further be advised that he will secure the personal permission of the Base Commanding Officer prior to his departure from the limits of the Air Base at any time."

That is signed "Frank O'D. Hunter," with some omissions, doubtless meaning Commanding General, Mitchel Field, Air Corps.

2304

Mr. McGohey: Your Honor, that is not entirely all that was read into the record at the hearing the other day. I understood our agreement just before the recess was that we were going to read into the record all the things that were read into the record the other day.

Mr. Ansell: Your Honor, that was not my understanding and I hope, if the United States Attorney is going to make the issue that I contemplate he is

going to make, that the entire subject which was presented in evidence before your Honor upon the independent hearing may not be discussed in the presence of the jury.

The Court: I think that is a proper suggestion. Do you wish to offer further——

Mr. McGohey: Yes, your Honor, I wish to offer the——

Mr. Robb: Just a minute. May we approach the bench on this, your Honor?

The Court: All right. Let the jury retire.

(The jury left the courtroom.)

The Court: All right.

2306 Mr. McGohey: I wish to tender at this time, your Honor, the communication dated 21 August 1944, "Subject: Request for resignation," which was a communication to the Adjutant General through military channels by the defendant Major Radovich, and the endorsements to that communication which were read into the record the other day.

Now, I understand that the purpose of the tender, the purpose, rather, of the evidence which is now being presented to the jury is so that they may have before them for their consideration all of the facts and circumstances surrounding the confinement and the general treatment of Major Radovich at Mitchel Field to consider in determining what weight, if any, they are to give the statement that was introduced 2307 in evidence by the Government, by Major Radovich, that is, the statement by Major Radovich which was introduced in evidence.

Now, since any part of that subject has been opened to the jury, I am of the opinion that the whole thing ought to be presented to them, and I so understood that to be our stipulation prior to the recess.

Mr. Ansell: Mr. Robb participated in the stipulation. I didn't know that that was the stipulation, but of course I am sure that we will have a mutual understanding about that, your Honor. However, I wish to make this statement to your Honor. I was presenting this very document in evidence——

The Court: Which very document?

Mr. Ansell: The ones that we have just read, in a sheaf. And the United States Attorney agreed then and there that they should be entered into evidence, and your Honor was then hearing, as you know, the independent issue. As I was about to finish that,
2309 and I state frankly to Mr. McGohey that I had not intended to put in the last sheet of that sheaf of papers, but Mr. McGohey did say to me, "Shouldn't you read all of it?" and I have no doubt that I said, "Yes, let it go in." Now, that was the first mention made of the tender of Radovich's resignation for the good of the service, as I remember it.

Now, what we were engaged in then was setting up a general picture by which we were endeavoring to cover everything from the time that Major Radovich was confined there up until the time he had made the statement to Mr. Flynn. So that did come in for discussion after that, That was upon that issue. I do not feel, I certainly don't feel that that tender of
2310 resignation for the good of the service ought to be presented to this jury, and I think it would be prejudicial if it were presented.

The Court: Well, let us proceed in order. Mr. McGohey says that he understood that you stipulated and agreed with him that all of this evidence, including the resignation and endorsements, were to be put into evidence in the same fashion, or in substance, as they were heard on the independent issue.

Do I understand you to say that you gentlemen did not agree or did not understand that you were making any such stipulation?

Mr. Robb: That is correct, if your Honor please. Might I be heard on that, inasmuch as I am the one who talked to Mr. Wallace? It is my understanding when we started our discussion that we were merely attempting to get in the record the orders respecting the dates of confinement of the defendant Radovich. After we had discussed that, Mr. Wallace suggested that he would also want to put in these records pertaining to the tender of the resignation, and I told Mr. Wallace then that we would agree that those were 2312
the records but we of course want to save our objection to their relevancy and materiality. Isn't that correct, Mr. Wallace?

Mr. Wallace: Yes, that is correct.

Mr. McGohey: Your Honor——

The Court: Just one second. Then do I understand that your position is that you did not stipulate that the resignation and endorsements should go into evidence, and that if they did you would object to them?

Mr. Robb: Yes. We were more interested in the data concerning the confinement of the defendant.

The Court: Just on the matter of whether there was a binding stipulation, have you any——

Mr. McGohey: Your Honor, I won't press that. 2313
This was in a hurry, with the jury going out, and if General Ansell and Mr. Robb say that they did not intend to so far stipulate, then I am not going to press that. I certainly do not intend to charge bad faith on anybody's part.

Mr. Robb: I understand that.

Mr. McGohey: I am willing to rely, your Honor, on the more fundamental point.

The Court: All right. Then we will consider that there is no stipulation and take up the question of whether the resignation and the endorsements are admissible in evidence at this time, and I will hear you on that.

Mr. McGohey: Now, your Honor, as I said, these circumstances surrounding the confinement of Major Radovich, the type of confinement, the length of it, the first change when he was released from the hospital to the limits of the field and then thereafter relieved of that, as I understand it, are being introduced, as I said before, for the purpose of having
2315 that before the jury in their consideration of the weight to be given to the statement. In other words, the effect.

The Court: It is upon that basis that I am admitting the testimony.

Mr. McGohey: Yes. Now, one of the things that happened to Major Radovich at that time, and one of the things that your Honor will recall, was, on the argument in the proceeding on the admissibility of the statement, the fact that a resignation had been tendered by Major Radovich, that it had been held up for some time, or that the final determination by the War Department had been held up before it was announced to him. I say that the whole story of that resignation, the resignation itself, the endorsements attached
2316 thereto, are all part of the period of confinement which is now being described to the jury. And since we have gone into any part of it, we ought to go into all of it.

The Court: I have this thought about it. Of course, the defendant put it in on the independent issue——

Mr. McGohey: Yes.

The Court: —and there was no objection by the Government. I don't think, by putting it into evi-

dence on the independent issue of the admissibility of the statement, that the defendant has in any way waived his objection to its introduction in testimony generally. So it really comes squarely up against the proposition whether or not the resignation and the endorsements thereon are admissible into evidence as against this defendant, and as to that I must confess I have pretty grave doubt. The circumstances under which the resignation was tendered do not appear to me, under what circumstances he tendered his resignation have not been shown, and it would seem to me that the introduction of his resignation by the Government would be for the purpose of introducing what 2318
tends to be an admission because the resignation, certainly the endorsements thereon, do contain some very damaging statements to this defendant. And without the circumstances of the making of the application being shown, it seems to me difficult for the Court to say that it is admissible. Besides, if the resignation went in, certainly it would mean that the endorsements should go in.

Mr. McGohey: I intended to offer them.

The Court: That gives me even more trouble, whether the endorsements are admissible. The endorsements of course are official records. But they are statements of opinions and conclusions made by persons who are not here as witnesses and subject to cross-examination. It gives me great concern whether 2319
statements of that kind, made outside of court and by persons who are not subject to cross-examination, and as expressions of their conclusions and opinions upon evidence which is not here—it seems to me to be very doubtful that it would be proper to admit them.

Mr. McGohey: Your Honor, I assume that counsel for Radovich will argue strenuously, as they have

before, your Honor, that the whole circumstance of the confinement tended to make this statement involuntary, and tended to make any subsequent statement based on the September statement involuntary. And one of the things I assume they are going to argue, as they did before your Honor, is that here was this man held, as they say, from August until some time the following June before he was served with court-martial charges——

The Court: No.

Mr. McGohey: —and that that was unreasonable.

The Court: They haven't gone into that. If they
2321 did, that might put a different complexion on it.

Mr. McGohey: That is what I am thinking about, your Honor, because certainly one of the circumstances surrounding the delay in the bringing of this man to trial on court-martial charges was this resignation that was offered in 1944 and rejected in March, 1945, right during the period when this man gave the two statements, one in September and one in March. If that issue is going to be excluded and not pressed before the jury, then that makes a difference in whether or not I want to offer this. But if I am going to be confronted with an argument that this man was laid hold of and thrown into some kind of jail, as it is called, and then dragooned around that field, and all the time wondering whether he was going
2322 to be charged with anything or not, when all the time it is in the record that he submitted his resignation and that the Commanding General, who has been said to have been very unduly harsh with him, was recommending the acceptance of the resignation on the ground that a gallant soldier of this kind, having confessed his error, ought to be given an opportunity of rehabilitation, I think all those facts ought to be brought before the jury.

The Court: If, as and when the case gets to the situation which you suggest, then I might admit the resignation, but it has not reached that. A great many things you have said have been argued in support of the defendant's motion to exclude the admission, but there is no evidence of that kind before the jury here.

Mr. McGohey: Well, your Honor, I am afraid if that comes up in summation it is going to be too late for me to do anything about it.

The Court: Yes, but there has been no proof or allegation of any undue delay in bringing this man to trial. 2324

Mr. McGohey: Do I understand then, your Honor, and I am not trying to fence with you, that I may reoffer it at such time later on as I think it is material and relevant?

The Court: Yes, sir. You may reoffer it if you are so advised, on cross-examination of the witness or in your rebuttal, and I will consider it then. I am disposed not to admit it now.

Mr. McGohey: Very well, your Honor. I won't press it further at this time.

The Court: I say, in the posture of the case as at present, although it is a novel question to me—I did not anticipate it when the examination of this witness started, and I haven't had a great deal of time to think about it, but I am certainly not definite in my opinion that you have a right to admit it certainly at this time. 2325

Mr. McGohey: Well, I shan't press it any further.

The Court: So I am not going to permit it to be admitted now. But of course you have leave to offer it later if you are so advised.

Mr. McGohey: Now may I ask, just so that we can get straightened out, if the time comes when I do offer

it, in the event that your Honor at that time should admit it, may we now agree with counsel that what appears in the transcript may be read rather than bringing this man back?

Mr. Robb: We have already agreed to that, Mr. McGohey.

Mr. McGohey: So that is all right.

Mr. Robb: Surely.

The Court: And also let me direct counsel that if the Government does wish to offer it, to take it up with me in the absence of the jury. I wouldn't want you to say, and I am satisfied that you would not, in
2327 the presence of the jury, that "I now offer evidence of the defendant's resignation." I know you would not do that.

Mr. McGohey: No, I would not do that, your Honor, for two reasons, first, I don't think it would be fair, and then I am sure your Honor would take me in hand at that point promptly.

The Court: Well, that is conceivable.

Are there any further questions of this witness?

Mr. McGohey: No, your Honor, I have no further questions.

The Court: All right, call another witness.

Mr. Ansell: Are you through, Mr. Keenan?

Mr. Keenan: No, I have not any further questions.

Mr. Robb: If your Honor please, I understood from
2328 Mr. Keenan that he might want to call this witness back as part of his case. Is that right?

Mr. Keenan: Yes, he has some records.

Mr. Robb: I assume the witness will be here then.

The Court: Yes. All right, call the next witness and call the jury in. Whom will you have next?

Mr. Robb: Mr. Keenan.

Mr. Keenan: Do you want to call me?

Mr. Robb: Yes.

The Court: Do you mean that you are calling Mr. Keenan as a witness?

Mr. Robb: Yes, sir, on one particular point.

The Court: All right.

(The jury returned to the courtroom and the following proceedings were had in the presence of the jury:)

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JOSEPH B. KEENAN, called as a witness on behalf of defendant Radovich, being first duly sworn, testified as follows: 2330

*Direct examination by Mr. Robb.*

Q. Mr. Keenan, you are the same Joseph B. Keenan who is counsel in this case, for the record? A. Yes.

Q. And how long have you been a member of the bar, sir? A. Since 1913—1914.

Q. Have you also held certain official positions? A. Yes. I was the Assistant Attorney General of the United States from 1933 to 1936, in charge of the Criminal Division. I was then the First Assistant to the Attorney General of the United States from 1936 to 1939, when I returned to private practice.

Q. Mr. Keenan, in the course of your preparation for this trial did you interview Colonel Jacobson, who testified 2331 here on behalf of the Government? A. I did.

Q. About when was that? A. I would place it some time in the month of July.

Q. Of what year? A. Of 1945.

Q. Mr. Keenan, upon cross-examination in response to certain questions by me Colonel Jacobson testified that he had a conversation with the defendant Radovich in the hospital at Mitchel Field in which conversation the de-

fendant Radovich told Colonel Jacobson that he had received some money, without mentioning the amount, from the Bayers and Colonel Jacobson testified that he told you about that conversation with the defendant Radovich. Let me ask you, did Colonel Jacobson ever tell you about that conversation?

Mr. McGohey: I object to this, your Honor, on the ground that it is improper examination. They are trying now, as I see it, to contradict something which they brought out from the witness on cross-examination.

2333 The Court: I will overrule the objection.

Q. Did Colonel Jacobson tell you that? A. He talked to me about a conversation with Major Radovich.

Q. Yes, sir, but did he tell you that Major Radovich had ever told him that he had received any money from the Bayers? A. He did not.

Mr. Robb: That is all, thank you.
The Court: Any cross-examination?
Mr. McGohey: I have no questions.
The Court: Stand down. Call the next witness.
Mr. Robb: I will call Mr. Levy.

2334

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WASHINGTON IRVING LEVY, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

*Direct examination by Mr. Robb.*

Q. Mr. Levy, for the record, you are the same Mr. Levy who is of counsel in this case? A. Yes, sir.

Q. How long have you been a member of the bar, sir? A. Somewheres around ten years.

Q. And have you also held certain official positions? A. Yes, sir.

Q. What were they, please? A. Well, I was in the Criminal Division of the Department of Justice, Claims Division.

Q. How long? A. Somewheres around three years.

Q. Mr. Levy, let me ask you whether or not you were present when Mr. Keenan, who just testified, interviewed the witness Jacobson? A. I was.

Q. About when was that? A. During the summer, somewheres around July or August; the latter part of July, 2336
maybe.

Q. Let me ask you whether or not the witness Jacobson in that interview ever told you or Mr. Keenan in your presence anything about a conversation in which Major Radovich had told him, Jacobson, that the defendant Radovich had received some money from the Bayers?

Mr. McGohey: I object to that, your Honor, on the ground that I urged before, that it is impeaching their own witness.

The Court: Overruled.

A. Well, I remember he spoke of a conversation with Major Radovich, but I don't recall him saying anything about money that Major Radovich received. 2337

Mr. Robb: That is all, thank you.

Mr. McGohey: No questions.

The Court: Stand down. Call the next witness.

(Witness excused.)

Mr. Ansell: Sergeant Kelly.

VINCENT JOSEPH KELLY, recalled on behalf of defendant Radovich, having been previously duly sworn, testified as follows:

*Direct examination by Mr. Ansell.*

Q. Mr. Kelly, may I ask you, sir, what your present position is? A. I am a detective of the Nassau County Police Department.

Q. And I caution you to raise your voice at least so that I can hear. Did you serve in the Army during this war now ended or about to end? A. Yes, sir, I did.

2339 Q. Where did you serve? A. I was stationed at Mitchel Field.

Q. How long did you serve there? A. At Mitchel Field?

Q. Yes. A. Oh, about a year and a half.

Q. From what time to about what time? A. April, 1943, I was sent to Mitchel. Then I went down to Miami for a while and then I came back to Mitchel. I don't know the exact dates offhand.

Q. Were you discharged from Mitchel? A. Yes, sir—well from Mitchel to Fort Dix.

Q. Were you serving at Mitchel Field in the months of August and September, 1944? A. Yes, sir, I was.

Q. How long have you been a police officer, Sergeant? A. Seventeen years.

Q. And you were a police officer then, of course, before
2340 you entered the Army? A. Yes, I was.

Q. And after you had been discharged you went back to your old job as a police officer? A. Yes, I did.

Q. And your present rank is what? A. Detective, Nassau County.

Q. While you were serving at Mitchel Field, will you please state what your duty was? A. I was an investigator in the Provost Marshal's office, in charge of all the investigators in the office.

Q. Do I understand from that that you were the chief investigator for that office? A. Yes, sir, I was.

Q. May I ask you, sir, if in the months of August or September, 1944, you came to see and know the defendant here, Walter V. Radovich? A. Yes, sir, I did.

Q. Will you relate the circumstances surrounding the occasion when you first saw him? A. I was assigned by Major Anthony, the Provost Marshal of Mitchel Field, to act as a guard for Major Radovich while he was confined to the hospital and to take him out daily for exercise in and around the hospital grounds.

Q. Do I understand that when you first saw him it appeared that Major Radovich had been in the hospital 2342
some time or not? A. I believe he was in there about two weeks before I took over.

Q. I wish you would state specifically, if you can, what your duty was with respect to taking Major Radovich out for exercise, the way you put it? A. Well, sir, I would report to the hospital and the Major would either get dressed or he would be dressed and I would take him out of ward 15 and we would walk around, and probably be out an hour, maybe an hour and a half, and then I would return him to the particular ward where he was confined.

Q. Would you tell me whether you went over there and took him out daily? A. No, sir. There were days that I could not make it, that I could not get over there. The understanding was that if I was busy he would miss out 2343
on his exercise.

Q. If you were busy doing something else? A. Yes, sir.

Q. Then you did not go? A. That is right, sir.

Q. When you did go, did you go at some particular hour or was an hour prearranged? A. Well, it was prearranged. I was supposed to get over there some time after lunch, but sometimes it would be a little later when I would get there.

Q. When you went over and saw Major Radovich, as you saw him frequently thereafter, what ward in the hospital, if you know, was he confined in? A. He was in the psychopathic ward.

Q. Had you been familiar with that ward before or did you acquire some familiarity with it as you went over in the performance of your duty with respect to Major Radovich? A. It was after I had gone over to pick him up. I did not know too much about the ward before that.

Q. May I ask you, sir, if you please, to describe this ward 15, the psychopathic ward?

2345 Mr. McGohey: I object to this as repetitious, your Honor. We have had that already.

The Court: I will let him testify. Go ahead.

A. The ward was a wing of the hospital in Santini, and when you came into it there were two or three rooms, reviewed by the doctor in charge and nurse in charge, and those rooms were separated from the ward itself by a door, a grilled door, a steel door of some kind. And you would be admitted by an attendant. They would open the door just like a regular jail door. And there were rooms on each side of a hallway extending down, and the Major was confined in the room on the right. I think it was the second room on the right.

Q. How large was the room in which Major Radovich
2346 was confined? A. Well, as I recall, the room was just deep enough to take a bed, and while it might have been 10 feet wide, 9 or 10 feet wide, something about that, and about, well, maybe 7 feet deep, of course the bed would just fit in on the one side, and I think there may have been a little bit of room at the foot of the bed, but not too much.

Q. What kind of a bed was it? A. I believe it was a hospital bed, a regular hospital bed.

Q. When you took Major Radovich out to walk around were you under arms? A. Yes, sir, I was.

Q. Do you know whether Major Radovich could get out of this ward 15 except when you, his guard, took him out? A. I don't believe he could get out unless he was taken out by some officer from the First Air Force, but the way I understood the orders, I was the only one who was supposed to take him out.

Q. And, so far as you know, you were the only person in military authority who did take him out? A. Yes, sir, as far as I know.

Q. Was he permitted to go anywhere, so far as your orders over him were concerned, without your going with 2348
him armed? A. No, sir, he wasn't permitted. He was confined to the base.

Q. To the base? A. Well, I mean to the area surrounding the hospital.

Q. Yes. A. And I had to be with him, and, naturally, I couldn't let him go, and I would return him to the ward and put him back in there, and then I was through, once he was back in under the care of the attendant.

Q. Had he wanted to attend divine service as mass, you would have to accompany him under your orders? A. Yes, sir, I would have.

Q. And you would have had to be armed, is that right? A. Yes, sir.

Q. When you came into contact in the relationship just 2349
stated with Major Radovich, will you tell me whether he was taking his confinement there contentedly or complainingly, or how? A. Well, he was complaining about his confinement and he wanted to get an attorney and he wanted to be released, and he made quite a strong complaint. I submitted that complaint to Major Anthony, and he took the necessary steps, and some time later I believe the Major was released.

Q. He was released? A. Yes.

Q. You do not know anything about his getting an attorney as a result of his complaint to you and you to Major Anthony? A. Yes, sir, a Mr. Bradspies went over to see him and I don't know whether Mr. Bradspies represented him. I don't believe he did. He just went over to talk to him. I don't believe he was the attorney.

Q. Do you remember upon one occasion when you went over for the purpose of taking Major Radovich out to walk that you found there, or there came in while you were there, you encountered there, an Army officer and two gentlemen in civilian clothes? A. I saw two men in civilian clothes, but I don't recall any Army officer being there.

2351 Q. Did you know at that time who those gentlemen in civilian clothes were? A. No. Major Radovich informed me that they were F.B.I. agents there to talk to him and that he would not be able to go out with me that day, that they wanted to talk to him.

Q. He at that time, as I understand it, was about ready to go out to you to walk? A. Yes, sir, that is right.

Q. And he was in uniform? A. Yes, sir, he was.

Q. And he then informed you, when you came in to take him out to walk, that some F.B.I. agents were there and he could not go with you, is that correct? A. Yes, sir, it is.

Q. Was there an occasion, Sergeant, when some question was raised or orders were given as to removing the medals, the decorations, from Major Radovich? A. Yes, sir. Or-

2352 ders came from somewhere—where I don't know—for Major Radovich to remove his decorations, and Lieutenant La Plante, Assistant Provost Marshal of our office, went over to the hospital. I drove him over, and we went in and Lieutenant La Plante advised the Major of these orders and that he would have to remove the decorations. And the Major refused to do so and Lieutenant La Plante then returned to our office and he advised Major Anthony. I believe Major Anthony himself went over later, whether

the same day or the next day, I am not sure which. I didn't go with the Major when he went over.

Q. But you did go with La Plante when he went over? A. Yes, I did.

Q. Did La Plante have the order with him? A. He had it in writing, yes.

Q. Did he read the order to Major Radovich, do you know? A. I believe he handed it to the Major to read, because it had to be endorsed by the Major's signature, which he refused to do.

Mr. McGohey: Keep your voice up.

The Witness: He gave the letter, I believe—he gave it to the Major to read, which required the Major's signature, and the Major refused to sign it. 2354

Q. You mentioned Mr. Bradspies. As I understood your testimony, and it may not be right, it was you who suggested to Major Radovich that Mr. Bradspies might serve? A. Major Radovich knew Mr. Bradspies and mentioned his name, and wanted to know whether or not Mr. Bradspies would represent him, and I gave that information to Major Anthony that way.

Q. What was the rank of Mr. Bradspies? A. He was a warrant officer, junior grade.

Q. So far as you know, then, during the time of your visit there, which I assume continued until Major Radovich was released from confinement in that hospital, Major Radovich, so far as you saw or knew, had no assistance of counsel? A. No, I don't believe he did, no, sir. 2355

Q. My understanding of the little room in which Major Radovich was confined is that there was a steel grill over the one window at the one end of the room opposite the door, is that correct, sir? A. Yes, sir, it is.

Q. Well, describe briefly that steel grill. Tell us what it looked like. A. My recollection of it is that it was in

the form of a mesh, a steel mesh, probably, well, not as thick as a pencil; thinner than a pencil. I wouldn't know what the diameter is. I would say a trifle thinner than a pencil. It was just a regular mesh, and I believe it was fastened inside by a lock in a casement on the side of the window. I'm not too sure on that.

Q. Then the grill that we have been talking about was sort of diagonal so as to make diamonds between? A. That's right.

Q. About what size would be the diamonds, if you can estimate? A. I would say about an inch.

Q. Do I understand that this grill was set in a frame
2357 and the frame was locked to a stanchion or something on the door frame or the concrete that constituted the window frame?

Mr. McGohey: I object to the leading character of this question, your Honor.

Mr. Ansell: All right.

Q. May I ask you whether or not, or how this grill opened and shut, if it did, and how it was fastened to the walls in which the window was placed? A. I believe it was set in a framework, a steel framework, and it was fastened by a lock, I believe a lock and a hasp. And I don't know who had the keys for that; probably the hospital attendant.

2358 Q. Was there a screen for the purpose of keeping out insects on that window?

Mr. McGohey: We have been all through this description of the room with another witness, your Honor.

Mr. Ansell: By another witness, your Honor.

The Court: I will permit the question. Was there a screen?

The Witness: Yes, the screen was there for the purposes of confinement, to keep anybody from getting out. That was the purpose of it.

Mr. Ansell: Probably I got mixed in the colloquy with Mr. McGohey. I was interrogating about a screen to keep out insects?

The Court: He answered your question with reference to the screen which he has been describing. You were asked if there was also an ordinary screen such as people use to keep out insects?

The Witness: I believe there was; yes, sir.

Q. Was that on the inside of the steel grill or was it outside? A. Outside. 2360

Q. How would you describe the floor of this room? What was it made of? A. I believe it was linoleum. I'm not sure on that.

Q. Linoleum on concrete or linoleum clear through, or what? A. Oh, it was a concrete floor. I believe the whole building is concrete or stone.

Q. With linoleum on the floor? A. I believe so.

Q. How about the walls of the room, what were they made of? A. Well, stone or concrete; they weren't wood.

Mr. Ansell: Mr. McGohey, you may take the witness.

The Court: Do you wish to cross-examine?

Mr. McGohey: Yes, sir, your Honor. 2361

*Cross-examination by Mr. McGohey.*

Q. Now, Detective Kelly, directing your attention to the day that you saw two civilians in the room with Major Radovich when you came to take him out, you found out from Major Radovich when you came over that these were agents of the Federal Bureau of Investigation, did you not? A. Yes, sir, I did.

Q. Now, am I correct in this: that your testimony is that Major Radovich told you that these men were F.B.I. agents? A. I don't know if he used those exact words, but that's what I understood them to be. I believe he said from the F.B.I. or they were agents, or they are F.B.I. agents.

Q. He indicated to you that they had some connection with the Federal Bureau of Investigation? A. Yes, sir.

Q. And did Major Radovich say that he did not want to go out? A. No, sir, he didn't. He said he had to stay there, that they wanted to talk to him; that he wouldn't be able to go out with me.

2363 Q. By that did you intend to convey to the Court and jury that these agents were preventing him from going out? A. No, sir, I did not.

Q. As a matter of fact, you know that the Federal Bureau of Investigation did not have any jurisdiction in that hospital? A. That's right, yes, sir.

Q. They would not have any power to say whether an inmate there could go or come, would they? A. That is correct.

Q. As a matter of fact, if Major Radovich had insisted on going out that day with you, you would not have permitted the agents to prevent him from going, would you? A. That is correct.

Q. Your testimony is that when you took the Major out you walked him around in the hospital area? A. Yes.

2364 Q. How big was the hospital area? Would you be able to estimate that for us? A. Well, there are quite a few acres in the entire grounds, and the hospital is only part of it. The other part of the grounds is used for barracks and other organizations doing business. The actual hospital grounds itself might have been say an acre or two acres, roughly. I mean, that's the entire building and all.

Q. When you went out on these walks with Major Radovich did you walk constantly while you were out? A. No,

we didn't. We would go down—there was a shaded area down there near a stream that runs through the grounds, and we would sit around there and talk.

Q. And smoke? A. And smoke, yes, sir.

Q. Did you talk? A. Yes, sir.

Q. Did the Major ever talk about this case? A. No, sir, he didn't go into details, other than that he was in a little difficulty and, naturally, which I knew.

Q. Well, what did he say about the difficulties? A. He said he didn't care to talk about it.

Q. Did he ever say anything about getting money from the Bayers?

2366

Mr. Ansell: I object, your Honor. I think there ought to be a reasonable compliance with the scope of the direct examination.

The Court: He is on cross-examination. I will permit the question.

A. No, sir, he didn't.

Q. Well, now, you testified that he did complain about his confinement? A. Yes, sir, he did.

Q. And did he complain that he was not getting a lawyer? A. That is right. He wanted a lawyer.

Q. At the time that he was making that complaint did he talk to you about the case? A. No, sir, I believe the Major thought I knew more about it than I did, because when I came over there he said, "I suppose you know why 2367
I am in here, don't you?" I said, "No, I don't." And I didn't know.

Q. Didn't he at that time tell you why he was in? A. No, sir.

Q. How many times did he talk to you about this Mr. Bradspies? A. Once or twice, I believe.

Q. Was it the first time or the second time that you conveyed his request that Mr. Bradspies be assigned to him to Major Anthony? A. The first time.

Q. Did he tell you why he wanted to talk to Mr. Bradspies? A. He said he wanted counsel, he would like to have somebody represent him, somebody to talk to.

Q. About what, did he say? A. About his case.

Q. But he never talked to you any more than that, about the case? A. No, sir.

Q. Did he mention the Bayers to you at all? A. No, sir, he did not.

Q. In any conversation? A. No, sir.

Q. Now he mentioned Mr. Bradspies to you, did he not? A. Yes, sir.

Q. Did he say to you that he would like to see Mr.
2369 Bradspies? A. Yes, sir, he did.

Q. Then thereafter you conveyed that to the Major? A. I did.

Q. And then thereafter Mr. Bradspies came to see him, did he not? A. Yes, sir, he did.

Q. Do you know whether or not Mr. Bradspies saw him prior to the day when you saw the two F.B.I. agents in the room? A. I think it was prior to the day I saw the two agents.

Q. That Mr. Bradspies was over to see him? A. Yes.

Q. When was the last time that you saw Major Radovich at Santini Hospital? A. I am sorry, I can't answer that. I don't know the dates.

Q. Well, would you say it was some time in September, 1944? A. It could be. I don't like to pin myself down
2370 because I am not sure.

Q. I am asking for your best estimate. A. It could be.

Q. Would you say it was as late as October? A. I am sorry. I can't give you any dates on it.

Q. Well, if I suggest to you that the official records at Mitchel Field indicate that he was released from that hospital some time in the middle or latter part of September, would that refresh your recollection? A. Well, if the records so indicate, then I saw him at that time.

Q. Well, then, may I ask you this: there did come a time, in any event, when he left Santini Hospital? A. That is right, sir.

Q. Did you ever see him on the post after that? A. Yes, sir, I did.

Q. Can you tell us when you saw him? A. Oh, I would see him frequenly because he had to report to our office; we had to know where he was all the time, and he had to call up and let us know where he was. That was in case he was wanted by somebody from the First Air Force. In other words, he was under a restriction; he was just released, but he was restricted to the base unless he had permission to leave. 2372

Q. Did you ever see any order about that? A. I don't believe I did. I believe I was advised that that was the order, but I don't think I saw it; I don't recall seeing it.

Q. Do you know whether there was any order that provided any terms that he had to keep in telephonic or other contact with the Provost Marshal's office? A. I didn't see the order. But all I know is that I was told that that is what he had to do, and he did call; he used to call two or three times a day.

Q. By whom were you told this? A. Major Anthony.

Q. You were a Sergeant at that time, were you? A. Yes, sir, I was.

Q. You were the chief investigator in the Provost Marshal's office? A. That is right.

Q. You had access to the files and orders, did you not? 2373
A. Yes, sir.

Q. Can you tell me whether at this period subsequent to September, 1944, there was any other officer or enlisted man at Mitchel Field who was under similar restrictions to Major Radovich? A. I can't recall offhand.

Q. But you do remember him— A. Yes, sir.

Q. You remember Radovich? A. Yes, sir, I do.

Q. Was there anybody else that was calling up, as you say Radovich was? A. Oh, no, sir, he was the only one called up.

Q. But you never saw any order providing that he had to do that, did you? A. No, sir, I did not.

Q. Can you tell us approximately how big the base at Mitchel Field is? I am not limiting myself now to the Base Headquarters area; I mean the total area of Mitchel Field. A. Well, Mitchel Field, I believe some of the runways run about 6,000 feet, and you probably got about another half of a mile not devoted to runways. I would say maybe three square miles, two square miles.

2375 Q. Now, are there canteens on the post? A. Yes, sir, there are.

Q. Are there recreation areas? A. Yes, sir.

Q. And buildings where men recreate? A. Yes, sir.

Q. There are places where there are public telephones, too, are there not, detective? A. Yes, sir, there are.

Q. Those public telephones do not clear through any Headquarters exchange, do they? A. No, sir, they do not.

Q. Anybody going in and using those telephones can make a call as freely as a person on Broadway? A. Yes, sir.

Q. Now during this period subsequent to the Major's release from Santini Hospital, he could travel any place he wanted on that post, could he not, as far as you know? A. After he was released?

2376 Q. From the hospital. A. Yes, sir, he could.

Q. In that respect he was no different from any other officer or enlisted man on the post, was he? A. In that respect, that is right.

Mr. McGohey: I have no further questions of the witness.

2377

The Court: Any further questions, gentlemen? All right, you may be excused.

We will take a recess for lunch now, ladies and gentlemen, until 2:15.

(Recess until 2:15 P. M.)

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AFTERNOON SESSION.

Mr. Ansell: May we approach the bench, your Honor?

(The following proceedings were had at the bench not within the hearing of the jury:)

2378

Mr. Ansell: Judge, we believe our defense to be in, and ordinarily we would rest here, but there are other co-defendants here who have been sharing the time of course with us, and I had wanted, if possible, to look over the record a bit if the other co-defendants could go on without disturbing what your Honor believes to be orderly procedure. That is, specifically I don't want to rest now though I feel that I will.

Mr. Robb: You mean formally to rest.

Mr. Ansell: I mean formally to rest, of course.

The Court: Well, I think the situation could be covered all right by just letting it be noted that the defendant Radovich now rests subject to leave granted to make application to introduce further testimony at a later time if he should be so advised.

2379

Mr. Robb: I think that is entirely fair.

Mr. Keenan: I think the jury ought to be informed of that, your Honor.

Mr. McGohey: That is, just leave to make application. There is no commitment now; I understand your Honor not to be deciding that you will grant that.

The Court: Well, I have not so decided.

Mr. McGohey: That is what I say.

The Court: But I am saying in fairness that if anything develops from the Bayer case, or if counsel should avow to me that they overlooked something, or something of that sort, I would be apt to give the right to him.

Mr. Ansell: With some frankness I say, Judge, I just simply want to look over the record, if the Court can go on.

Mr. McGohey: All I wanted to make clear was, your Honor, that I am not foreclosed from interposing at the time that is made such objection as I think may be right.

The Court: That is right. I believe in reasonable attitude to everybody. If anybody avows to me that they forgot something, even if it is out of order, you can put
2381 it in.

All right. You wish me to state that to the jury?

Mr. Keenan: I think it would be wise, your Honor.

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: Ladies and gentlemen, the result of that conference was that counsel for the defendant Radovich advised me that it is their impression at this time that they have introduced all the evidence which they desire to introduce, but they desire to confer and read the record and not be foreclosed from the introduction of additional evidence if they should be of the opinion that they have omitted anything, and so I have granted them that privilege.

The defendant Radovich, subject to that proviso, now
2382 rests.

Mr. Keenan: The statement about the defendant Radovich's counsel conferring means with Radovich and his co-counsel, Mr. Robb.

The Court: Yes.

Mr. Keenan: I say that because of our close proximity at the table.

The Court: I think that everyone definitely understands that General Ansell and Mr. Robb represent Radovich

and Radovich only and you, Mr. Keenan, and your associates represent the two defendants Bayer and them only.

All right, sir.

Mr. Keenan: Your Honor, could we have this lieutenant recalled who had the 201 record?

Your Honor, I don't think it makes much difference, but I haven't completed the cross-examination of the witness who was called by counsel for Major Radovich, but I think we can go right on without——

The Court: Oh, I think so.

Mr. Keenan: There is no point in going back through it all again.

Mr. McGohey: You have not completed your cross-examination of this witness? 2384

Mr. Keenan: That is right.

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ABRAM L. WHIPPLE resumed the stand.

*Cross-examination (continued) by Mr. Keenan.*

Q. I call your attention to the eighth sheet in this file, coming down from the top, which I am unable to find bears any date. Perhaps you could help me. I don't want to disturb it because of some other comments I wish to make about the file, that is why I haven't disturbed the brads on it. A. That is referring to the basic letter dated 24-2-45. 2385

Q. 24-2-45. And that was a letter from the Infant Jesus Orphanage of Mulaganmudu, Travancore, to the A.G.O.—is that Adjutant General? A. That is right, sir.

Q. (Continuing) —stating that on February 5th they sent parcel post lace valued Rs. 3272.6 to Major Walter Radovich, A B P O 433 No. 1 Air Commandos Group, New Delhi, and would like help in collecting the debt. Is that right? A. Yes, sir.

Q. Now does the record show—it wouldn't show anything more than that? A. I can tell you about it.

Q. What about it? A. That is not the original letter. You have got to understand that military correspondence is entirely different from correspondence that is used in civilian life. That is merely a resume of what was in that letter from that organization, and all those endorsements that appear under it were endorsements that come through the office, but we keep no record of them; you just make a notation as to what was in that particular endorsement. You reply by endorsement; it may be 10 or 12. I have seen 32 endorsements to a basic letter. That is just military
2387 correspondence. You won't find anything more about that letter in this file.

Q. I find out $100 was sent there by Radovich after he got back to this country. A. That is what that endorsement says.

Q. In payment of those laces that he got from the Sisters of Jesus. A. So one endorsement states, but there is no correspondence about that in that file.

Q. This file shows about an accident that was sustained by Major Radovich when a plane crash occurred in 1941 and some people in the aeroplane with him were killed, doesn't it? A. Yes, sir.

Mr. McGohey: I object to that.

2388 Q. And shows that he suffered shock at that time?

Mr. McGohey: I object to this, your Honor, as immaterial.

Mr. Keenan: Your Honor, I want——

Mr. McGohey: It is all immaterial.

Mr. Keenan: I want to——

The Court: I am going to admit it.

Q. The record shows on the official report that out in San Anselno, California, approximately 7.30, on or about the 2nd of November, 1941, Walter V. Radovich, pilot—what does that dash 40 mean? A. No. 40 aeroplane, 40 aeroplanes.

Q. 40 aeroplanes en route from Medford, Oregon, to Fresno, California, element in flight of 13 Hughes leading period Lieutenant Speckham— A. That is a period.

Q. —leading, that is right, period. Speckham and Truax crashed and killed, Lieutenant Radovich jumped in Lucas Valley near San Raphael, broken leg and shock. Is that correct? A. Yes.

Q. There is evidence of other accidents, too, subsequent to that, isn't there? Or do you know? A. I believe this next sheet counsel is looking at refers to the same crash. I believe that is a duplicate report. 2390

Q. Then, isn't it a fact that on the 16th of March, 1942, there is a request for transfer? A. Yes, sir.

Q. With reference to Second Lieutenant Walter V. Radovich, and that the captain of the Medical Corps, the flight surgeon, certified as follows: "It is my opinion that it is to the good of the service and to the benefit of Second Lieutenant Walter V. Radovich, that he be transferred from pursuit flying to a transportation group because of his severe airplane accident of recent date." Is that correct? A. Yes, sir.

Q. That is another accident, apparently, other than the one in 1941? A. No, I don't believe it is. I believe it is the result of that accident, from reading this record. 2391

Mr. McGohey: Your Honor, I press my objection now of the utter immateriality of all this line of questioning.

Mr. Keenan: Your Honor——

The Court: I will overrule the objection.

Q. That is, the file shows that as late as March 16, 1942, it was considered advisable to transfer him from pursuit flying to a transportation group because of his severe airplane accident? A. Yes, sir.

Q. The result of that lasted that long, apparently? A. Sir, you will have to read the rest of that file with endorsements to get it correctly. You will have to read all the endorsements that go with the letter to get the true picture. This is one of them (indicating).

Q. You are calling my attention to another one on the 7th of March, 1942? A. Yes, sir.

Q. All right. I would like to read that. That is from
2393 Station Hospital at Air Base, Hamilton Field, California, Office of the Surgeon. Is that correct? A. Yes, on that stationery, yes, sir.

Q. Yes. And the subject is: "Request for Reassignment," is that correct? A. Yes, sir.

Q. And it was sent by Walter V. Radovich. He was then a Second Lieutenant, is that right? A. Yes, sir.

Q. And that is made to the Commanding General of the Fourth Air Force, San Francisco, California, through channels? A. Correct.

Q. (Reading) "1. Request that I be relieved from assignment with the 57th Pursuit Group, 65th Squadron, Boston, Massachusetts, and be assigned to the 64th Transport Group, Hamilton Field, California.

"2. The reason for this request is that I feel I will be of
2394 more benefit to the service of the Transport Squadron due to the injuries received in aircraft accident November 2, 1941, while on an authorized flight.

"3. In the event this request is approved, there will be no added expense to the Government."

Have I read the part that you think is significant, Lieutenant? A. Yes, sir.

Q. And that shows that Lieutenant Radovich himself thought——

Mr. McGohey: I submit, your Honor, that it speaks for itself.

The Court: I will sustain the objection.

Mr. Keenan: All right, your Honor.

Q. Are you pretty familiar with this file, Lieutenant, fairly familiar? A. I have read through it two or three times.

Q. Do you notice that the items therein contained do not follow in sequence from the standpoint of the dates? A. No.

Mr. McGohey: I object to this, your Honor. The condition of the file is certainly not material to this issue. 2396

Mr. Keenan: I do not know whether it is or not, your Honor. I claim it is.

The Court: Go ahead. The objection is overruled.

Q. Do you see here the tenth endorsement? Dated what, please? A. That is undated.

Q. Undated? A. Yes, sir.

Q. Is that normal correspondence, to have the endorsements undated? A. That very frequently happens.

Mr. McGohey: I object to this, your Honor.

The Court: I will overrule the objection.

A. Very frequently a piece of correspondence will be undated. The next endorsement might refer to an undated endorsement. 2397

Q. Does this— A. I will have to read the next endorsement to see what the eleventh refers to.

Q. And what do you call the next one, the eleventh? A. Yes, sir. No, it does not mention it.

Q. This tenth endorsement is—would that be before the eleventh one? A. Yes, sir.

Q. So that it is some time prior to April 25, 1942? A. Yes, sir.

Q. And we would assume in recent proximity thereto. Would that be safe, from the standpoint of date? A. Not longer than a week I should say.

Q. And that is signed by Philip G. Cochran, Captain of the Air Corps, Commanding; is it not? A. Yes, sir.

Q. And the fourth endorsement states——

The Court: The fourth paragraph.

Mr. Keenan: The fourth paragraph, thank you, your Honor.

2399 Q. The fourth paragraph states that if there is any doubt as of his physical or mental well being after his return to his squadron, then he should be transferred; is that correct? A. That is what that paragraph says.

Q. That is signed by Philip Cochran? A. Yes, sir.

Q. Have you any reason to believe that these records are not authentic?

Mr. McGohey: I object, your Honor. I submit the record speaks for itself.

The Court: Do you have any personal knowledge of the defendant Radovich?

The Witness: Not of him.

The Court: I am permitting you to testify and
2400 then to be examined just as to the records. You are the custodian of those records?

The Witness: That is true.

The Court: All right.

Q. Now, will you kindly tell me what that tenth endorsement that I just read of Philip Cochran, Captain, refers to? A. I will have to go back to the basic communication and see what the subject is about.

2401

Q. It ought to be reasonably related to the endorsement? A. Yes, sir.

Q. Please do so. A. (Witness examines papers.)

Q. It is not in the file at all, is it? A. I don't see the basic letters, sir.

Q. That is unusual, is it not, in the file to have endorsements without any basic letter attached thereto? A. No, I would not say it is unusual, sir.

Q. Well, what do these endorsements refer to? A. I have no way of knowing unless I see the basic communication.

Q. Isn't it ordinary and proper to have the basic communication or a copy thereof, to which these endorsements are attached, in order to make the file intelligible?

2402

Mr. McGohey: I object to that, your Honor. The conditon of the file is not material in this case.

The Court: I will overrule the objection.

A. I have the basic letter.

Q. All right. A. Dated March 17, 1942.

Q. Would you mind telling me what the difficulty was in locating it?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: Well, I would like to know what it is. I could not find it.

Mr. McGohey: Well, it is there.

2403

Mr. Keenan: He had a little difficulty, too.

Mr. McGohey: I object to the question as immaterial.

The Court: I will sustain the objection.

Q. What is the basic letter? A. That was the application from Walter V. Radovich for reassignment.

Q. Is that the one that we referred to before, March 17, 1942? A. I believe it is, sir.

Q. That you asked me to read? A. Yes, sir.

Q. And what is this next communication of March 16, 1942, that is between this that you have just pointed out and the endorsements to which we referred? A. That is a recommendation from a C. C. G. Porter, Captain, Medical Corps, to the Commanding Officer, Hamilton Field, that in his opinion it would be for the good of the service for then Lieutenant Walter V. Radovich to be transferred from pursuit flying to transportation group. It has nothing to do with the other basic letter that we are talking about.

2405 Q. It refers to some request for transfer, does it not? A. The flight surgeon had apparently initiated a request for transfer, or at least made a recommendation.

Q. It appears then from here that it was the flight surgeon that made the suggestion that Lieutenant Radovich quit the pursuit flying as early as March, 1942, and go to a less dangerous operation? A. It would so appear.

Q. That is because of injuries he sustained previously? A. I would not know about that.

Q. It was something that appealed to the surgeon, was it not?

Mr. McGohey: I object to that, your Honor.

The Court: Sustained.

2406 Q. Now, there was a recommendation for promotion of the major from the Air Promotion Board, and that was dated the 8th of March, 1943, is that correct? A. Yes, sir.

Q. And it was a recommendation for promotion of Captain Walter V. Radovich to the grade of Major, and that is not favorably considered by the A.A.F. promotion board because of insufficient service, is that correct? A. Yes.

Mr. Robb: Because of what?

Mr. Keenan: Insufficient service.

Mr. Robb: Insufficient service.

Mr. Keenan: Yes.

Mr. Robb: In other words, he had not served in that grade long enough.

Q. Now, I notice this, on a communication dated the 3rd of September, 1943, and it is signed by M. Carl Goetz, Major of the Air Corps, and it is addressed to whom? A. On the military correspondence the bottom line here (indicating) is the person that writes the communication. It is known as the record and routing sheet. It is addressed to Assistant Chief of Air Staff Personnel, Orders Branch.

Q. That is dated the 3rd of September, 1943, is it not? 2408
A. Yes, sir.

Q. And it has a lot of abbreviations in it? A. Yes, sir.

Q. It does say: "1. Request for so much of R and R, dated August 28, 1943, regarding Walter Radovich 041689" —that is his serial number, I take it? A. Yes, sir.

Q. Be revoked. A. Yes, sir.

Q. Now, will you tell us what R and R, dated the 28th of August, 1943, what that it? Find that for us. A. I don't see it in the file, sir.

Q. Do you have any idea where it could be, to help us? A. No, I have not, unless it is referring to another paper that went through relative to his promotion. I believe it is dealing with his promotion.

Q. What does R and R mean? A. R and R means the routing and record sheet. It is just military correspondence 2409
that is used in Headquarters Army Air Force.

Q. It means something was being revoked, does it not, by order of the Major, he was requesting that something be revoked? A. The R and R that they referred to probably had a request to have something done and this revokes that request that was in a previous R and R.

Q. Isn't it a peculiar thing to have something in the file revoking——

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: Just a minute. I would just as soon step up to the bench, but I want to finish my question first.

The Court: Go ahead.

Q. Isn't it a peculiar thing, Lieutenant, in your files to have an application for a revocation of something remaining in the file and not have the base matter in which they are discussing likewise in the file?

Mr. McGohey: I object to that, your Honor.

The Court: I will overrule the objection.

2411

A. No, sir. I tried to point out that an R and R is not an order. It is just correspondence in a Headquarters. It is not an order.

Q. Well, it is of sufficient importance that they wanted something revoked in it?

Mr. McGohey: I object to that as argumentative, your Honor.

The Court: The objection is sustained. I have permitted him to testify what the records are and to explain them and not to express an opinion.

Q. This is addressed to Orders Branch, is it not? A.

2412 Yes, sir. You read the copy and that is the original R and R.

Q. Yes, I know, but it is to the Orders Branch? A. Yes, sir; Assistant Chief of Air Staff, Orders Branch.

Q. Would it not have something to do with an order? A. Yes, sir, probably the former R and R requested Orders Branch to do something, and this R and R says to revoke that portion of it.

Q. Now we come to the next one right after it. That seems to be something that I would call a letter. Is that a letter? A. That is a letter, yes, sir.

Q. And it is on the stationery of the War Department and it is restricted, is it not? A. Yes, sir.

Q. That means that there is something secret about it? A. Not necessarily.

Q. What does the term "restricted" mean. Very briefly, in your department? A. Not for the general public.

Q. Well, your files are not for the general public anyway, are they? A. Not if there is any classification on it at all.

Mr. McGohey: I object to this line, your Honor, as immaterial.

Mr. Keenan: I would like to know a little more about what restriction means. 2414

Mr. McGohey: I will press the objection.

Mr. Keenan: I will withdraw the question to save time.

The Court: Go ahead.

Q. That is from the War Department Headquarters, Army Air Force at Washington, and that is dated the 6th of September, 1943, and the subject matter is "Amendment of Orders," and it is addressed to the Commanding General of the First Air Force at Mitchel Field, is it not? A. Yes, sir.

Q. And that says, so much of letter this headquarters dated 1st September, 1943, as requested orders issued relieving Captain Walter V. Radovich from further assignment and assigning him to the A.D. 664A, with temporary duty at Goldsboro, North Carolina, pending movement overseas is revoked. That is correct, is it not? A. Yes, sir. 2415

Q. So that that shows he had previously been ordered to go to Goldsboro previous to the 6th of September, 1943? A. Yes, sir.

Q. And that that order had been revoked? A. Yes, sir.

Q. Now, can you find that in the files? A. I think you had that order this morning. That was the order that transferred him to Goldsboro.

Q. That was the 18th of September, if I remember correctly. Wasn't that the date, the 18th of September? A. If my memory serves me right, it was the 18th of September.

Q. Then, if that is true, this has reference to the 6th of September, 1943? A. There must have been a previous order before the one dated the 18th of September.

Q. That is, Captain Radovich must have received some orders——

2417

Mr. McGohey: I object to this, your Honor. The records speak for themselves now. I object to any interpretation by counsel.

The Court: I am not going to let him express any opinions as to the background and so forth, unless they are orders used, and which contain different phraseology than what is used in ordinary life. I am going to permit him to explain it but not to express an opinion.

Q. Now, with the Court's admonition of explaining without expressing an opinion, Lieutenant, will you tell us if this file does not show that Captain Radovich was ordered some time prior to the 6th of September, 1943, to Goldsboro, North Carolina? A. Yes, sir.

2418

Q. And we don't know the date of that order, as far as the files are concerned? A. That is correct.

Q. Some time prior to September 6th? A. Yes, sir.

Q. And it would be fair to assume from this correspondence some time in that vicinity of time? A. I would say within a week.

Q. And then that order was revoked? A. Yes, sir.

Q. For the reason that the file does not disclose? A. That is correct.

Q. Now, does there appear in this file from your interpretation, without giving an opinion, any reason for just having in the 201 file the order of revocation of his assignment to Goldsboro without having the assignment itself to Goldsboro in the 201 file?

Mr. McGohey: I object to that, your Honor. The condition of the file is not material.

The Court: I overrule the objection.

A. I can't explain why it is not there, sir.

2420

Q. Also there is some revocation of that order that is not there, isn't there? A. According to this letter dated 6th September.

Q. And there is nothing wrong with the authenticity of that letter, is there? It is restricted, but it nevertheless is accurate, isn't it? A. Yes, sir.

Q. We do find 18th September, the next one, so our memory, the both of us, was correct on that? A. Yes.

Q. That is the date the record shows he was sent to Goldsboro—Radovich? A. Yes, sir.

Mr. Keenan: I will show the pertinency of this letter if there is any question about it. It is very brief.

2421

Q. The file shows that on the 8th of October, 1943, Colonel Goetz authorized Captain Radovich to personnel and temporary duty, to proceed to Mitchel Field, New York, for five days in connection with Special Project No. 9, personnel matters, and on completion of this duty to proceed to headquarters AAF at Washington, D. C., and report to Lieutenant Colonel Allison for ten days' temporary duty. That is right, isn't it? A. That is correct.

Q. What was the project; does this file show what the project was? A. The file doesn't show, and I don't know what it was.

Q. Is that restricted and secret, as far as you know? A. I believe that is a top secret; it was at that time.

Q. Top secret, super secret? A. Yes, sir.

Q. Would it be more super secret than 281?

The Court: I don't think that is material, counsel.

Mr. Keenan: Well, your Honor, the testimony that is already——

The Court: He says he doesn't know what it was and can't explain it.

2423

Mr. Keenan: I don't wish to press it as long as you think I should not.

Q. Now on the 16th October there are instructions for Captain Radovich, who is then said to be in temporary duty, Headquarters AAF—what is that? American— A. Army Air Forces.

Q. Army Air Forces. (Continuing) —to proceed from Washington on the 16th October, 1943? A. That is correct.

Q. That is correct. And that he was instructed to go to Wright Field at Bridgeport, Connecticut? A. Yes, sir.

Q. And Elgin Field. A. And also on the 22nd day of October of 1943, he was also, Captain Radovich, instructed by command of General Arnold to proceed from Washington to California for approximately fifteen days. And the

2424

second paragraph reads: Authority is given to make such variation in his itinerary and to proceed to such additional places as may be necessary for the performance of this mission. That is correct, isn't it? A. Yes, sir.

Q. And that is the 22nd of October, 1943? A. Yes, sir.

Q. Now on the 12th of November, 1943, the Major received authority for travel likewise from Major Goetz for ten days' temporary duty. Correct? A. That is right, sir.

Q. Effective the 13th of November, 1943, to Bridgeport, Connecticut, and thence to Bradley Field; is that correct? A. Yes, sir.

Q. And thence to Mitchel Field, New York? A. Yes, sir.

Q. And thence upon completion of this temporary duty to return to Army Headquarters Air Forces for five days' temporary duty—that is at Washington, isn't it? A. Yes, sir.

Q. And that assigned Captain Radovich to Project CA 281, doesn't it? A. No. He was assigned to that.

Q. Oh, he was assigned? A. Yes, sir.

Q. That second paragraph, that just denominates to which he was assigned. Thank you. What is the fifth paragraph, 2426
"Deliver order to Major Goetz"? A. You must remember that this is a routing and record sheet, which is a request to orders branch to cut these orders sending Major Radovich to these three stations, to cut the order. When the order is cut, to immediately hand it down to Major Goetz, he is waiting for it.

Q. What does the term "cut the orders" mean to us civilians? A. Write the orders.

Q. Write the orders. Here is the first endorsement, to Headquarters, First Fighting Command, Office of the Surgeon, Mitchel Field, Samuel Kato. What is that attached to? That is the first endorsement, isn't it? A. Yes, sir. You have got to find the basic to see——

Q. You have got to find the basic letter to find out what 2427
it means about the surgeon. Give us the basic, please. A. The letter dated 16th October, Headquarters, First Fighter Command, Office of the Surgeon, Mitchel Field, New York.

Q. And that is a communication from a first lieutenant of the Medical Administration Corps, dated October 16, 1943, to the Flight Surgeon of Overseas Replacement Training Center, Goldsboro, North Carolina; is that correct? A. Yes, sir.

Q. And it refers to some form 64 file. Can you tell us what that is? A. I am not familiar with that form number. I believe it is—I can give you the best of my knowledge.

Q. Yes. Well (referring to papers), you say this first endorsement is attached to this? A. Yes. That is the way military correspondence goes. The first endorsement might very well be at the bottom of the first page of the basic.

Q. But it is on top of the next one? A. They haven't got enough room at the bottom, so he puts it there.

Q. They don't have enough room at the bottom?

2429 The Court: I don't see the materiality of that.

Mr. Keenan: It is absolutely incorrect, your Honor.

Mr. McGohey: May I see that, your Honor?

Which is the basic, please, that you are talking about here?

The Witness: This is the basic communication.

Q. May I ask how you know that? A. Well, it is the same subject, and the first and second endorsements follow it.

Q. That is dated December 9, 1943. There is some endorsement on there. A. That is the date it was filed there, the date it was sent to the central file. That is not the date of the endorsement.

Q. All right; then, we will hurry along. There is a
2430 special order 40. Is that an original—is that connected with this? A. This is the order promoting Captain Radovich to Major, Special Order No. 40, paragraph No. 1, dated 1 March.

Q. 1 March, 1944? A. Yes, sir.

Q. That obviously isn't connected with this preceding endorsement? A. It is not. It has nothing to do with these endorsements.

Q. What is it doing in this place in the file, can you tell us that? A. No, sir.

Q. On the 15th of June, 1944, the record shows that for some diagnosis that is pending by communication from the Flight Surgeon to the Base Surgeon, that Major Walter V. Radovich was this date found physically disqualified for duties involving flying? A. Yes, sir.

Mr. Robb: What is the date of that, Mr. Keenan?

Mr. Keenan: 15th of June, 1945—1944. I beg your pardon.

Mr. Robb: 1944.

Mr. Keenan: I have no further questions to ask this witness. But I would like to have this file impounded in this case for further purposes of examination. 2432

The Court: All right, sir, I will direct that it be filed subject to being returned.

Mr. McGohey: If your Honor please, has your Honor ruled on that?

The Court: I did, but I am always subject to changing my mind.

Mr. McGohey: Your Honor, I submit that Mr. Keenan has had this the better part of the day and his examination indicates that he has gone through that pretty completely. I don't know any reason why it ought to be impounded.

Mr. Keenan: I just suggest, is there any harm being done leaving it here a little bit longer until we can peruse it a little more at leisure? 2433

The Court: Frequently witnesses generally attend a trial until it is over, until the evidence is all admitted.

Do you have that file in your personal charge and custody?

The Witness: Yes, sir. I have orders not to leave it unless I am directed by the Court.

Mr. Keenan: May I be permitted to state, and I think it will not be objectionable, that the lieutenant

found it necessary in the performance of his duty to take it away at the appointment of the lunch hour and keep it until he got on the stand.

Isn't that correct.

The Witness: Yes.

Mr. Keenan: You asked me for it?

The Witness: That is correct.

Mr. Keenan: And I didn't see fit to bother you about it, your Honor.

The Court: If the lieutenant is personally responsible for it, I don't blame him for wanting it in his personal possession.

2435 Mr. Keenan: I thank you, your Honor, for the implied compliment.

The Court: No, I was not referring in any uncomplimentary way to you or anyone else, I was referring to the obligation of the Army officer as against all the world. I certainly meant no inference such as you have drawn. If he is going to part with it at all, there is no reason for him to object to imparting it to you.

(To the witness) You just keep the file but remain at the trial until you are excused.

The Witness: Yes, sir.

The Court: Call the next witness. That finishes that part of the case, doesn't it? Are you ready to proceed?

2436 (Witness excused.)

Mr. Keenan: I am ready to proceed, your Honor. I would like to call Mr. Wallace to the witness stand.

The Court: All right, take the stand, Mr. Wallace.

EDWARD C. WALLACE, recalled as a witness on behalf of defendants Bayer, being previously duly sworn, further testified as follows:

*Direct examination by Mr. Keenan.*

Q. You are Mr. Wallace, the Assistant United States Attorney, and you have previously testified in this case, is that correct? A. That is correct.

Q. And you have had charge of the preparation, you have had charge, as Assistant United States Attorney, of this prosecution from its inception to date; is that not correct? A. That is correct. 2438

Q. Under, of course, Mr. McGohey, the United States Attorney? A. That is correct.

Q. And you had Major Radovich come to your office at some time in 1943?

Mr. Robb: If the Court please, might counsel approach the bench at this point?

The Court: Yes.

(The following proceedings took place at the bench, not in the hearing of the jury:)

The Court: What is in your mind?

Mr. Robb: If your Honor please, we find ourselves——

The Court: What I had in mind was, I have ruled that as to the statement of Radovich that I have directed the jury, and will direct them again, that it is not to be considered against your client, and I ruled that you could not examine him on that question. 2439

Mr. Robb: That is the point I had in mind, your Honor.

Mr. Keenan: Yes, but I want to bring out that a part of the defense in this case, the attitude of the United States Government in this prosecution as it

affects not alone the presentation of the matter against Radovich, but against my defendants, the Bayers, that the sequence shows pressure being brought to bear on Major Radovich with reference to his testimony, and we have a right to have Major Radovich available as a witness to tell the truth, free from any type of pressure or influence. And the evidence shows that he was subpoenaed down here and that indictments were returned against Samuel and Elias Bayer—Samuel, two substantive indictments for bribery, and Samuel and Elias together with Greenblatt for conspiracy to violate Section 91, I believe, of Title 18, and that as long as
2441 Radovich continued to co-operate with the Government, as they called it, they did not indict him, but when he refused to co-operate with them he was indicted.

Now, as a circumstance of the case I think I have a right to show this to the jury as reflecting upon the opportunity this defendant has had to present its defense in all aspects, and I think that is highly pertinent, your Honor. It is significant that he was brought back to be interrogated.

The Court: I can't agree with you. I am going to adhere to the ruling heretofore made, which ruling is that based upon everything you have said that would only go to the admissibility of the weight of Radovich's statement, which I have directed the jury may not be considered against your clients, and I adhere
2442 to that ruling and decline to permit you to examine or cross-examine the witness on the stand as you indicated you desired to.

Mr. Keenan: While I do not contend that is the only reason I am asking the testimony of this witness, I ask your Honor, too, to give consideration to the fact that anything that the jury considers by way of any testimony that builds up a corpus delicti is material to all defendants in the case. That we have not, I think,

argued fairly enough to your Honor—perhaps you have given a little time——

The Court: You have covered——

Mr. Keenan: I never mentioned that point in the argument, that anything that is built, any testimony that builds up any part of the corpus delicti is material to any defendant in the case.

The Court: I have considered that phase, too. I adhere to my ruling. You may note your exception.

Mr. Keenan: Does that mean I can't ask Mr. Wallace any questions?

The Court: You can't ask him any questions along the line you have indicated. You are perfectly free to 2444
examine him as to the facts and circumstances of the statements made by the defendants whom you represent.

Mr. Keenan: I am not going to use hi. as my witness for that purpose.

I note an exception.

The Court: Very well.

All right, you may stand down.

(Witness excused.)

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: Call the next witness.

Mr. Keenan: I want to ask him some other questions not connected with——

The Court: All right. 2445

EDWARD C. WALLACE resumed.

*Direct examination by Mr. Keenan.*

Q. Mr. Wallace, you have testified in this case about three indictments that were brought against Samuel Bayer other than this indictment——

Mr. McGohey: I object to this, if your Honor please, as being immaterial in this case.

The Court: Unless there is some reason which I don't know about, I am going to exclude any testimony about any other indictment. These defendants are on
2447 trial on this indictment.

Mr. Keenan: Your Honor, it is our claim in this case——

Mr. McGohey: If your Honor please, if we are going to have argument I suggest it be at the bench, on this question.

The Court: I beg your pardon.

Mr. McGohey: I suggest that any argument we are going to have——

The Court: If he makes it in the absence of the jury, if he wants to be heard at length——

Mr. Keenan: Your Honor wishes that we approach the bench and state the——

The Court: Any argument on——

2448 Mr. Keenan: I don't want to argue it, your Honor. I want to present the theory under which we are offering the evidence.

The Court: All right, sir, come up?

(The following proceedings were had at the bench, not within the hearing of the jury:)

Mr. Keenan: The theory under which we offer this evidence is that the charges that are made in the indictment upon which these defendants Bayer are stand-

ing trial are tantamount to a charge of bribery, and that the real issue in the case as it is now presented, as we take it, is whether or not the defendants were guilty of bribery or subjects of extortion; that we are going to argue that the Government well recognizes that there wasn't bribery because it not alone could have but did indict on charges of bribery and dismiss the causes.

The Court: I sustain the objection and decline to allow any examination on that.

Mr. Keenan: You give us an exception on that, your Honor?

The Court: Yes. 2450

Mr. Keenan: And upon that entire line of testimony that we so offer.

The Court: Yes.

Mr. Keenan: I note an exception.

(The proceedings were resumed within the hearing of the jury as follows:)

Mr. Keenan: We don't have any testimony of Mr. Wallace for the time being.

The Court: All right. Call your next witness.

(Witness excused.)

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C. C. ARMSTRONG, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows: 2451

*Direct examination by Mr. Keenan.*

Q. Will you state your name, please? A. C. C. Armstrong.

Q. What is your business, Mr. Armstrong? A. I am in the textile business, manufacturing cotton yarns.

Q. What is the name of your concern? A. Gastonia Combed Yarn Corporation.

Q. Where are the mills located? A. In Gastonia, North Carolina.

Q. How long have you been with that company? A. Since 1936, its organization.

Q. What is your position with the company? A. Treasurer, sir.

Q. Are you acquainted with the defendant in this prosecution—Samuel Bayer? A. I am, sir.

Q. How long have you known him? A. For twenty-five years.

Q. Have you acquaintances with his business friends and acquaintances in Metropolitan New York? A. Yes, sir.

Q. And the community where he lives? A. Unfortunately, no, sir.

2453 Q. Have you visited him out there in his neighborhood? A. I beg your pardon?

Q. Have you visited him out in Lawrence, Long Island? A. No, sir.

Q. But you do know them in Metropolitan New York? A. Yes, sir.

Q. Have you the means of knowing of his reputation for veracity and character? A. I feel that I do.

Q. You have the means? Yes or no. A. Yes.

Q. What is that reputation? A. Good.

Mr. McGohey: Your Honor, I object. I think the witness' answers indicate that he is not qualified to testify to that.

The Court: I will let him testify.

2454

Q. What is his reputation in that regard? A. Good. Good, sir.

Mr. Keenan: I think that is all.

The Court: Do you wish to examine?

Mr. McGohey: No questions from the Government.

The Court: Stand down. Call the next witness.

(Witness excused.)

SELIG FORTMAN, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Would you state your name a little louder? A. Selig Fortman.

Q. Where do you live? A. Far Rockaway.

Q. Far Rockaway? A. Yes, sir.

Q. You are a rabbi of the Jewish faith? A. Yes, sir.

Q. How long have you been a rabbi? A. In this country fifteen years.

Q. Fifteen years? A. Yes, sir.

Q. And where do you have your temple or congregation? 2456
A. Far Rockaway.

Q. Is Samuel Bayer a member of your congregation? A. Yes.

Q. How long has he been a member? A. Since I remember him, about fifteen years.

Q. Have you been a rabbi for fifteen years, or out at Far Rockaway for fifteen years? A. Rabbi of this congregation fifteen years.

Q. Have you had occasion to visit Samuel Bayer or meet him from time to time over the past fifteen years? A. Of course, yes; he is used to come to shule, come to the synagogue.

Q. Do you know his neighbors where he lives? A. I know his house, where it is. 2457

Q. You go to his house? A. Sometimes, yes.

Q. Do you know his wife? A. Yes.

Q. And his boys? A. His boys I know from the Hebrew school, one of them.

Q. Rabbi, I don't know whether you speak louder to your congregation, but we can't hear you back here. A. I will speak louder.

2458

Q. Have you the means of knowing what Mr. Bayer's reputation is, his reputation with regard to character? A. Yes, sir.

Q. And in his own community where he lives? A. Yes.

Q. And what do you say, rabbi, as to the reputation that Mr. Bayer so has or bears among this group? A. He enjoys a very good reputation.

Q. A very good reputation, is that correct? A. Yes, correct.

Mr. Keenan: I think that is all.

2459

The Court: Any questions?

Mr. McGohey: I have no questions, thank you.

The Court: All right. Call the next witness.

(Witness excused.)

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LEWIS A. ROSEN, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Will you state your name, sir? A. Lewis A. Rosen.

Q. And how old are you, Mr. Rosen? A. Sixty-three.

Q. And where do you live? A. 299 Riverside Drive, Manhattan.

2460

Q. Do you know the defendant Samuel Bayer? A. Very well.

Q. How long have you known him? A. Between eighteen and twenty years.

Q. By the way, what is your business, Mr. Rosen? A. I am an attorney.

Q. You are an attorney? A. That is right.

Q. And where do you practice law? A. 261 Broadway, Manhattan, for the last twenty-seven years.

2461

Q. For how long? A. I am practicing since 1907, in 261 Broadway, since the last twenty-seven years.

Q. And do you know the defendant Samuel Bayer? A. I do, very well.

Q. How long have you known him? A. For eighteen to twenty years.

Q. And have you the means of knowing his reputation in the metropolitan community here? A. I do.

Q. And what is his reputation for character and veracity? A. Very fine; very good.

Mr. Keenan: That is all.

Mr. McGohey: I have no questions.

2462

The Court: All right, next witness.

Mr. Keenan: I have another question that I forgot to ask him.

The Court: All right.

*By Mr. Keenan.*

Q. Do you know, Mr. Rosen, the neighbors and acquaintances of Mr. Bayer, at Far Rockaway? A. I have been a neighbor of Mr. Bayer's in Far Rockaway for about sixteen to seventeen years. I just moved to Manhattan three years ago.

Q. I forgot to ask you that. Were you connected with his church? A. I was. I was a member of the synagogue for five years prior to the time I moved to Manhattan.

2463

Q. And was Mr. Bayer an active member of the congregation? A. Very active.

Mr. Keenan: That is all.

The Court: All right, call the next witness.

HENRY FINE, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is Henry Fine? A. Correct, sir.

Q. Are you married? A. Yes, sir.

Q. Where do you live? A. 400 West End Avenue, New York.

Q. And what is your business? A. Shirt manufacturer.

Q. How long have you lived in New York City? A. Oh, about fifty years.

Q. How long? A. Fifty years.

2465 Q. And do you know the defendant Samuel Bayer? A. Oh, for thirty years.

Q. What? A. About thirty years.

Q. Did you have business with him? A. Yes, sir.

Q. Extensive, over a period of time, over a long period of time? A. Thirty years.

Q. What is your connection? You say you are in the shirt business? A. Well, we are doing business together.

Q. No, I mean your concern. I just went over that briefly and hastily. What is the name of your company? A. M. Fine & Sons.

Q. Shirt manufacturers? A. Shirt manufacturers, correct.

Q. What is your position with M. Fine & Sons? A.

2466 President.

Q. And in your business relations with Mr. Bayer in Metropolitan New York, did you obtain occasion to observe his character and his reputation among the people with whom he did business, and with whom he lived his life here? A. Yes, sir.

Q. Is that right? A. Yes.

Q. And over a period of years you had an opportunity to observe that? A. Yes.

Q. Do you, therefore, know what his reputation is in the group in New York, yes or no? A. Yes, sir.

Q. And what is that reputation for character? A. A-1.

Mr. Keenan: I think that is all.

Mr. McGohey: I have no questions.

The Court: All right, that is all. Call the next witness.

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HARRY A. FLORSHEIM, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows: 2468

*Direct examination by Mr. Keenan.*

Q. Will you state your name, please? A. Harry A. Florsheim.

Q. Are you married? A. Yes, sir.

Q. Where do you live? A. Norwalk, Connecticut.

Q. What is your age? A. Sixty.

Q. What is your business? A. Selling agent, cotton yarns.

Q. With whom are you connected? A. A group of mills: Glenn Thread Company, Hampton Company, Ruby Cotton Mills. 2469

Q. Do you have your own business? A. Yes, sir.

Q. What are you, sort of a broker? A. No, we are the exclusive selling agents of these mills.

Q. Exclusive selling agents? A. Yes.

Q. Have you know the defendant Samuel Bayer? A. Yes, sir.

Q. Do you know the people with whom he does business in New York? A. No.

2470

Q. Are you acquainted with that group? A. No, not the ones that he sells to.

Q. Do you know those from whom he buys? A. Fairly well, yes.

Q. How long have you known Mr. Bayer? A. Oh, twenty years.

Q. Have you had an opportunity in Metropolitan New York in your business here to learn of his reputation for honesty and character? A. Yes, sir.

Q. What is that reputation? A. Very, very good.

2471

Mr. Keenan: That is all.

Mr. McGohey: No questions.

The Court: Call the next witness.

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MELVIN USDAN, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Will you tell us your name? A. Corporal Melvin Usdan.

Q. What is your serial number? A. 12219208.

2472

Q. What is your business? A. I am a corporal in the United States Army Air Corps.

Q. And where are you stationed? A. I just returned from overseas.

Q. How long ago? A. Approximately three weeks ago.

Q. Where did you return from? A. I returned from the Arctic Circle, Greenland.

Q. Where do you live? Where is your home when you are home? A. 1058 New MacNeill Avenue, Lawrence, Long Island.

Q. You are related to Samuel Bayer? A. Yes, I am.

Q. What is the relationship? A. He is my uncle.

Q. Your father is alive? A. No, he has been dead for five years, sir.

Q. And your mother is a sister of Samuel Bayer? A. Yes, sir.

Q. She lives? A. Yes, sir.

Q. And you are home now on a furlough? A. Yes, sir; recuperation furlough.

Q. Recuperation furlough? A. Yes, sir.

Q. How long do they give you, Melvin? A. They gave me forty-five days, sir.

Q. Had you come directly from Greenland home? A. 2474
No, sir, I came through Labrador and Canada, and then home.

Q. Did you stop at any other place or was that just the route you took? A. I was then en route, sir.

Q. How long? A. I stopped for approximately a month in Labrador.

Q. A month in Labrador? A. Yes, sir.

Q. What is the branch of service that you are in? A. I am in the United States Air Corps.

Q. What were you when you left the United States of America, what was your rank? A. I was corporal, sir.

Q. When were you made corporal? A. I was made corporal at Westover Field, in Massachusetts, 881st Medical Detachment of the Airborne Engineers.

Q. What camp were you at when you were made cor- 2475
poral? A. Westover Field, Massachusetts.

Q What were you when you first came to Mitchel Field? A. I was a private, sir.

Q. What were you when you left Mitchel Field? A. A private, sir.

Q. Do you know Martin Bayer? A. Yes, sir.

Q. How long have you known him? A. I have known him for about nineteen years, sir.

Q. How old is Martin Bayer? A. He is about twenty-two, sir.

Q. Where did you live with reference to Martin Bayer at the time you went into the service? A. My home was right behind his home, sir.

Q. Your home backed into the other? A. Yes, sir.

Q. And did you see much of the Bayer family, that is, of Samuel Bayer's family? A. Yes, sir. During those years I have been very close to my uncle Sam, and in the last five years, since my dad passed away, I was even more close to him.

Q. You were even more close to him since your dad passed
2477 away? A. Yes, sir.

Q. How many cousins have you that are children of Samuel Bayer? A. I have three cousins, sir, but two that are very close to me.

Q. Who are the three? A. The three are Martin Bayer, Robert Bayer and Sanford Bayer.

Q. In the order of their ages? A. Robert Bayer, Martin Bayer and Sanford Bayer.

Q. Where is Martin Bayer? A. Martin Bayer is in Burma, India.

Q. Where is Robert Bayer? A. He is in Okinawa, in the Pacific.

Q. Close to Japan? A. Close to Japan, yes, sir.

Q. Where is Sanford Bayer? A. Sanford is in the United States Navy aboard ship, sir, I believe.

2478 Q. And these three boys, you grew up with them, did you? A. Yes, sir.

Q. Like a member of the family, is that correct? A. It was a second home to me, sir.

Q. A second home to you? A. Yes, sir.

Q. And did you go to the same school? A. Yes, sir, we did. We belonged to the same clubs, also.

Q. And the same clubs? A. Yes, sir.

Q. What kind of clubs were they, Melvin? A. Social clubs and athletic clubs.

Q. What do you call a social club? A. Well, when we had dates and dances, and the topics of the day were discussed.

Q. In a word, it might be stated that you and Martin were particular pals? A. Yes, sir. We went on numerous dates together, sir, and all during that time I have been very close to him.

Q. Did you have occasion to observe Martin as he grew up? A. Yes, sir. All during the time I have been with him he has always been a sickly kid.

Q. He has been a sickly boy? A. Yes, sir.

Q. Will you tell us briefly about that? A. Well, sir, we used to have a lot of athletic events and he didn't go in much for that, and then at the beaches in the summer—— 2480

Q. Melvin, you are talking very fast and I have difficulty following you. Will you slow up a little bit? A. Yes, sir.

Q. You have told us now about the athletic events in which he did not participate very much? A. He did not, yes, sir.

Q. What else did you notice about him? A. In the summer months we would visit the beach, sir, and his chest was caved in from rickets, sir, and I noticed it; it was very noticeable. He was shy from it. He didn't want anybody to notice it. He would try to hide it at times.

Q. He was sensitive about it, was he? A. Yes, sir, and about his health.

Q. What else, if anything, did you notice about his health as a growing boy? A. Well, all during the time he used 2481
to cough quite a bit, and as long as I have known him he has been a very sick kid; he has been sickly.

Q. He has been sickly? A. Yes, sir.

Q. Do you recall anything unusual at the time that you were both entering the service together? A. Yes, I did.

Q. Did you go down to enlist at the same time, yes or no? A. Yes, sir, we did.

Q. And where did you go to be physically examined? I suppose you were physically examined? A. Yes, sir.

Q. Where did you go for this examination? A. Grand Central Palace, New York.

Q. Grand Central Palace, New York? A. Yes, sir.

Q. And you and Martin went together? A. Yes, sir, we did, sir; with my uncle.

Q. And your uncle who? A. Uncle Samuel Bayer.

Q. He took the both of you down there? A. Yes, sir.

Q. How long were you there during the time of the examination? A. I would say about three hours, sir.

Q. And will you tell us very briefly what you observed while you were there? A. Yes, sir. We entered the building—just before entering the building Marty became very
2483 nervous at that time, sir, and he called me aside, and he said, "Melly, I am afraid that I won't pass the physical." And then we entered the building and he was behind me during the physical——

Mr. McGohey: If your Honor please, I refrained from offering any objection, but I do not see the materiality of any of this testimony, of what transpired there or what Martin Bayer said, or what Melvin Usdan said. Neither of these boys are on trial.

The Court: I do not think conversation between them is admissible.

Mr. Keenan: Your Honor, this is the first part of any conversation. It may go out by consent. May I proceed?

2484 Mr. McGohey: Now, if your Honor please, I press the objection as to any conversation. I have agreed with your Honor as to the latitude given up to now, but what Martin Bayer said or Melvin Usdan said has no materiality to this issue.

The Court: I will sustain an objection as to conversations, but I am going to permit him to testify as to what happened.

Q. What did you say happened there? A. I say that we entered the building, and about halfway through, Martin was behind me all the time, and I turned around——

Q. Was he right there in your presence? Did you see this with your own eyes? A. Yes, sir. He was right alongside of me at all times until I turned around and he wasn't behind me any longer. I just wondered about it, and I went back to look for him.

Mr. McGohey: I object to that.

Mr. Keenan: Strike out that he wondered.

Q. What else did you do? A. I went back to look for him, sir, and I saw him lying on the medical bench with a doctor beside him, and I heard a conversation with the doctor—— 2486

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: Your Honor, I want to ask for the conversation between the doctor and Martin Bayer that this witness heard, because obviously we haven't Martin Bayer here.

The Court: I will let him testify.

Mr. McGohey: I object to it, your Honor.

The Court: What did the doctor say?

Q. Will you state it slowly because I cannot follow you. Please speak slowly? A. Yes, sir. He was standing by Martin Bayer and Martin was pleading with him to give him another chance, sir. It seemed like he had very high blood pressure and the doctor was going to turn him down right there. 2487

Q. Was that the conversation? A. Yes, sir. Here is how it went, sir: Martin was pleading, and he said, "Doc, I'll even bring you back a dead Jap if you let me pass through here." The doctor said "O.K., lay back and we will see what we can do for you."

Q. And did he lay down? A. Yes, sir, he laid down.

Q. How long did he rest there? A. I don't know, sir, because I had to go on with my physical, but I waited for him about two hours after that, sir, after I completed my physical.

Q. You waited for him to come out? A. Yes, sir.

Q. And you don't know what happened in that interim, from what you saw? A. No, sir, I don't.

Q. You do know that he was finally accepted? A. Yes, sir. He came to the desk where the clerk was at the rejection or O.K. table, who smiled up at him and said that it was stamped O.K.

2489 Q. Were you out at Mitchel Field with him? A. Yes, sir, I was.

Q. When you enlisted, where did you go first? A. I went to Camp Upton, New York, sir.

Q. Did Martin go with you? A. Yes, sir, he was along with me.

Q. That is, you had been pals and had gone around together, and you enlisted together and you went out to Camp Upton together? A. Yes, sir.

Q. After you were inducted into the service as soldiers? A. Yes, sir.

Q. How long were you at Camp Upton? A. Approximately a week, sir.

Q. And while you were at Camp Upton did you do what the other boys did as far as you could observe, like any
2490 other inductees? A. Yes, sir.

Mr. McGohey: I object to this, your Honor. I cannot see the materiality to the issue here.

Mr. Keenan: It is a little preliminary, your Honor. I will not trespass very long on this.

The Court: All right.

Q. After you left Camp Upton, where did you go? A. I went to Mitchel Field, New York, sir.

The Court: I am going to take a mid-afternoon recess. The court will take a ten-minute recess.

(Short recess.)

Q. I believe we got as far as the time when you left Camp Upton and went to Mitchel Field, is that right? A. Yes, sir.

Q. When you went to Mitchel Field, what task were you assigned to? A. I was assigned to the Basic Training Section of the Air Base Squadron, sir.

Q. Did you have any particular duties to perform there, or what was that like? A. We were to take basic training, sir, for the Army; to take the initial training, sir. 2492

Q. How much basic training did you have at Mitchel Field?

Mr. McGohey: I object to this, your Honor.

The Court: I will overrule the objection.

A. I had one week's basic training, sir.

Q. During all the time you were at Mitchel Field? A. Yes, sir.

Q. Getting ahead of our story for a minute, when you went from Mitchel Field you went to Westover Field? A. Yes, sir, that's right.

Q. How much basic training did you have at Westover Field? A. None at all, sir.

Q. And from Westover Field you went to Goldsboro? 2493
A. Yes, sir.

Q. How much basic training did you have there? A. None at all, sir.

Q. And from Goldsboro, after you were there a few days, you went to Wilmington, or to Newcastle, Delaware? A. Yes.

Q. To the Air Transport Corps? A. Command, sir.

Q. Air Transport Command? A. Yes, sir.

Q. And how much basic training did you have there? A. None at all, sir.

Q. And from there you went to Greensboro? A. Greensboro, North Carolina—O. R. D.—overseas replacement depot.

Q. Overseas replacement depot? A. Yes, sir.

Q. And how much basic training did you have there? A. I didn't have any at all, sir.

Q. And from there you went to the Arctic, to the Arctic Circle? A. Yes, sir. I went from there, sir, to the port of debarkation—embarkation, I am sorry.

Q. What? A. Port of embarkation.

2495 Q. And from there you went up to Greenland? A. Yes, sir.

Q. Now, what about your cousin Martin? Do you know how much basic training he had? A. Yes, sir.

Q. How much did he have? A. He had approximately two weeks, sir.

Q. All told? A. Yes, sir.

Q. And after you got through with the one week's basic training at Mitchel Field, at Headquarters Company, was it? A. It is First Air Base Squadron; headquarters of First Air Base Squadron.

Q. What did you do there after your one week's basic training? A. I was a file clerk, sir, at Base Headquarters of the 201 file section.

Q. 201 files? A. Yes, sir.

2496 Q. Who was your commanding officer? A. At that time, sir, I believe it was Captain Wood.

Q. Captain Wood? A. Yes, sir.

Q. And did you do the work, as far as you know, of any clerk out there, any soldier clerk? A. Yes, sir.

Q. Did you conform to the ordinary hours of duty? A. I did, sir.

Q. Did you have any weekends or any leaves of absence that were not in accordance with the regulations or of what the other boys did? A. I did not, sir.

Q. None whatsoever? A. None whatsoever, sir.

Q. May I ask you if you performed your work with the ordinary care and attention of other clerks out there that you could observe? A. Yes, sir, I did.

Q. Did you ever receive any disciplinary acts of any kind for neglect of duty of any kind? A. Not since I have been in the Army.

Q. Not since you have been in the Army? A. No, sir.

Q. By the way, have you received a good conduct medal? A. Yes, I have, sir.

Q. And a citation for that? A. Yes, sir.

Q. And how long were you at this base headquarters at Mitchel Field? A. I believe I was there—— 2498

Q. Under Captain Wood? A. I think about two months, sir; something like that; two or three months, approximately.

Q. During all that time did you do filing clerk's work? A. Yes, sir.

Q. And nothing else? A. Nothing else, sir.

Q. All day long? A. All day long, sir.

Q. And how about your cousin, Martin Bayer? A. He was working alongside of me, sir.

Q. Doing the same thing? A. Doing the same work, yes, sir.

Q. And what about him? Did you observe whether he had special treatment of any kind, nature or description? A. He did not, sir.

Q. Did he, the same as you, get up at the same hour 2499 in the morning as the other boys? A. Yes, we did, sir.

Q. And perform the same hours of duty and labors as other men in light work? A. We did, sir.

Q. And eat the same food? A. Yes, sir.

Q. And conform to the same regulations? A. We did, sir.

Q. Now, after two or three months, you were transferred to where? A. After two or three months I was

transferred to the First Fighter Command, Mitchel Field, New York.

Q. To the First Fighter Command, Mitchel Field, New York? A. Yes, sir.

Q. Do you know anything about that organization from your own observation? A. It controlled the fighter planes for the protection of the East Coast, sir.

Q. That was its job, was it? A. Yes, sir.

Q. And that first job to which you were assigned at the base headquarters—those headquarters remain there, do they, or do they change to another field? A. No, they are there today, sir.

2501 Q. They are there today? A. Yes, sir.

Q. When you went to the headquarters of the Fighter Command, did you make out an application for a transfer, do you recall? A. I did not, sir.

Q. Do you know anything about that? A. No, sir.

Q. You know you were transferred to the Fighter Command? A. Yes, sir.

Q. And during the time that you were at the Base Headquarters did you know Major Boebel? A. I knew him; I knew of him, sir. I didn't know him personally.

Q. You did not know him personally? A. No, sir, I did not.

Q. Would you have any conversation with these Colonels in the Army? A. No, sir, I do my work as an enlisted man, the same as anybody else did.

2502 Q. Was it the custom and habit of enlisted men to have to do with one another and have very little conversations with officers except with sergeants? A. Yes, sir.

Q. By the way, did you ever have any information from any sergeant that you were soldiering on the job and not doing your work efficiently or faithfully? A. No, sir. I had the opinion the other way around, sir.

Q. And as far as you know, Melvin, no one ever complained that you know of to you of your job? A. Nobody has ever, sir.

Q. Who was your commanding officer at the First Fighter Command there? A. At the First Fighter Squadron, sir, Captain Radovich.

Q. And did you know him before you went into that Command? A. I did not, sir.

Q. Did you ever hear of him? A. No, sir.

Q. Was he your immediate boss? A. No, sir, he was not.

Q. What officer was more immediate than Captain Radovich? A. Lieutenant Roeser.

Q. Lieutenant Roeser, is that right? A. Yes, sir.

Q. And did you work close to him? A. Side by side, sir. 2504

Q. Side by side? A. Yes, sir.

Q. What was your job at the Fighter Command? A. As a clerk, sir, doing the typing and filing.

Q. As a clerk? A. Yes, sir.

Q. Doing typing and filing? A. Yes, sir.

Q. What about Martin? A. He was doing the same work, sir.

Q. Was he transferred all the time the same as you were, and at the same time? A. Up to that point, sir, he was. Not through all my Army career, sir.

Q. Not all through, but up to that time? A. Yes, sir.

Q. Who else worked around for Lieutenant Roeser doing clerk work? A. Well, sir, up until about a week or so before I was transferred there were the two of us, sir, and after that Lieutenant Roeser had a friend, I believe, 2505 brought in there to work with him, and he had a girl friend of his, I believe, to come to work for him.

Q. And starting at the beginning, how many clerks did Lieutenant Roeser have when you and Martin first went in and were assigned to him? A. Two, sir.

Q. Two in addition to you? A. No, sir, we were the only two.

Q. I mean before you were assigned. A. None at all, sir.

Q. And after you came there was another individual, a man, a soldier? A. A soldier, yes, sir.

Q. An enlisted man? A. Yes, sir.

Q. And I believe you said that he was a friend of Lieutenant Roeser? A. Yes, sir.

Q. And do you know how he happened to get there? A. No, sir, but I know that in civilian life he spoke with him quite often, and he came down to see him, and after he enlisted in the Army he came to work with us.

Q. And he did clerk's work too? A. Yes.

2507 Q. And then came the young lady? A. Yes, sir.

Q. Do you happen to remember her name? A. No, I don't.

Mr. McGohey: I object to this, your Honor. I do not see the materiality of this.

Mr. Keenan: Your Honor, we intend to prove that one of the reasons that this boy was transferred——

Mr. McGohey: I object, your Honor.

Mr. Keenan: Does your Honor hold that he cannot answer that question or do you overrule it or sustain it?

The Court: I haven't got to it.

Mr. Keenan: I beg your pardon.

The Court: As a matter of fact I forgot what the
2508 question was. I think it was a question of what the lady's name was.

Mr. Keenan: If he knew what the lady's name was.

The Court: All right. I sustain the objection to it.

Q. What did the young lady do there?

Mr. McGohey: I object to that, your Honor.

The Court: I sustain the objection to that.

Mr. Keenan: I want an offer of proof on that, your Honor.

The Court: All right.

(The following took place at the bench not within the hearing of the jury:)

Mr. Keenan: I want and offer to prove, if permitted to answer, the witness would show that the young lady was a civilian and a friend of Lieutenant Roeser's, who had been in other parts of the country and was brought up from other parts of the United States through the efforts of Lieutenant Roeser, and brought out to that field, and that a job was made there for her; and that one of the reasons, if not the 2510
predominant reason, that he was transferred to the medical detachment was by reason of the fact that they wanted to keep the position for this young lady, and that the young lady being there, there was no longer any need for him.

The Court: I think that is material.

Mr. McGohey: The evidence now shows that the transfer out of the First Fighter Command to the hospital was at the request of this young man.

The Court: But he has testified to the contrary. I am going to admit the testimony.

Mr. McGohey: I do not believe even on the testimony offered here that it is material, your Honor.

The Court: I do not think it is a matter of great importance, but my idea is that there has been some 2511
testimony that he was transferred to the medical command at their request and for the purpose of getting a softer job.

Mr. McGohey: And the order so shows.

Mr. Keenan: It shows for a softer job?

Mr. McGohey: No, the order shows that it was at his request.

The Court: If he has any proof to the contrary, I think he is entitled to show it.

Mr. McGohey: But the order shows it was at his request.

Mr. Keenan: I am not going to be bound by any of these orders.

The Court: I will overrule the objection and let him testify. Go ahead.

(The following took place before the jury:)

Mr. Keenan: I will reframe the question and ask another one.

2513 Q. Do you know whether he had known her before she whether or not there was work enough for you after the young lady came there? A. No, there was hardly any work when we first started to work there, and when two other people came to work there was nothing at all to do.

Q. So when the young lady came there, there was nothing to do whatsoever? A. Yes, sir.

Q. Do you know who brought the young lady out there? A. Yes, sir.

Q. Who was it? A. Lieutenant Roeser.

Q. Were you there and did you hear conversations between them frequently? A. Yes, sir.

Q. Do you know whether or not the work continued or came there? A. Yes, sir, she did.

2514 Mr. McGohey: I object to this, your Honor.

The Court: On the ground that it is hearsay, I think it is objectionable.

Mr. Keenan: Exception.

Q. How long were you in the clerk's office at the First Fighter Command? A. I was there about four months, sir.

Q. And did you obey every order you got? A. Yes, sir.

Q. Were you permitted to have leaves of absence?

The Court: You asked him that question.

Mr. Keenan: Wait a minute, your Honor. I intended to cover this examination as thorough as I know how. I thought I had covered it up to the time of the Fighter Command, but if your answer would be the same during all the time you were in the Army, wherever you were, I shall not press it.

The Witness: Yes, sir, it was the same throughout my Army career.

Q. And the same with Martin? A. Yes, sir. 2516

Q. During all the time he was at Mitchel Field? A. Yes, sir.

Q. And all the time he was at Westover Field? A. And Delaware.

Q. And at Delaware? A. Yes, sir.

Q. During the time that you were at the First Fighter Command did you know Major Radovich? A. I knew him as my C. O., sir.

Q. Did you have conversations with him other than those in line of your work and duty? A. No, sir.

Q. Did you know him differently—I shall ask you the broad question—than any other commanding officer that you had? A. No.

Q. Did he ever give you any favors of any kind that you could observe or any special consideration? A. No, sir. 2517

Q. Did he treat you, as far as you could observe, any differently than he treated anyone else in his company? A. Not any different, sir.

Q. Did you know him intimately? A. No, I did not.

Q. How did you address him? A. As "Sir", as "Captain".

Q. How did he address you? A. Corporal, or private at that time, sir.

Q. And how about your cousin Martin—I am asking you because he is not present in the court room. A. Yes, sir.

Q. Did you observe what his relations were with Captain Radovich? A. Not any different than mine, sir.

Q. And was he singled out for any unusual orders or treatment that you could see in any way? A. No, sir, not at all.

Q. And when you were transferred to the medical detachment, how long did you stay there? A. I stayed there about a week, sir. I worked night and day there that week.

Q. Tell us about that. You have told us that there
2519 wasn't much to do particularly after the young lady came to the Fighter Command? A. Yes, sir.

Q. Now, what about when you got to the medical detachment, what did you do there? A. I worked as a clerk also, sir, and they seemed to be shorthanded at that time, and I worked at nights and days, sir.

Q. You worked nights and days? A. Yes, sir.

Q. Prior to your going to the medical detachment, did you work nights? A. No, I did not, sir.

Q. And how about Martin? A. He did not.

Q. And how about him, after he got to the medical detachment? A. He worked nights also, sir.

Q. And were you busy in that way the whole week that you were there? A. Yes, sir.

Q. Did you receive any special consideration or differ-
2520 ent treatment than other persons there? A. No, sir, we did not.

Q. And then what happened after you were there a week at the medical detachment at Mitchel Field? A. We were shipped out on orders—I went to Westover Field, Massachusetts, and Martin went to Bradley Field, Connecticut.

Q. Up to that time, up to the time you got to Westover Field, had you had a gun in your hand at all? A. No, I did not.

Q. Or a pistol? A. No, sir.

Q. Had you had any training of that nature at all? A. No, I did not.

Q. Had you done any marching or drilling out at Mitchel Field? A. I believe there was only one day of it, sir.

Q. One day of drilling or marching? A. Yes, sir.

Q. Otherwise you worked as a clerk would work downtown in an office? A. That's right, sir.

Q. And when you got to Westover Field what was the company to which you were assigned? A. I was originally assigned—I don't recall the number of the company there but it was an engineers airborne division.

Q. Engineers airborne division? A. Yes, sir. 2522

Q. At Westover Field? A. Yes, sir.

Q. That company to which you were assigned, what was its destination? A. It was ready to leave the next day for overseas, sir.

Q. Did you leave the next day for overseas? A. No, sir. There was some bit of a mixup of orders and another boy replaced me before I got there.

Q. Then what happened? A. Then I was placed into another outfit, 881st Airborne Engineers, also a medical detachment, sir.

Q. Medical detachment where? A. At Westover Field, Massachusetts.

Q. Were you transferred to the medical detachment at Westover Field with the first outfit you were sent to? A. 2523
No, sir, that was not the first outfit I was sent to. I was sent first to this outfit that was leaving the next day.

Q. You don't remember the number of that? A. No, sir. I don't recall the number.

Q. But were you to be a medical clerk in that outfit? A. Yes, sir.

Q. Had you had any training at all, of parachute equipment or anything of that nature? A. I did not.

Q. But you had had your hands on parachutes? A. No, sir, I was never in a plane.

Q. Never had been in a plane? A. No, sir.

Q. They had shipped you there to go out the next day overseas? A. Yes, sir.

Q. And someone else took your place in a mixup out there at Westover Field? A. Yes, sir.

Q. And as a result of that you were assigned to some other outfit? A. Yes.

Q. What outfit was that? A. 881st Airborne Engineers, Medical Detachment.

Q. Can you tell us about when that was? I think we have
2525 the accurate records and probably can help you. A. I wish you would help me, sir; I have been in so many outfits.

Q. About the 19th, 20th of August, 1943? A. Yes, sir, approximately that.

Q. Is that right? A. Yes, sir.

Q. And what was your next—while you were there were you busy? A. Very busy, sir.

Q. Somewhat different from Mitchel Field? A. Yes, sir. We were training airborne engineers in the outfit I was put into, we were giving basic training to these volunteers for airborne engineers.

Mr. McGohey: May I have that answer read.

(Answer read.)

2526

Q. What kind of training were you giving? A. Given, sir, or giving?

Q. Giving. A. None at all, sir. I wasn't; I was in—I was working in the medical detachment and I took care of the first aid.

Q. But in this record, Melvin, as it is taken down, did I understand you correctly, you said you were giving—

A. Well, the outfit itself was designated to give training, and the medical detachment was part of the outfit, sir.

Q. Were you giving training to someone else there? A. No, sir, I was not.

Q. But you were busy there, were you? A. Yes, sir, we were, sir.

Q. And was your work interesting? A. It was interesting, sir, yes.

Q. How about Martin, was he there with you? A. No, sir, he was not.

Q. Where did they send Martin to? A. Bradley Field, Connecticut.

Q. How long was he at Bradley Field, Connecticut? A. 2528
About two months, sir.

Q. Was that the same type of outfit you were sent to? A. Yes.

Mr. McGohey: I object to that. The witness testified that it was a different field.

The Court: Overruled.

Mr. Keenan: Is there really a contention that there was any difference? We are under a handicap——

Mr. McGohey: I object to this, and I ask——

Mr. Keenan: He is out in India where we can't get him.

Mr. McGohey: I object to any speeches by counsel as to why he is asking questions. The witness testified that he was at one field and the other boy was at 2529
another field.

Mr. Keenan: I will ask the question:

Q. Do you know what organization Martin was sent to? A. Yes. The same type of organization as mine except a different number it had.

Q. Did he eventually come to Westover Field? A. His outfit moved up there, sir.

Q. Do you happen to know what it was? A. 1921 Airborne Engineers, Medical Detachment.

Q. 1921 Airborne Engineers, Medical Department, is that right? A. Yes, sir.

Q. That was moved up to— A. Westover Field, Massachusetts.

Q. The 881st that you had joined, was that ready for overseas? A. Not at all, sir.

Q. Was it alerted at any time that you were there? A. No, sir, it never was.

Q. You would know that, wouldn't you? A. I would, sir.

Q. Were you transferred from Westover Field to the
2531 commando outfit down in Goldsboro? A. Up until that time——

Q. May I repeat the question. Were you sent to Goldsboro from Westover Field? A. Yes, sir.

Q. To join some project? A. Some project number, sir; I don't remember the number.

Q. The commandos. You know what it was now, don't you? A. I found out afterwards.

Q. That was the commando force that was to go over there, fly over behind the Japanese lines, is that right? A. I have heard about that, yes, sir.

Q. By the way, when you got down to Goldsboro to join that commando outfit, did they give you any equipment? A. Yes. They gave me a 45 pistol, sir.

Q. Did you ever have one in your hand before? A. No,
2532 sir, I never had, sir.

Q. At Westover Field how big was the unit you were in, the 881st; any idea of that? A. About 500 men, sir.

Q. And I believe I have asked you if it was alerted, and I am particularly emphasizing whether it was alerted, to go overseas at the time that you received your notice of transfer to Goldsboro? A. It was alerted.

Q. Do you know what the full strength of the outfit would be? A. Well, when I say approximately 500, the full

strength would be 500, I think, sir, but we were under strength at that time.

Q. Was your strength being built up or diminishing? A. Well, sir, in my detachment there were originally 26 men and when I left there there was only 7 left.

Q. So that if the outfit as such was alerted to go overseas it was going over with a skeleton outfit? A. Yes, sir.

Mr. McGohey: I object to that, your Honor.

The Court: I think that is a conclusion and improper.

Mr. McGohey: I move to strike it out.

The Court: Strike it out. 2534

Q. In any event, there were 25 in your immediate outfit when you went there?

Mr. McGohey: I submit we have this.

Mr. Keenan: I think it is very important. I don't understand why the United States Attorney doesn't want to emphasize it.

Mr. McGohey: I move to strike that out.

The Court: You may argue your case when the time comes. But these clashes—strike out the comment.

Mr. Keenan: I will ask the question, your Honor—

The Court: He said there were 26 men when he got in it and when he left there were seven.

2535

Q. There were seven? A. Yes, sir.

The Court: What is the next question?

Q. Now, do you know whether or not that diminishing proportion went on through the whole 881st Engineers?

Mr. McGohey: I object.

Q. (Continuing) Was that unusual for the particular group you were in?

Mr. McGohey: I object to that, your Honor. It is immaterial.

The Court: I overrule the objection.

A. It was unusual. They were breaking up the outfit to my knowledge at the time.

Q. When you say "the outfit", what outfit are you talking about? A. The 881st Airborne Engineers.

Q. How much notice did you get that you were being shipped out of Westover Field to go down to Goldsboro?
2537 A. About 12 hours, sir.

Q. Did you get a chance to go home? A. No, sir, we did not.

Q. How much notice did your cousin, Martin, get? A. The same amount of time, sir.

Q. Was anybody else shipped out of that field at Westover Field besides yourself and Martin, that you know of, to make that trip? A. No, sir. We were the only two.

Q. How many soldiers were there at Westover Field, about, at that time? A. I would say about 30,000, sir.

Q. About 30,000? A. Yes, sir.

Q. Had you had any training of any special type for overseas? A. No, sir, I did not receive any special training.

2538 Q. And what was the physical condition of your cousin Martin that you described at that time? A. Well, sir——

Mr. McGohey: I object.

Q. As you observed.

Mr. McGohey: It appears from the testimony that they were at different fields.

Mr. Keenan: After he got to Westover.

A. Yes, sir. During that time, sir, he always coughed a lot, sir, and he coughed violently at that time, I remember him particularly, and he spat up blood at that time. And that——

Q. Did you see that? A. Yes, sir. I asked him, questioned him about it——

Q. No. You will not be permitted to tell the conversation about it.

Now, do you know what happened to him when he got to Greensboro?

The Court: Goldsboro.
Mr. McGohey: Goldsboro. 2540
Mr. Keenan: No. Greensboro, your Honor.
The Court: All right, you ask the question.

Q. Do you know it? A. Yes, sir, I do. I found out through a letter. But while he was down there he was coughing up quite a bit; also, before I went overseas I meant to say something to somebody before I went overseas, but they pulled out too fast before I could. And I understand he got double pneumonia.

Q. He got double pneumonia? A. Yes, sir.

Q. That is, before he went overseas? A. Yes, sir.

Q. Before he went over to Burma? A. Yes, sir.

Mr. McGohey: Will you fix the date of that?

2541

Q. What was the date of that? The United States Attorney wants to know. A. I don't recall, sir, the exact date. It was about August 5th, something like that.

Mr. McGohey: Of what year?
The Witness: 1944, sir.
Mr. Robb: What is the date?
Mr. Keenan: August 5, 1944.

Q. That is when you——

Mr. McGohey: Your Honor, I move to strike that out.

The Court: I overrule the motion. But you may cross-examine.

Q. Now, did you know that you were going to Goldsboro to the commando outfit before you received this 12-hour notice? A. I did not.

Q. Did you have any intimation of any kind from anyone? A. No idea at all.

2543 Q. Did you hear from Captain Radovich? A. No, sir.

Q. How long since you had seen Captain Radovich before you went down to Goldsboro? A. About six months I would say, sir. I don't remember the——

Q. Had you talked to him? A. No, sir, I never did.

Q. Or got any letters from him? A. Never did.

Q. Or communication from him? A. Never did.

Q. Then, when you got down to Goldsboro did you have a talk, a conversation with Colonel Boebel? A. No, sir, I never did, sir.

Q. And did you tell Colonel Boebel that you were sent down there by Captain Radovich? A. I never spoke to the Major down there. I spoke to an enlisted man, sir.

Q. Whom did you report to when you got to Goldsboro? A. The sergeant in charge, which I always do in any place
2544 where I go.

Q. What did the sergeant tell you to do? A. Report to the barracks, sir.

Q. Did you report to the barracks? A. Yes, sir.

Q. Did you see Captain Radovich there? A. Not that I recall, sir.

Q. You don't know whether he was or was not there? A. That is right, sir.

Q. But you don't recall having seen him at all? A. That is right.

Q. Therefore I will ask you, do you recall having spoken to him? A. Never, sir.

Q. At Goldsboro? A. No, sir.

Q. And, as far as you recall, if Lieutenant-Colonel Boebel says that you told him that Captain Radovich sent you down there, he is mistaken about that? A. I never said anything like that, sir.

Q. Or never talked to him? A. I never spoke to him at all.

Q. Do you remember whether you saw him around there? A. No, I did not, sir. 2546

Q. Were you on any social terms of speaking with Lieutenant-Colonel Boebel? A. I did not, sir. I did not have anything to do with him at all, sir, at any time at all.

Q. Did he have anything to do with you? A. No, sir.

Q. How about Captain Kogan, do you know him; had you seen him when he was a sergeant? A. No, sir.

Q. How long were you at Goldsboro? A. At Goldsboro, about a week, sir.

Q. You left apparently to go some place else. Where was that? A. To be shipped to Newcastle Army Air Base, Air Transport Command.

Q. What did you do there? A. I worked——

Q. Wait a minute. Was that pursuant to some order that you got? A. Yes, sir, special order came out, like a regular order that usually comes out. 2547

Q. Who told you about it? A. The sergeant, sir.

Q. And when the sergeant spoke to you and told you to go you moved? A. Yes, sir.

Q. And that was your habit, usually? A. Yes, sir.

Q. Sergeants were that way? A. Yes, sir.

Q. When you got to Wilmington, Delaware, what kind of work did you do there? A. I was working in the message center, on secret and confidential work, sir.

Q. Were you busy there? A. Yes, sir, we were.

Q. Was Martin there with you? A. He did not work with me, sir; he was in a different outfit, but he was there at the same field.

Q. On the same field but with a different outfit? A. Yes, sir.

Q. What kind of work did he do, if you know? A. He worked in the file section.

Q. On the file section? A. Yes, sir.

Q. Have you any knowledge of your own about how you happened to be transferred from Westover to Goldsboro? A. Not at all, sir.

2549 Q. Or from Goldsboro to Wilmington, or Newcastle? A. I didn't at that time, sir.

Q. You have read the papers and of course you have heard of this matter that is pending in this courtroom? A. That is right, sir.

Q. May I ask you when you first saw me? A. Monday evening, sir, when you called me in to speak to you.

Q. You had never seen me before Monday evening? A. No, sir, I never did.

Q. Do you know how you happened to come back to this country this particular time? A. I had a recuperation furlough, temporary duty in the United States. I should say that is given to all the boys returning from overseas, from this outpost, from the Arctic Circle, an isolated place.

2550 Q. You were up at an isolated place at the Arctic Circle? A. Yes, sir.

Q. Pretty cold up there? A. Yes, sir.

Q. You were glad to get home? A. I certainly was, yes, sir, with my wife.

The Court: Do you wish to cross-examine?

Mr. McGohey: Do you want me to start now, your Honor?

The Court: Yes.

*Cross-examination by Mr. McGohey.*

Q. Melvin— A. Yes, sir.

Q. —when you were ordered out of—where was it? Bradley Field you were or Westover? A. Westover Field, Massachusetts.

Q. Westover you were at? A. Yes, sir.

Q. When you got your order to leave Westover Field, I think you told us that you got short notice? A. About twelve hours, sir. It was less than that, I would say, even.

Q. Sir? A. I would even say it was less than that.

Q. What do you mean by that, that from the time you were told you were leaving you were given twelve hours to 2552
get out of Westover Field? A. No, sir; we were in the process to leave for overseas in that twelve hours; I left the field within twelve hours, sir.

Q. That is what I mean. From the time you were first told you were going you got twelve hours in order to get out of the field? A. Yes, sir.

Q. And at the end of that twelve hours did you leave the field? A. Yes, sir.

Q. How did you go down to Goldsboro? How did you travel? A. By train, sir.

Q. And where did you take the train? A. I took the train—I have forgotten the name of the town, sir; it is right near Westover Field, Massachusets. I have forgotten it, sir.

Q. How long were you at this field, Melvin? A. I was 2553
there about 3½ months, sir, I would say.

Q. During that time did you have some passes to go to the town? A. The same as anybody else.

Q. Well, yes, certainly. And in the ordinary course of your duties you got your passes, like any good soldier would get? A. That is right, sir.

Q. Did you go into town? A. Yes, sir.

Q. How many times did you go into town? A. I don't recall the amount, sir.

Q. Would you say you went on an average of three times a week? A. No, sir. I might get a night pass about three times a week, sir.

Q. Where would you go when you got a night pass? A. To Westover.

Q. Was that the town? A. Yes, sir. Holyoke. I am sorry. It was Holyoke; that is not the place where I took the train, sir. Holyoke was near there.

Q. Holyoke was nearer to the field? A. Yes, sir.

Q. That is where you would go on your passes? A.
2555 Yes, sir.

Q. Is Holyoke the place where you took the train? A. No, sir. It was a larger town.

Q. Were you ever in the town before the time you went there to get out the train? A. Yes, sir.

Q. How many times were you there? A. A couple of times when I went home, sir.

Q. You don't remember it? A. No, sir, I don't.

Q. How far from the field was it? A. It was—I would say about thirty miles—no, I don't say that. About twenty miles, twenty-two, twenty-two, thirty miles.

Q. How did you get from the field to the train? A. They had buses there.

Q. When you got these orders you went to this town and
2556 got on the train? A. No, sir. Army transportation took me to the train, sir, by truck.

Q. In any event, in some mode of conveyance you got to this town? A. Yes, sir.

Q. What itme of day was it? A. It must have been about 4 o'clock in the afternoon; I don't recall the time, sir.

Q. How long did it take you to go from that town to Goldsboro? A. I left that afternoon and arrived in Goldsboro the following evening, I believe, sir; about a whole day.

2557

Q. Would you say it was about twenty-four hours? A. I would say that, yes, sir, about that. I don't recall, though, how long it was.

Q. Do you recall the date on which you got those orders? A. No, I don't, sir.

Q. If I showed you the order would that refresh your recollection, Melvin? A. It might, sir.

Q. Would you take a look at this? This is Government's Exhibit 3. A. I don't recall it saying "proper time." I don't recall the orders directly, but I know the "proper time"—I don't remember seeing it, sir.

Q. Were you given a copy of these orders? A. Yes, sir, I was.

2558

Q. You looked at them, of course? A. Yes, but——

Q. Did you look at them? A. Yes, sir, I did.

Q. Will you look at the date of these orders on this copy that I show you here? That date there is 22 November, 1943? A. Right, sir.

Q. Does that refresh your recollection as to the time at which you got your orders? A. I don't know, sir, if it is true or not, because I don't remember——

Mr. McGohey: I move to strike that out, your Honor.

Q. I just— A. I am sorry, sir.

Q. You and I will get along all right; don't try to go too quickly. A. I am sorry, sir.

2559

Q. What I asked you is, does that refresh your recollection as to the date on which you were ordered to leave Westover Field and go to Goldsboro? A. No, it does not, sir.

Q. Well, in any event it is your present recollection is it, that you left there some time in the afternoon of whatever day you got your orders? A. Yes, sir.

Q. And that you traveled all that afternoon and that night? A. Yes, sir. We slept on the train.

Q. You say "we slept on the train." Whom do you include in "we"? A. Martin and I, sir. We were the only two on the orders. I was in charge of the trip, sir.

Q. Were you at the same field with him? A. Well, his outfit moved up after two months at Bradley Field to Westover Field, Massachusetts, sir.

Q. So that at the time you got your orders to leave he was at the same field you were? A. In the same field in a different outfit.

Q. You traveled together from the field in and got the
2561 train together? A. We were called in by the headquarters at the field and put on the same orders and we were given the orders together and told to go together.

Q. You traveled together all the time? A. Yes, sir.

Q. Then you slept on the train? A. Yes, sir.

Q. Your recollection is that it was some time late the next afternoon or some time the following afternoon—A. Yes, sir. But while we were on our way here we had about a two-hour layover in New York, and I called my mother and Marty called his folks and they came down to see us.

Q. Did you change trains at New York? A. Yes, sir, we did.

Q. When you got to New York what time was it, do you recall? A. Maybe about 7 o'clock, sir, something like that.

2562 Q. 7 o'clock in the morning? A. P. M., sir.

Q. 7 P. M. of the same day that you left Westover? A. Yes, sir.

Q. What train did you come down on, by the way? A. I don't remember. It is Grand Central Terminal we came into, sir.

Q. You came into Grand Central Terminal? A. Yes, sir.

Q. Then from what terminal did you leave going to Goldsboro? A. I think we left Pennsylvania, sir.

Q. Where was it that you met your folks and Martin met his? A. We called them and they came in, sir.

Q. Where was it that you met them? A. At the Grand Central, I believe it was.

Q. You called at the Grand Central for them? A. Yes, sir.

Q. Where was it? Where did you make the telephone call? A. At the station, sir.

Q. When you got into New York? A. Yes, sir.

Q. And then you waited there for them? A. Yes, sir.

Q. Did you have dinner together? A. Yes, sir, the folks did, sir.

Q. All of them, you and Martin and your relatives? A. Yes, sir; and my wife, sir.

Q. Your wife? A. Yes, sir.

Mr. McGohey: Would your Honor excuse me for just a second here, please?

The Court: Let me make the inquiry, have you considerably more?

Mr. McGohey: Yes, your Honor, I have.

The Court: We will take an adjournment then until tomorrow morning.

(To the witness) Let me admonish you that you have started to testify and have not finished, and between now and tomorrow morning, until it is completed, do not discuss your testimony with anybody.

The Witness: Yes, sir.

The Court: Don't talk about the case or discuss it with anybody.

The Witness: Yes, sir.

The Court: All right. Adjournment until 10.30 tomorrow morning.

(Adjourned to Thursday, October 18, 1945, at 10.30 A. M.)

New York, October 18, 1945,
10.30 A. M.

TRIAL RESUMED.

Mr. McGohey: Melvin, will you take the stand, please.

MELVIN USDAN resumed the stand.

*Cross-examination (continued) by Mr. McGohey.*

2567 Q. When we suspended yesterday afternoon, Melvin, you remember we were talking about the time that you and Martin Bayer left Bradley or Westover, whichever field it was, and went to Goldsboro? A. Yes, sir.

Q. Were you a corporal at that time? A. Yes, sir.

Q. And you were in charge of the detail in travel? A. I was given field orders, yes, sir, except for one special order——

Q. Melvin, please do not be nervous now and try to keep your voice up loud enough so that everybody back here at this last table can hear you and the last lady here in the jury box can hear you. Will you do that, please? A. Yes, sir.

Mr. McGohey: May I have the last question read?

2568 (Question read.)

Q. What was the special order? A. Instructing us to go to Goldsboro, North Carolina.

Q. And did that order tell you when you were to report there? A. We were given transportation by the Government, sir, and it was immediate.

Q. I do not think that is quite responsive. Maybe you misunderstood my question. You got a special order? A. Yes, sir.

Q. Directing you to go to Goldsboro? A. Yes, sir. Immediately.

Q. Did that order specify when? Did it give you any date that you were to arrive at Goldsboro? A. I believe it did, sir. We are told to go right down there. I don't recall the date, sir.

Q. During the time that you were in the Army, you got passes from time to time, like other boys did, did you not? A. Yes, sir.

Q. Did you sometimes get week-end passes? A. Once in a while, yes, sir.

Q. In the regular course. And when you got a week-end pass you would leave the station some time on Saturday morning, probably, would you? 2570 A. No, sir; you leave at night, when the pass started.

Q. Your pass would start at night? A. Yes, sir; after your day's work.

Q. Suppose you had a week-end pass, when you were at Bradley Field, for instance— A. I wasn't at Bradley Field, sir.

Q. Well, at Westover. A. Yes, Westover, sir.

Q. When would that pass start? A. It would start about 5.30, I believe, sir.

Q. When would you have to report back on a week-end pass? A. I would have to report back—well, sir, you never received a week-end pass; you received a two-day pass or a three-day pass or a one-day pass. 2571

Q. Was there ever an occasion when you had three-day pass? A. I don't believe I ever had one at Westover Field, sir.

Q. At any time while you were in the Army did you ever have a three-day pass? A. Yes, sir.

Q. And you would use the three days, would you not? A. Yes, sir.

Q. You would get back on time, would you not? A. Yes, sir.

Q. You would not get back late? A. No, sir.

Q. Were you ever a.w.o.l.? A. No, sir, I wasn't.

Q. You would not get back late? A. No, sir.

Q. Would you get back ahead of your pass, ahead of the time? A. I usually did, yes, sir.

Q. How long ahead of the time? A. About half an hour, I would say.

Q. About half an hour? A. Yes, sir.

Q. So that you wanted to be sure that you are always in on time and that you kept up your record? A. Yes, sir.

Q. It would be about an hour or a half hour ahead of
2573 reporting time that you would get there? A. Yes, sir.

Q. Did you ever have a pass for a longer period than three days? A. I never had a pass for a longer period than three days, sir; not an authorized pass for seventy-two hours.

Q. Were you married all the time that you were in the Army, Melvin? A. No, sir, I was not.

Q. When did you get married? A. June 11th of 1944—of 1943.

Q. 1943? A. Yes, sir.

Q. After you got married, any time that you could get a pass I assume that you would come home to see your wife? A. At Delaware, sir, you were allowed to live off the post if you were married.

Q. Prior to that time, let us take the time in June, 1943.
2574 Where were you stationed? A. At Delaware, sir.

Q. In 1943? A. That is right. If I get the year straight, I believe——

Q. In June, 1943, you were at Mitchel Field, were you not? A. I want to straighten out my date. I am all mixed up, I have been so many places, and I don't get the dates clear. I have been married 16 months, sir.

Q. Wait a minute, let me see if I can help you. You went into the Army in December, 1942? A. That is right, sir.

Q. You were first at Camp Upton? A. That is right, sir.

Q. Martin was with you at Camp Upton, was he not? A. That is right, sir.

Q. When you left Camp Upton you came to Mitchel Field? A. Yes, sir.

Q. Martin came with you, did he not? A. Yes, sir.

Q. When you were at Mitchel Field you were first assigned to the base, is that right? A. The Base Squadron, yes, sir.

Q. Doing clerical work there? A. Not immediately, sir.

Q. I don't hear you, Melvin? A. Not immediately, sir.

Q. What did you do when you first went there? A. I was assigned to the Basic Training Center—Section, I am sorry. 2576
Basic Training Section of the air base squadron for basic training in the Army.

Q. Was Martin Bayer there with you at that time? A. Yes, sir.

Q. Some time subsequent to that, however, you did come into the base headquarters, did you not? A. Yes, a short while after, yes.

Q. You and Martin were there together? A. That is right, sir.

Q. That was in 1943, wasn't it? A. Yes, sir. That was part of 1942. Let's see, now, sir. I believe about a week before, in 1942, something like that.

Q. We are trying to figure out 1943. Now, in 1943, in the early part of that year, you were working as a clerk 2577
at the base, at base headquarters at Mitchel Field, were you not? A. That is right, sir.

Q. Martin Bayer was working with you? A. That is right, sir.

Q. Were you working together? A. Yes, sir.

Q. Then some time later in 1943 you were transferred to the First Fighter Command, were you not? A. That is right.

Q. That was in 1943. Then later on you were transferred—by the way, when you were transferred to the First Fighter Command Martin was transferred with you, was he not? A. Yes, sir.

Q. At the same time? A. Yes, sir.

Q. On the same orders? A. I don't remember if I ever saw the orders. If you are on the field I don't believe you get a copy of the orders.

Q. Well, you left the base and came to the First Fighter Command together at the same time? A. Yes, sir.

Q. Then you left the First Fighter Command and were transferred to the Medical Detachment at Mitchel Field
2579 at Santini Hospital, were you not? A. No, I was not transferred to the Santini, sir. It was right on the field, the base hospital, and they had a section in Santini also.

Q. You were transferred, however, from the First Fighter Command to the Medical Department at Mitchel Field, is that correct? A. That is correct.

Q. Martin was transferred with you at the same time, was he not? A. That is right.

Q. To get back to the question that we were talking about, l[redacted]es: Now, during 1943 you got some leaves, did you no[redacted] much as three days at times? A. I think I might have received one, sir.

Q. At least you got as many as you were entitled to get or as you could get, is that so? A. That is right.

Q. And, like any other boy, you wanted to see your parents
2580 and you wanted to see your wife, and you took as much time as you were entitled to have under the regulations? A. That is right, sir.

Q. Now— A. Pardon me, sir. Could I say something?

Q. Yes. A. Yesterday I said something about a phone call that I made in New York. I was a little mixed up. Did I say in New York that I made the phone call before I came?

Q. My recollection is that you said you came down to New York from Westover— A. Yes, sir.

Q. —and that when you got into New York, you and Martin, that you made a phone call to your parents from Grand Central Station. That is my recollection of what you said. A. I mixed myself up there, sir. I believe I made the phone call from Westover Field, sir.

Q. Whom did you call? A. I called my wife and my mother, sir.

Q. You called your wife and your mother? A. She wasn't my wife at the time. I was engaged, sir. My wife, she was at school at that time. I called her at school. I remember that, sir. 2582

Q. Melvin, please keep your voice up good and loud now, because everybody back here wants to hear you; just try and talk a little more slowly. A. Yes. She was at college at that time, and I called her there, and I called my mother at home.

Q. Do you know whether Martin made a call at Westover Field? A. I believe he did, sir.

Q. Do you know whom he called? A. His folks.

Q. His folks? A. Yes.

Q. You told them I suppose that you were coming to New York? A. No—well, we told them we would pass through, yes, sir.

Q. That is what I say, passing through. A. Yes.

Q. Did you ask them to meet you? A. We asked them if they could, yes, sir, if it was possible. 2583

Q. And they did? A. Yes.

Q. Now, do you recall when it was that you got down to New York? A. Sir, I think it was—I have some data at home that I keep around from my Army career, and I looked at the time yesterday and it was—I left Westover Field, Massachusetts, at about 5.30 and arrived in New York about 9.30, and had to leave about 11.30, 12 o'clock from New York.

Q. That was 11.30 P. M. you mean? A. Yes, sir.

Q. As I understand it now you say that you have refreshed your recollection overnight from some memoranda that you have at home? A. Yes, sir. I had a schedule that I was supposed to keep that the Army gave me; that was a schedule that the Army gave me when I left Westover Field, Massachusetts, a transportation schedule.

Q. Have you got that card with you, Melvin? A. No, sir, I don't.

Q. You don't have it with you now? A. No, I don't.

Q. You say the Army gave you this schedule to keep. Was that something that you were required to turn over to
2585 some officer at Goldsboro, when you reported there? A. No, sir, not at all.

Q. Was it an official form of some kind? A. It was an official form, yes, mimeographed form, yes, sir.

Q. What was its purpose, if you know? A. It gave the time of the train's leaving and the time of the train's arrival and departure again.

Q. Am I mistaken? I thought you said that it was a form which the Army gave you to keep, a schedule which they gave you to keep. Am I wrong in assuming that that means that there were certain entries you had to make on it? A. No, sir, not at all.

Q. Well, just what was it? A. It started this way, sir: It was dated about the 24th, sir—I looked at it—dated the 24th of November, and it said, "To depart"—and I remem-
2586 ber the name of the town also, Springfield, Massachusetts, sir——

Q. A little more slowly and loudly so that we can all hear. A. It says, to depart from Springfield, Massachusetts, at approximately 5.30 and arrive at New York at 9.30 and depart from New York at 11.30 or 12.

Q. On what date now? A. I think it was the 24th it was dated, that was November 24th, and arrive on the 25th at Goldsboro, North Carolina, at approximately 3.30 in the afternoon, 3.30 P. M.

Q. And you followed out those instructions? A. Yes, sir.

Q. And Martin Bayer was with you all the time? A. That is right.

Q. So that you just had a few hours with your family and your wife in New York before you went down? A. That is right.

Q. At the time you were going to Goldsboro, did you know you were going to an outfit that was ultimately and shortly going overseas? A. Well, the way that reached us, sir, I believe we were going overseas. And the way the orders read, "Project", I think for overseas, or something like that.

Q. When you met your family and your wife you told 2588
them, I assume, that you were being sent to an outfit that was going overseas, did you not? A. Well, I didn't want to tell them directly. My mother is very nervous and I didn't want to upset her. I didn't tell her exactly what was going on; no, sir.

Q. You did not tell her that you were going overseas? A. Well, she tried to get it out of me, but——

Q. Did you tell her? A. I don't believe I did, sir, at that time.

Q. Did she find out in some other way, if you know, at that time? A. I don't believe so, sir.

Q. I assume that all of you had dinner together and you were all sitting around and talking? A. Well, I spent a lot of time with my wife; I was engaged at that time to my 2589
wife now.

Q. At dinner I assume you were all sitting around talking? A. Yes, for about a half hour.

Q. Did you hear Martin Bayer say anything to his parents about where he was going? A. Well, I don't know if he told them.

Q. Did he tell his folks that he was going overseas? A. I don't believe he did, in my presence, sir. I don't know if he did or not.

Q. Did you ever meet a Major in the Army named Major Saffron? A. Never have, sir.

Q. Do you recall the time that you went to the Induction Center at Grand Central Station? A. Yes, sir.

Q. Did you meet him there that day? A. No, sir.

Q. Were you introduced to any officer that day by Mr. Samuel Bayer? A. Nobody at all, sir.

Q. But Mr. Bayer was with you that day when you went to the Grand Central Station with Martin? A. Yes, sir.

Q. Do you know any of the gentlemen named Busch who run the I. Buss Uniform Company? A. I believe it is my uncle's brother-in-law or something like that.

2591 Q. Philip Busch and Harold Busch and Joe Busch? A. Yes, sir.

Q. Were any of them with you that day at the Induction Center? A. I think one of them was with me. I don't recall, though, very clearly, but I think he was.

Q. But your best recollection is that one of those three Busch brothers was there? A. Yes, sir.

Q. After your enlistment into the Army, did you see Mr. Samuel Bayer from time to time during the spring and summer of 1943? A. When I had a pass I would most likely stop over and say hello.

Q. Did you see your uncle, Elias Bayer? A. Not too often because he lived in New York.

Q. Did you see him at some time during that period? A. Maybe once, or something like that; twice.

2592 Q. At any time that you were talking with Mr. Samuel Bayer did he ever tell you that he knew Lieutenant Roeser? A. No, sir, he never did.

Q. You knew Lieutenant Roeser, did you not? A. I worked for him, yes, sir.

Q. You worked under his immediate orders? A. Yes, sir. In his section.

Q. Did Mr. Bayer ever tell you that he knew Major Radovich? A. No, sir; not to me, not at all.

Q. There came a time when you came under Major Radovich's command, the First Fighter Command? A. At the same time as Lieutenant Roeser, yes, sir.

Q. At any time thereafter did Mr. Bayer tell you that he knew Captain Radovich? A. No, sir.

Q. Did he tell you he knew Colonel Vidal? A. No, sir.

Q. Did he tell you he knew Colonel Jacobson? A. He did not, sir.

Q. Did he tell you he knew another officer on the field named Captain Kogan? A. No, sir, he did not.

Q. Did you ever meet Captain Kogan? A. I don't believe so; on the field, sir, you see so many officers and I don't recall all the names. 2594

Q. In any conversations that you had with Martin Bayer did the name of Captain Kogan ever come up? A. No, sir.

Q. Or Colonel Jacobson? A. No, sir.

Q. Or Colonel Vidal? A. No, sir.

Q. Captain Radovich? A. No, sir.

Q. Captain Engelhardt? A. No, sir.

Q. Did you know Colonel Vidal? A. I believe he was in the First Fighter Command, sir. I don't know what he did there. I just heard the name around there.

Q. Did you ever see him? A. I don't think I ever did, sir.

Q. Did you ever see Colonel Jacobson? A. I think I might have seen Colonel Jacobson because he had something to do with our department, I believe.

Q. Did Samuel Bayer or Elias Bayer ever tell you at any time during the year 1943 that they had entertained Colonel Jacobson? A. No, sir. 2595

Q. Or that they had entertained Colonel Vidal? A. No, sir, they did not.

Q. Or that they had entertained Captain Radovich? A. They never told me, sir, anything like that.

Q. Or Lieutenant Roeser? A. No, sir.

Q. Did they ever tell you at any time during 1943 that they had paid for uniforms for any of those officers? A. No.

Q. You never heard anything at all about that? A. No, sir; not until I read about it in the papers.

Q. Did you ever hear from anybody that these officers, Colonel Vidal and Lieutenant Colonel Jacobson and Captain Radovich and Lieutenant Roeser, had received or had gotten uniforms from the I. Buss Uniform Company? A. You say at any time?

Q. At any time in 1943? A. No, sir, I never did.

Q. While you were at Mitchel Field? A. No, sir.

Q. You never heard it? A. I never heard it.

Q. Did you ever hear that your uncle, Samuel Bayer, had paid for uniforms for any of these officers? A. No, sir;
2597 not at that time.

Q. During that time? A. No, sir; not at that time.

Q. Directing your attention to your transfer from the First Fighter Command to this medical detachment at the Base at Mitchel Field— A. Yes, sir.

Q. You requested a transfer at that time, did you not, Melvin? A. No, sir; it was pretty odd the way it happened, sir.

Q. Well, will you first answer my question as to whether or not you made a written request for transfer? A. I did not make—I did not write a request, sir.

Q. Well, did you sign a request for a transfer? A. After I was asked to, yes, sir.

Q. Do you know whether or not Martin Bayer made a request for a transfer? A. He was along with me all that
2598 time the same incident happened.

Q. And you both signed requests for transfers? A. After we were asked to sign the requests.

Q. By whom were you asked? A. By a Lieutenant in the Medical Corps in the First Fighter Command.

Q. By a Lieutenant in the Medical Corps in the First Fighter Command? A. Yes, sir.

Q. Did you refuse to sign it at first? A. No, sir. I did not.

Q. Did you refuse at any time to sign it? A. No, sir, because for the simple reason that the work was getting scarce there and we knew that there were ratings open in the medical detachment, and we liked to get something to do and we were pretty upset about not doing much work at the First Fighter Command.

Q. You were upset about not doing work at the First Fighter Command? A. After those two people came in to work.

Mr. Keenan: I do not hear the witness.

The Witness: After the two people came in with Lieutenant Roeser to work with him. 2600

Q. Sometime during the spring of 1943, members of the Women's Army Corps came into Mitchel Field, did they not? A. I believe a few of them; not many.

Q. What kind of work did they do, do you know? A. They were schooling them; the ones I knew, they were schooling them in weather, in the Weather Department.

Mr. Keenan: I do not hear that. I wish the witness would be cautioned to speak up.

The Court: Speak up.

The Witness: At that time they were instructing them on data about weather, to work with the Weather Department at Mitchel Field.

2601

Q. Were any of them doing clerical work? A. They might have been; I don't know, sir.

Q. Before you left the Base to come to the First Fighter Command, didn't some members of the Women's Army Corps come in there to do clerical work? A. There might have been a few, I think so.

Q. And then subsequently didn't they come over to do clerical work in the First Fighter Command? A. Not while I was there, I don't recall, sir.

Q. Well, in any event, you signed this request for a transfer to the medical detachment, and Martin also signed one? A. He signed it, yes, sir.

Q. Is that correct? A. Yes, sir.

Q. Who is the first officer to whom that request would go in ordinary procedure? A. I don't understand that question, sir.

Q. Well, when you make out a request for a transfer to whom do you address it? A. To the Commanding Officer.

Q. And you have been in the Army now since 1942? Do you know where such a request goes first, to what officer does it go? A. I'm not sure, but I believe it goes to the
2603 Commanding Officer.

Q. Your immediate commanding officer? A. I imagine it gets to him eventually. I don't know which one gets it first.

Q. Melvin, you have done clerical work in the Army for quite a while, have you not? A. Yes, sir.

Q. And you have seen quite a lot of Army correspondence, have you not? A. Yes, sir.

Q. You know, do you not, that when a letter is written in the Army, it is handled thereafter by endorsements? A. Yes, sir.

Q. In the normal course a request for a transfer would go to what officer? I will withdraw that question and put it to you directly. Doesn't your request for a transfer go in the first instance to your immediate commanding officer? A. Are you referring to Lieutenant Roeser?

2604 Q. No, I am referring to your commanding officer? A. I believe it would, sir.

Q. And your commanding officer at that time was Captain Radovich, was he not? A. That's right, sir.

Q. Don't you know that in order to have that request proceed to a higher authority it would first have to be approved by your immediate commanding officer? A. I believe that's right.

Q. And you know, do you not, that Captain Radovich as a matter of fact did approve your request for transfer? A. I didn't know at that time, sir.

Q. You know that ultimately you were transferred, don't you, Melvin? A. That's right, sir.

Q. Well, now, didn't that mean to you that Captain Radovich had approved this transfer?

Mr. Keenan: I think he answered the question, if the Court please.

The Court: I will allow him to answer.

Q. May I have the answer? A. You want to know—will you repeat the question? 2606

Q. (Question read.) A. I believe so; it would mean that.

Q. Do you recall how long it was from the time that you and Martin first made your requests to be transferred until you finally were transferred from the First Fighter Command to the medical detachment? A. After we signed it must have taken about two weeks, sir.

Q. Could it have been a month? A. At that time—I believe it was two weeks; I don't know, sir, for sure.

Q. After you made out the request for the transfer at the request, as I understand your testimony, of the officer in the medical detachment——

Mr. Keenan: Just a minute. I object to that question. 2607

The Court: I think he said he signed it.

Mr. Keenan: That is right.

Mr. McGohey: I will withdraw it.

Q. After you signed this request for transfer, which as I understand you signed at the request of an officer in the medical detachment at Mitchel Field, is that correct? A. Yes, sir.

Q. You did that? A. Yes, sir.

Q. After that, between the time you signed it and the time you were ultimately transferred, did you have any conversations with this officer in the medical detachment about the transfer? A. No, sir.

Q. By the way, who was he, do you know? A. I don't recall his name, sir. I know there were two officers, I believe, in the First Fighter Command medical detachment. There was a Captain and a Lieutenant.

Q. A little louder and not quite so fast. A. I believe there were two officers in the medical detachment in the First Fighter Command. One was a Lieutenant and one
2609 was a Captain at that time.

Q. And you do not recall which of those two officers asked you to sign this request? A. Yes, sir; I remember it was the Lieutenant.

Q. It was the Lieutenant? A. Yes, sir.

Q. And not the Captain? A. No, sir.

Q. By the way, was that request for transfer which you signed, written in duplicate or triplicate, do you know? A. I don't think I signed—I don't know if it was, sir. I only signed one copy, I believe.

Q. Was it typewritten? A. Yes, sir.

Q. And did Martin sign his at the same time? A. Yes, sir.

Q. And was his typewritten? A. Yes, sir.

Q. And where were you when you signed it? A. In this Lieutenant's office.

2610 Q. In the office of the Lieutenant who asked you to do it? A. Yes, sir; he called us in.

Q. Please keep your voice up. A. He called us in.

Q. Even though I step up there, Melvin, everybody back here has to hear you. A. I am sorry.

Q. As far as you recall, were there any carbon copies attached to the request which you signed? A. I don't remember, sir. I don't believe there were, but there might have been.

Q. Now, Melvin, again I call to your attention the fact that you have been handling a lot of paper work in the Army, and correspondence of various kinds? A. Yes, sir.

Mr. Keenan: Your Honor, I object to that. I think that has been answered and I think the witness is trying to answer these questions. He said that he did not remember. He said that he thought that possibly there were but he did not remember.

The Court: I overrule the objection.

Mr. Keenan: Exception.

The Court: Go ahead.

2612

Q. Don't you know as a fact, Melvin, that all papers of this kind, all requests and all letters in the Army, are made out with several carbon copies? A. That's right.

Q. As a rule? A. As a rule.

Q. And you have seen other requests for transfer from other boys come over the desks and go into the files, have you not? A. I believe I have seen a couple of them.

Q. And in those cases there were usually extra carbon copies attached? A. No, sir.

Q. You never saw carbon copies attached? A. Not in the files, no, sir; just one copy of everything.

Q. Don't you know that a request for a transfer would have to be filed in various places? A. I don't believe so, sir. I believe—it might be, I don't know, sir, but all we received was one copy at the 201 file section.

2613

Q. I think I have asked you this question: between the time that you signed the request for transfer at the request of the Lieutenant and the time you were ultimately transferred to the medical detachment, did you have any conversation with that Lieutenant about the transfer? A. I didn't have any conversation at all with him, sir.

Q. Well, did you have any conversation with anybody about that? A. No, sir, I never did.

Q. Did you discuss it at any time with Mr. Samuel Bayer? A. No, sir, I did not.

Q. Do you know whether or not that request was disapproved at any time by any officer at Mitchel Field? A. I was not told about it.

Q. I asked you, do you know whether it was or not? A. No, I do not. I didn't know about it, no, sir.

Q. Melvin, don't you, as a matter of fact, know that that transfer was turned down by the Commanding Officer on the grounds that there was a shortage of clerical help at the First Fighter Command? A. I would have to laugh at that, sir.

2615 Q. Sir? A. I would have to laugh at that.

Q. Well, you can laugh, but I am asking you, didn't you know that? A. I didn't know that.

Q. Do you know that somebody stated that to be the reason why it was turned down? A. I did not know that.

Q. Do you know whether or not at the time that the transfer ultimately went through, that another soldier was transferred from the medical detachment to the First Fighter Command in your place? A. I did not know that.

Q. And that another soldier was transferred from the medical detachment to the Fighter Command in place of Martin Bayer? A. I didn't know it.

Q. You never knew it? A. I never knew it. This is the first I have heard of it.

Q. Do you know whether there was at Mitchel Field in
2616 August of 1943 a Major General by the name of Royce? A. He was Commanding Officer of the First Air Force.

Mr. Keenan: May I ask whether the question was, if this witness knew the General, or knew of him?

Mr. McGohey: I asked him whether he knew at that time. I asked him if there was a Major General named Royce at the field in August of 1943.

Mr. Keenan: Will you read that question that was asked before, Mr. Stenographer, please.

(Question read.)

Mr. Keenan: I wanted to be sure I had it.

Q. Don't you know as a fact that he disapproved the transfer? A. No, I knew nothing about it, sir.

Q. Did you in the summer of 1943 know a soldier at the medical detachment at Mitchel Field named Jerome L. Epstein? A. No, sir, I never knew him.

Q. You never met anybody by that name? A. No, sir, I never did.

Q. Don't you know as a matter of fact, Melvin, that he is the man that replaced Martin Bayer? A. No, sir, I never met him and I never knew of him. 2618

Q. You never heard of him? A. I never heard of him. This is the first I heard of him.

Q. Did you say to your commanding officer of the First Fighter Command that you desired a mutual transfer to be arranged between the First Fighter Command and the Medical Detachment? A. No, I didn't, sir.

Q. Do you know whether Martin Bayer did or not? A. I don't believe he did, sir.

Q. I ask you to look at that file, Melvin.

Mr. Keenan: May we have it identified, what he is looking at?

Mr. McGohey: I don't know that that is necessary, your Honor. 2619

Mr. Keenan: I don't see how we can follow this case from this record without it being identified.

The Court: He is being shown a document.

A. Yes, sir.

Q. Does that refresh your recollection, Melvin? A. No, sir. I am pretty sure he never did make anything like that.

Q. In any event, this does not refresh your recollection? A. No, it does not.

Mr. Keenan: I now ask that that instrument be identified, because I don't know how I am going—I think it should be marked in the record.

The Court: I will ask counsel to show it to you. He doesn't have to introduce it.

Mr. McGohey: Mr. Keenan, I just got that back from you this morning.

Mr. Keenan: I just got it from you after the Colonel said it wasn't there, and the Judge ordered——

2621 The Court: I don't like these——

Mr. Keenan: He started it, your Honor.

Mr. McGohey: No, I didn't start it.

The Court: I am not going to pass on who started it, but I am stopping it. I don't like these altercations between counsel.

Mr. McGohey: I don't like them either.

The Court: All right. Now the document has been shown to counsel. You may proceed. Have you further questions?

Mr. McGohey: Yes, your Honor. Pardon me for just a moment.

Q. Melvin, I understood you to say that when you signed this request for transfer Martin Bayer was present and
2622 signed a similar request? A. Yes, sir.

Q. Both of course at the request of this officer? A. That is right.

Q. Would you look at that top sheet there (handing)? A. That might be the same one.

Q. The same kind that you signed? A. Yes, sir.

Q. And the same kind of— A. It might be. I don't remember the exact wording of it.

Q. Well, take a good look at it, Melvin. A. I wouldn't remember it, sir, because it has been so long since I have seen it, and I didn't look at it very closely at that time.

Q. Is it substantially the same as the one you signed? A. I couldn't answer that, sir, because—it looks like the same one to me.

Q. Well, in the request that you signed did there appear this language, "Although I have no practical or specialized training in the medical department, it is my sincere belief that if said transfer is favorably considered my service to the Government would be of much greater value than at present"? A. I believe it ran like that, something like that.

Q. Prior to going into the Army, Melvin, how far had 2624
you gone in your education? A. I had high school and I had some trade school training, sir; I had a little college at night.

Q. Did you state those facts in this application for transfer? A. I believe so; I don't recall.

Q. Well, do you recall whether or not you related those facts to the officer who prepared the request for transfer? A. I didn't speak to him at all before he called me in, sir.

Q. Well, was the letter all prepared before you came in? A. Yes, sir.

Q. And this information about your education was in it? A. I didn't know if it was in it, that part I don't recall, I don't know if it was in it; it might have been in it, but I don't remember, it has been so long now.

Q. Well, could he have gotten that information any place 2625
else? A. My service record, very easily.

Q. Would your service record show all of your educational background? A. Yes, sir, everything.

Mr. McGohey: May I have this marked for identification, your Honor.

(Marked Government's Exhibit 26 for Identification.)

Mr. McGohey: I have no further questions of the witness, your Honor.

Mr. Robb: I have a few questions.

*Cross-examination by Mr. Robb.*

Q. Melvin, how many people does this application or request for transfer have to be approved by? A. I don't know, sir.

Q. Quite a few, didn't it? A. I imagine so, sir. Usually it does in the Army.

Q. Started out, though, down in your organization by Captain Radovich, is that right? A. I don't know. Started
2627 by me, as far as I know.

Q. Do you know whether or not it also had to be approved by Lieutenant Roeser? A. I imagine it would; the section, yes, sir.

Q. This medical officer that you mentioned, what organization was he attached to? A. He was with the Medical Detachment of the First Fighter Command, I believe.

Q. That was not the same organization you were in, was it? A. Yes, it was.

Q. I mean the same particular organization, the same general organization? A. It was part of it, that is right. It was in the same building.

Q. Yes. But you were working in what particular branch of the First Fighter Command? A. The radar section.

2628 Q. The radar section. Do you know whether or not your request for transfer was approved by Colonel Travis? A. I didn't know anything about it.

Q. Did you know him? A. No, I didn't.

Q. You were just a buck private, you didn't know the officers? A. That is right; I didn't know the big shots.

Q. Melvin, Mr. McGohey asked you some questions about what you knew about this transfer. Am I correct that you were given to understand that you were being transferred

to make way for Roeser's girl? A. Well, there wasn't much work for two of us when we first started to work there, and then when four of us were working there there was hardly anything at all.

Q. The four included Roeser's girl? A. Yes.

Q. By the way, Melvin, this Medical Detachment lieutenant, who was his superior officer? A. I imagine the same superior officer of everybody else.

Q. Who was that, the commanding general? A. The commanding general of the First Fighter Command, I believe.

Q. In other words, he wasn't under Captain Radovich? A. No, sir, he wasn't.

2630

Mr. Robb: Thank you.

The Court: Any redirect?

Mr. Keenan: Just a question or two, your Honor.

*Redirect examination by Mr. Keenan.*

Q. Melvin, to get this marriage business straightened out. You are pretty young not to remember your anniversary. When was it, in 1944? A. 1944. June 11, 1944. I am sorry, I am a little mixed up.

Q. All right. I might have an excuse— A. My wife is in the audience. It is pretty embarrassing.

Q. You told us that you only had one week's basic training while at Mitchel Field or any place else? A. That is right, sir.

2631

Q. But you did have that week's training? A. Yes, sir.

Q. How was it that you didn't complete the regular period of training? A. Well, I had a little trouble, I got a little sick and I was in the hospital for about a week, and then as I came out of the hospital I was told that it was discontinued, basic training was discontinued at that time.

Q. Discontinued for everybody there? A. For everybody, yes, sir.

Q. So that the reason that you didn't go on with the basic training was that there was no more given to anyone? A. That is right.

Q. Did that include Martin, too? A. Yes, sir, that included Martin, too.

Q. That is the reason why Martin got no more basic training than anybody else? A. That is right.

Q. The basic training would be to teach you how to use guns and how to fight? A. Yes, sir.

Q. And how to take care of yourself on the field of battle? A. That is right.

Q. And in travel? A. That is right.

2633 Q. And how to improve your muscles? A. Yes, sir.

Q. And your physique? A. Yes, sir.

Q. To meet the foe; is that right? A. Yes, sir.

Mr. McGohey: I object to Mr. Keenan testifying.

The Court: All right.

Mr. Keenan: I don't think there is very much novel about the——

Mr. McGohey: I object to all the comments.

The Court: Go ahead.

Q. By the way, were you asked any questions about this by any representative of the Federal Bureau of Investigation? A. I don't know who he was, sir, but when I was at Delaware somebody came in and questioned me, an officer.

2634 Q. Was he in uniform? A. Yes, sir.

Q. Then that wouldn't be the F. B. I., that would be the Army? A. Yes, sir.

Q. Someone in the Army asked you about this matter of transfers? A. At that time I didn't know what it was all about, but now I find it was about that.

Q. Did you make any statement, did you answer questions that were asked you? A. Yes, sir.

Q. How long did the interview take, about? A. About a half hour, I would say.

Q. Did he write down any answers to your questions? A. Yes, sir; there was a stenographer there.

Q. There was a stenographer there? A. Yes, sir.

Q. Was the transcript of what you said typewritten and presented to you to sign? A. I don't remember.

Q. Or do you remember? A. I don't remember if I signed it or not, but it was typewritten, because—for the simple reason it went through my office eventually. I didn't see it, but I was told it did.

Q. You were asked some questions by a military person? A. Yes, sir.

2636

Q. Was he an officer? A. Yes, sir, a major, sir.

Q. A major? A. Yes, sir.

Q. Do you remember whether his name was Hogan, Major Hogan? Would that help you? A. I don't think he introduced himself to me.

Q. He was just a major? A. Yes, sir.

Q. Now did anyone tell you when you got down to Goldsboro that you were joining an outfit that was purely a voluntary unit and that you didn't have to continue there unless you wanted to? A. No, sir, nobody said anything to me about that.

Mr. Keenan: I think that is all.

Mr. McGohey: No further questions.

The Court: All right, stand down. Call the next witness. 2637

(Witness excused.)

Mr. Keenan: Your Honor, I have a couple of short witnesses here that I would like to put on.

The Court: All right.

ROBERT J. ENGLAND, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is Robert England? A. That is right.

Q. E-n-g-l-a-n-d? A. That is right.

Q. Where do you live, Mr. England? A. 81 High Street, Bloomfield, New Jersey.

Q. What is your business? A. I am credit manager for James Talcott, Inc., New York.

Q. How long have you had that position; how long have you been so engaged? A. Approximately 12 years.

2639 Q. Before that what did you do? A. I was credit manager; assistant credit manager, for the Chemical National Bank.

Q. Chemical National Bank, New York? A. That is right.

Q. Does your business carry you into metropolitan New York? A. It does.

Q. Generally? A. Generally.

Q. In what industry do you have your business acquaintances or contacts with credit? A. Frankly, they are quite diversified.

Q. Diversified. Do you know the defendant Samuel Bayer? A. I do.

Q. And do you know his brother, Elias Bayer? A. I do not.

2640 Q. You don't know him. How long have you known Samuel Bayer? A. Over a period of approximately six years.

Q. Do you have contact with the people with whom he does business? A. I do.

Q. And frequent contact? A. I have had, yes.

Q. Have you the means from your contact in metropolitan New York in your business of knowing what the reputation of Samuel Bayer is as to being a man of good character? A. I do.

Q. What is that reputation? A. Well, he has a reputation for character and honesty.

Q. By "character", I don't want to put words in your mouth, but what kind of character? A. His reputation as we would class it is good.

Mr. Keenan: I think that is all.

Mr. McGohey: I have no questions, your Honor.

The Court: You may be excused. Call the next witness.

The Witness: Thank you.

Q. It was suggested that I should ask you something 2642
more about the James Talcott Company. Are they commercial bankers? A. Factors and commercial bankers.

Q. Are their transactions extensive here in the metropolitan district? Is it a large organization? A. Well, our volume runs approximately 150 million dollars.

Mr. Keenan: I think that is all.

Mr. McGohey: No questions.

The Court: Call the next witness.

(Witness excused.)

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MAX E. SANDERS, called as a witness on behalf of de- 2643
fendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is Sanders? A. Max E. Sanders.

Q. What is the first name? A. Max.

Q. Max? A. That is right.

Q. What is your business or profession? A. I am an attorney.

2644 *Max E. Sanders—For Defts. Bayer—Direct.*
*Sol Fisher—For Defts. Bayer—Direct.*

Q. Where do you practice law? A. At 40 West 40th Street, in the Borough of Manhattan, City of New York.

Q. How long have you been a practitioner at the bar? A. 35 years.

Q. Do you know the defendants in this case, Samuel Bayer and Elias Bayer? A. I do.

Q. How long have you known them? A. Upwards of ten years.

Q. Have you had contact with them from time to time in their business and social acquaintances? A. Yes, sir.

Q. And have you the means of knowing what their reputation is in this community as to character and stability
2645 and citizenship? A. Their reputation is good.

Mr. Keenan: I think that is all.

Mr. McGohey: I have no questions.

Q. That applies to Elias as well as Samuel? A. That is correct; both of them.

Mr. Keenan: Thank you.

(Witness excused.)

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Sol Fisher, called as a witness on behalf of defendants
2646 Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Your name is what? A. Sol Fisher.

Q. Fisher. Where do you live, Mr. Fisher? A. 40 West 77th Street, New York.

Q. Speak a little louder, please. A. 40 West 77th Street, New York.

Q. How old are you, Mr. Fisher? A. Sixty-one.

Q. And what is your business? A. Manufacturer of men's shirts and pajamas.

Q. Do you have factories? A. Yes, sir.

Q. Where are they located? A. One is in Uniontown, Pennsylvania, and one is in Maryland, Frostburg, Maryland.

Q. You have offices here in New York? A. Yes, sir.

Q. What is your position with that company? A. I am the president of the company.

Q. And have you done business—do you know the defendant Samuel Bayer? A. I do.

Q. And his brother, Elias Bayer? A. Yes.

Q. How long have you known Samuel Bayer? A. About 2648
thirty-two years.

Q. And have you known him well during that period? A. I have known him well.

Q. Pardon me. Was the answer yes or no? A. Yes, sir.

Q. You have frequent contacts with him? A. Yes, sir.

Q. And with Elias Bayer, you have seen him? A. Not as much as with Samuel.

Q. Not as much as with Samuel, but do you know Elias? A. I know Elias, yes.

Q. In the transaction, in business affairs that you have in New York City, do you come in contact with others who know Mr. Samuel Bayer and have known him for some period of time? A. I do.

Q. And those who have had business relations with him? 2649
A. Yes.

Q. And social relations with him? A. Quite a few.

Q. A few? A. Yes, sir.

Q. And have you the means of knowing his reputation in the community or metropolitan New York as to his character and stability and citizenship and the like? A. Yes, sir.

Q. What is that reputation that he bears? A. Very good.

Q. And do you subscribe to that, that that is the same as you found his reputation to be from your contact? A. Yes, sir.

Q. How about Elias Bayer? A. Well, I don't know him as well as Samuel Bayer. I have met him occasionally, charitable institutions, and I used to meet him once in a while, but not in business direct.

Q. Charitable institutions? A. Yes.

Q. And not any business contact? A. Not any business contact.

Q. Would you feel therefore that you could not pass
2651 upon the reputation of Mr. Elias Bayer? A. I would.

Q. You could or couldn't? A. Yes, sir, I could.

Q. What is that? A. Good.

Mr. Keenan: You may have the witness.

Mr. McGohey: I have no questions, your Honor.

The Court: That is all. Call the next witness.

(Witness excused.)

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HOWARD MARKEL, called as a witness on behalf of defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

2652

Q. Your name is Howard Markel? A. That is right.

Q. Where do you live, Mr. Markel? A. Reading, Connecticut.

Q. What is your business? A. I am connected with the Merchants Bank of New York.

Q. Merchants Bank of New York? A. That is right.

Q. What is your connection with that bank? A. I am the president.

Q. You are president of it? A. That is right.

Q. Do you know the defendant Samuel Bayer? A. Yes, I know Mr. Bayer for a long time.

Q. Would you give us some approximate idea of the years? A. About fifteen years.

Q. During that time have you had business dealings with him? A. Yes, very extensive.

Q. And as a banker I suppose you would see him very often in reference to these business affairs? A. That is right.

Q. And do you know others with whom he does business, too? A. Yes, quite a few of them.

Q. Do you know Elias Bayer, his brother? A. I don't know him as well, but I have seen him during that period also frequently. 2654

Q. Do you have sufficient, or have you had sufficient relationships with those who know Samuel Bayer in his community—withdraw that.

Q. Where is your bank located in New York? A. 434 Broadway.

Q. Where is that with reference to the streets? A. Near Canal Street.

Q. Do you have the means of knowing the reputation of Mr. Samuel Bayer as to his character, his probity, the reputation he bears as a good citizen or otherwise? A. I think so.

Q. What do you say his reputation is? A. Well, in our dealings with Mr. Bayer over those fifteen years we have found him to be of excellent character and we have heard no criticism from any outside people that we know who are acquainted with him. 2655

Q. What about Elias Bayer, what contact have you had with him? A. I think we can say the same for him.

Mr. Keenan: You may have the witness.

Mr. McGohey: No cross-examination.

The Court: Call your next witness.

(Witness excused.)

Mr. Keenan: I would like to have this Colonel Travis who was a Government witness who was excused.

Could I have that last Government exhibit?

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ROBERT B. TRAVIS, called as a witness on behalf of defendants Bayer, being previously duly sworn, further testified as follows:

2657 *Direct examination by Mr. Keenan.*

Q. Colonel Travis, when you were here the last time testifying as a witness for the Government, I think I asked you a question if you knew about the part of the Government's file, or if you had any of the records that would show the endorsements of the transfers of these two boys, Melvin Usdan and Martin Bayer. Do you remember that? A. Yes, sir.

Q. And you told me, I believe, that you didn't have such records? A. That is correct, sir.

Q. Now you were mistaken about that, weren't you? A. No, sir.

Q. Did you have such records? A. No, sir. The only
2658 thing that I had was the orders that were offered in evidence, no correspondence at all.

Q. Well, I will show you Government's Exhibit 26 and ask you if you have ever seen this before? A. Yes, I have seen this before, but it is not a part of my files.

Q. Where did you see it? A. In the District Attorney's office.

Q. It was not a part of your file? A. No, sir.

Q. Did you bring a file to the United States Attorney? A. I brought this particular file into the United States Attorney.

Q. I don't think I understand you very well. Will you relate the— A. Yes, sir. Those are from the headquarters of the First Air Force and I was simply a messenger that delivered them here. They are not from the files of my headquarters at all.

Q. What files were you supposed to have at your headquarters? A. The orders that I brought in at the same time and I believe that have been offered in evidence, the order directing the transfer of the soldiers from the First Fighter Command to the Medical Detachment at Mitchel 2660
Field.

Q. And the order referred to and you also gave us some information and related the fact that there were twelve endorsements? A. That is right. That is indicated in the order.

Q. In the order? A. Yes.

Q. And I asked you—you brought in special order 231? A. I believe that is the number of it, sir; I am not sure of the number.

Q. I am reading from the transcript.

The Court: All right.

Q. When you were here the first day of this trial as a Government witness you were asked these questions and 2661
gave these answers, I believe.

"Q. Those were all the regular records of the United States Army?" And you answered, "Yes, sir."

"Q. And in proper form? A. Yes, sir.

"Q. I noticed that in one, I think it was Government's Exhibit 2, the transfer of Melvin Usdan, there was some statement of twelve endorsements. You remember that? A. Yes, sir.

"Q. What would that mean, Colonel? A. To make it clear, I had better explain how that is handled, sir.

"Q. I wish you would. A. The letter originates with an individual with the headquarters or from any source that would put it into the military administrative channels. Instead of a reply to that or any action being taken on that, it being handled in a new letter, each office through which it passes puts an endorsement on it, that is, they write a letter, a specific form used by the Army, and they call that endorsement. Since the letter had twelve endorsements on there, it indicates it was originated with the individual and passed through twelve offices in which it went to the First
2663 Fighter Command with a direction that transfer be effected, and each of those endorsements is tantamount to a new letter. That is a form of correspondence that the Army uses entirely."

Do you recall that? A. Yes, sir.

Q. "Q. In other words, in simple language, that had to pass through twelve different types of authority before it became valid? A. Yes, sir.

"Q. And all of those things were recorded and are recorded some place in the Army records, all those endorsements"?

I asked you that question and you gave this answer: "They were requested, but it is not required. Correspondence of that sort are not maintained in permanent records of any organization."

2664 Did you give that answer? A. Yes, sir.

Q. Then the next question was asked of you:

"Q. Are those records available?" and you answered: "I don't know, sir."

Is that true? A. Yes, sir.

Q. "Q. Are the original records of whoever made that application available any place?" and did you answer, "No, sir, they are not"? A. That is correct, sir, and the original records are still not available, sir.

Q. "How soon are they destroyed after they are made? A. They may be destroyed any time after six months."

Now as a matter of fact you had, yourself, brought to the United States Attorney's office records, official Army records, showing the twelve endorsements, did you not? A. That is right, yes, sir.

Q. And I am now presenting to you a paper marked for identification Exhibit 26 and ask you if that is not, that information and data, from the official records of the Army? A. I believe it is the same, sir.

Q. And that record does show each and—is supposed to show each and every endorsement, is it not? A. That is right.

Q. And you brought that to the United States Attorney? A. Yes, sir.

Q. And handed the records to him? A. That is right.

Q. That is all you know about it? A. That is right.

Q. You don't know how it happens that they were not presented or no questions were asked you about it? A. That is the reason——

Mr. McGohey: I object to that.

Q. I am saying, you don't know? A. No, sir.

Q. When an objection is made, wait until it is ruled upon.

The Court: I will overrule it. Go ahead. 2667

Mr. Keenan: Now, your Honor, we offer this in evidence.

The Court: Is there objection?

Mr. McGohey: No, your Honor.

The Court: All right, sir, let it be admitted.

(Marked Defendants Bayer's Exhibit D.)

The Court: Have you further questions?

Mr. Keenan: None of this witness.

The Court: Have you further questions?
Mr. McGohey: No, I have no questions, your Honor.
The Court: Mr. Robb?
Mr. Robb: No, sir.
The Court: All right, you may be excused.
(Witness excused.)
The Court: We will take a ten-minute recess.
(Short recess.)
The Court: Are you ready to call another witness?
Mr. Keenan: Yes, sir.
The Court: Call him.

2669

JOSEPH SULLIVAN, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. Mr. Sullivan, where do you live? A. In Washington, D. C.

Q. What is your occupation? A. I am a Federal employee in the Adjutant General's office of the War Department.

Q. Federal employee? A. Yes, sir.

Q. Adjutant General's office at Washington? A. That
2670 is right.

Q. Did you come here in response to a subpoena to bring some records? A. Yes, sir.

Q. And the records you brought were official records from the files of the War Department? A. Yes, sir.

Q. And you were subpoenaed and asked to bring with you the 201 files of Martin Bayer and Melvin Usdan is that correct? A. Yes, sir.

Mr. Keenan: May we have this marked as Defendants' Bayer Exhibit E?

(Marked Defendants' Exhibit E for Identification.)

Q. I will ask you if this Defendants' Exhibit E came from the file 201 of Martin Bayer? A. It did, sir.

(Mr. Keenan hands paper to Mr. McGohey.)

Mr. McGohey: No objection.

Mr. Keenan: We offer this in evidence. Do you want to see this, your Honor?

The Court: No. Mark it.

(Defendants' Exhibit E for Identification received in evidence.) 2672

Mr. Keenan: May I read this to the jury?

Mr. Robb: May I see it, Mr. Keenan?

Mr. Keenan: Yes. I am sorry.

Mr. Robb: No objection.

(Defendants' Exhibit E read to the jury.)

Mr. Keenan: There is stricken out in this statement three words, "for overseas service." There is stricken out on the side, "Authentication, seal of notary public, signature and title of witness, address of witness." There is stated at the bottom, "Strike out words that do not apply." There is also stated, "This certificate should be witnessed by a notary public or other official having authority to administer oaths, or by an officer of the Regular Army." 2673

The exhibit is in the form of an ordinary document and bears some other writing that are unsigned, and I shall therefore not read them.

The Court: All right.

Q. Do you have in your hand a document that was taken from the file of Melvin Usdan? A. Yes, sir.

2674 *Joseph Sullivan—For Defts. Bayer—Direct.*

Mr. Keenan: I ask that this be marked as an exhibit (hands paper to Mr. McGohey).

Mr. McGohey: Are you offering only this one letter at this time?

Mr. Keenan: Yes.

Mr. McGohey: I have no objection.

Mr. Robb: No objection.

(Marked Defendants' Exhibit F.)

Q. I will show you this Defendants' Exhibit F and ask you if that is part of the regular 201 file of Melvin Usdan? A. Yes, sir, it is.

2675

Mr. Keenan: I would like to read this to the jury at this time (reads Defendants' Exhibit F).

Will you mark this as an exhibit?

(Marked Defendants' Exhibit G for Identification.)

(Paper handed to Mr. McGohey.)

Mr. McGohey: I have no objection to that.

Mr. Robb: We have no objection, if your Honor please.

Q. I show you this Defendants' Exhibit G and ask you if this came from the 201 file of Martin Bayer? A. Yes, sir, it did.

2676

Mr. Keenan: We offer it in evidence.

The Court: All right.

(Defendants' Exhibit G for Identification received in evidence.)

(Read to the jury.)

Mr. Keenan: I would like to have the jury inspect this, if I may, your Honor.

The Court: All right.

(Defendants' Exhibit G handed to the jury.)

Mr. Keenan: I wonder, in order to save time, whether I might ask a question of this witness while the jury is inspecting the exhibit?

The Court: Yes.

Q. You are familiar with the contents of these files? A. Yes, sir.

Q. And these records that I have just read are all the data that are contained in the 201 files about the transfer of either one of these two boys? A. They are, in the open files.

Q. I have subpoenaed the 201 files from Washington. 2678
Are there any other files that you would know about? A. There may be what we term down there as the confidential files, which I wouldn't be allowed to bring up.

Mr. Keenan: That is all.

The Court: Any questions?

Mr. McGohey: May we look at whatever he brought up with him?

Mr. Keenan: Yes.

The Court: Are there any questions, Mr. Robb?

Mr. Robb: No, sir.

The Court: Have you any, Mr. McGohey?

Mr. McGohey: May we just leave the witness there and we will look at these papers, your Honor?

The Court: All right. Are you ready to proceed, 2679
Mr. McGohey?

Mr. McGohey: I was going to suggest, your Honor, that I find a number of cards and some papers here that this witness has produced. I should like to have a chance to look at them, but I am afraid that if I do it now it will take too much time. Might we do this: let the witness be excused now and let me and my associates look this over during the lunch hour, and

then if we want to take it up again with him, we can do it at that time.

Mr. Keenan: Well, I have a question or two to ask him first.

The Court: All right.

Mr. Keenan: It will not be on this, Mr. McGohey.

Mr. McGohey: I will either do it now, your Honor, or I think we might save time if I do it during the lunch hour.

Mr. Keenan: I have just a question or two.

The Court: All right.

2681 *By Mr. Keenan.*

Q. You came here in response to a subpoena? A. Yes, sir.

Q. Did you ever see the subpoena? A. Yes, sir; I have a copy of it.

Q. It starts off: "The President of the United States of America, to the Adjutant General, War Department, Munitions Building, Washington, D. C.

"We command you, that all business and excuses being laid aside, you appear and attend before Honorable Alfred D. Barksdale, District Judge, United States District Court, Southern District of New York, Room 1106, United States Courthouse, Foley Square, New York 7, New York, on the 15th day of October, 1945, at 10.30 o'clock in the forenoon,

2682 to testify and give evidence in a certain action now pending undetermined in the District Court of the United States for the Southern District of New York, between United States of America and Samuel Bayer, Elias Bayer and Walter V. Radovich, defendants, on the part of the defendants Bayer, and that you bring with you and produce at the time and place aforesaid:

"201 file of Sergeant Martin Bayer, ASN 12219010.

"201 file of Private Melvin Usdan, ASN 12219208.

"And the records showing orders and endorsements thereon, including names of officers making such endorsements for all transfers of the above-named soldiers between date of enlistment and the present date of this trial, to wit: October 2, 1945, now in your custody, and all other deeds, evidences and writings which you have in your custody or power concerning the premises. And for failure to attend, you will be deemed guilty of a contempt of court," etc.

Did you read that subpoena? A. Yes, sir.

Q. Did you accept this subpoena for the Adjutant General of the United States Army? A. Yes, sir. 2684

Q. And you understood that it called for all records showing the orders and endorsements thereon, including the names of officers making such endorsements for all transfers of the above-named soldiers between the date of their enlistment and the present date of this trial? Did you make an effort to obtain those at the War Department? A. Yes, sir; I brought all the records that are in the possession of the Adjutant General's office in the open file.

Q. This does not say anything about the open files or closed files, does it? A. No, sir, but there are records in the so-called confidential or secret files that I am not allowed to bring and divulge any information from those records.

Q. Who told you that? A. That is a practice in the War Department. It is the policy of the War Department. 2685

Q. Who told you it was the policy? A. The Major in the Judge Advocate General's Department.

Q. He gave you that instruction? A. Yes, sir.

Q. Did you talk over with him what you should bring down here? A. Yes, sir; and he told me that under Army regulations I could not bring the confidential file.

Q. And these are all the files that he gave you to bring down here with reference to the transfer? A. That is right. He did not give them to me but I secured them from the files.

Q. But the other files having to do with the transfers and the like that were of a confidential nature, you could not bring down because you did not have enough authority to do it yourself? A. That is right, sir.

Mr. Keenan: I think that is all of this witness at this time.

The Court: All right, you may be excused, but do not leave, be available.

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2687 Mr. Keenan: Now, I would like to read, your Honor—I understand the United States Attorney wants to examine some papers and then cross-examine this witness later on, is that correct?

Mr. McGohey: Perhaps.

The Court: Maybe.

Mr. McGohey: I say perhaps, your Honor.

Mr. Keenan: All right, I am very glad to go forward and read this, if I may be permitted to.

The Court: Yes, very well.

Mr. Cohen: Pardon me for batting for Mr. Keenan.

(Mr. Cohen reads Defendants' Exhibit G to the jury.)

The Court: Have you further testimony, Mr. Keenan?

Mr. Keenan: I call upon the United States Attorney to
2688 produce a statement made by Walter Radovich——

Mr. Robb: If the Court please, may we approach the bench for this?

The Court: All right, come up.

(The following took place at the bench:)

The Court: What have you to say about this document?

Mr. McGohey: Let me see what the first item is? I do not think they are entitled to that, your Honor. I have not offered that in evidence. I have offered a statement

of March. It has no relation at all with the statement of September. It has been referred to, it is true, but it has no relationship to it at all. I do not know of any ground that the defendants are entitled to this statement.

Mr. Keenan: How do I know that Major Radovich is not going to take the witness stand?

Mr. McGohey: There is not anything shown here that will indicate that the statement of September 6th is different or contradicts in any way the statement of March.

The Court: What is your position, Mr. Robb?

Mr. Robb: If the Court please, our position is that we cannot see how anything Major Radovich may or may not have told some third person has any bearing upon Mr. 2690
Keenan's clients' guilt or innocence?

Mr. McGohey: Your Honor, you have admitted the March statement——

The Court: Do you object?

Mr. Robb: Yes, sir.

Mr. McGohey: The March statement was admitted under a very careful instruction to the jury which your Honor said you would repeat in your charge, that it was to be considered only as against the defendant Radovich. There is no suggestion made here that there is any contradiction. As a matter of fact, insofar as there is any testimony of the question of the relationship of the September statement to the March statement, it is this: that they are identical.

The Court: The ruling of the Court is that the Court 2691
will not require the production of the paper.

Mr. Keenan: Will the record show an objection upon the part of the United States Attorney to produce them?

The Court: The objection on the part of the United States Attorney and an objection on the part of the defendant Radovich.

Mr. Keenan: We believe that we are entitled to produce in the defense of Samuel Bayer and Elias Bayer any rele-

vant testimony that in any manner within the principle of reasonable proximity is conducive to their innocence, and that we believe that the statements contained—that if we want to, we have the right to introduce them as made by Radowich, just as much as the Government has; that if it would in any manner show the innocence of the defendants that these statements against interests do not belong alone to the Government, it belongs to any party in the lawsuit.

We believe that we are being deprived of our right to produce before this Court and jury relative and pertinent testimony that might even be determinative of the entire issue in the prosecution, and that a failure to do so pre-
2693 vents us from in turn presenting other evidence upon which such information would be based.

Mr. McGohey: I have this to say: I will ask that your Honor take the September statement and read it. I think maybe your Honor has already read it.

The Court: I have, but I am not very familiar with it.

Mr. McGohey: I will submit the statement to the Court so that the Court may examine it to determine whether or not there is any contradiction between the statements, and if there be no contradiction, then to seal it as an exhibit in this trial so that it can be available for the appellate court on review if there be an appeal.

Mr. Robb: If the Court please, might I say here that we called upon Mr. McGohey at the time we were cross-examining the agent, Flynn, to produce the September
2694 statement, and Mr. McGohey refused to do it. I do not think this is a time to put this statement under seal and have it submitted to your Honor for some rather strange proceeding.

Mr. McGohey: It is not a strange proceeding.

Mr. Ansell: I furthermore think that it would lead, if I understand what is in the motion, to a trial of collateral matters, and prolong this trial and actually elucidate nothing.

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Mr. Robb: If the Court please, our position is simply that we called upon Mr. McGohey at the time we thought was the proper time to produce that statement, and you refused to do it. Now I do not think Mr. Keenan should be given that statement, perhaps to be used against our client. I do not know why he wants it. By the same token, I do not think it should be made available to your Honor under seal. We thought we were entitled to have it at the time we asked for it. Mr. McGohey did not give it to us. That was for a specific purpose.

Mr. McGohey: For what specific purpose?

Mr. Ansell: Even so, you are going to get into a long and almost interminable trial of collateral matters, and it will serve no useful purpose. 2696

Mr. McGohey: I do not think it will take your Honor too long to read that statement.

The Court: I am going to take this situation under advisement and let us go ahead with something else.

Mr. Keenan: I would want to have this decided before I decide what else I want to go ahead with.

The Court: What about these other statements?

Mr. McGohey: There is a statement there from some man named Smith, I believe. I never heard of that statement before and I never saw it, and I have no copy of it.

The Court: What about the other one?

Mr. McGohey: The other one I have, or I have what purports to be a copy of that. I never saw the original. I cannot for the life of me see what relevance that would have, 2697
your Honor, here. It is not mine. I have a carbon copy. I think we have a carbon copy of it, but the other one I never saw, the Smith statement.

Mr. Wallace, you never saw that either, did you?

Mr. Wallace: No.

The Court: You say you have a copy of this second statement?

Mr. McGohey: Yes, sir, I have. On the same theory, there is no objection to either one of these, except, your Honor, that I do not know the purpose of them. I cannot understand it. If it is claimed that they were going to contradict the statements that were put in, I am going to submit them to your Honor under the rule of the Krulewitch case and the Cohen case in this circuit.

The Court: I think I will let the jury go until two o'clock. The jury is excused until two o'clock.

(Jury retired from the courtroom.)

The Court: Let me have the statement referred to in paragraph 1, and anything you have pertaining to the statement referred to in Paragraph 2. I understood you to say
2699 you had a copy of that?

Mr. McGohey: Yes. May I get that, so that the record will show what I am giving to the Court?

The Court: Yes.

Mr. McGohey: I do not believe, your Honor, that there is any rule that anybody can just demand anything that they may think is in the possession of the Government unless there is some showing made or some reason——

The Court: They can demand all right.

Mr. McGohey: I mean, properly demand and get.

The Court: I did not say get. I say he can demand. This one is in evidence, is it not?

Mr. McGohey: This one is Exhibit 25.

The Court: Make yourselves at ease for a few moments.

2700 Mr. Keenan: May the record show that your Honor has been given the September statement, the March statement which is in evidence, and a typewritten paper which purports to be a statement of Major Radovich given to Colonel Snyder on the 14th of August 1944.

The Court: All right.

The Court: Gentlemen of counsel, I have not re-read the statement of March 15th which was introduced in evidence, because I had previously read it and heard it read in evidence and am familiar with its contents. I had already previously read the statement of September 6th and I have re-read that at this time, and I have read fully the carbon copy of the statement of the defendant Radovich to Colonel Snyder.

I am going to overrule the motion made of me that the United States Attorney be required to produce the documents which are not introduced, principally upon the basis of the fact that I have carefully examined them and I find no conflict in any matter of materiality in the two documents 2702
not admitted and the document which has been admitted, therefore I shall not require them to be produced.

I do think that the papers should be made a matter of record in the event that there should be a review of my decision.

Mr. McGohey: I suggest in that connection, your Honor, that you order them sealed and the sealed envelope marked as an exhibit. That practice has been followed in other cases in this Court.

The Court: All right, I will follow that suggestion and direct——

Mr. Ansell: That means they will not be spread upon the record?

Mr. McGohey: No. They will be sealed and marked "Court's Exhibits". 2703

The Court: They shall not go into the record in this case at all, but I do think it only fair that they be made available should anyone desire to review the ruling which has been made, which could not intelligently be made unless the papers were available.

Mr. McGohey: Do I understand your Honor to mean that they are to be made available to counsel for the defendants?

The Court: No, sir.

Mr. McGohey: Made available for the Court in the event of appeal?

The Court: Exactly.

Mr. McGohey: And may they be marked Court's Exhibits A, B and C?

The Court: They may be, but we haven't got a clerk here now to do it.

Mr. Ansell: Mark them exhibits in this case A, B and C.

Mr. McGohey: Mark them Court's Exhibits A, B and C and sealed.

2705 The Court: This (indicating) was in.

Mr. McGohey: I mean the two statements, A and B, Court's Exhibits A and B, and that they will then be sealed.

The Court: And available——

Mr. Keenan: The Court will grant us an exception to his Honor's ruling on that?

The Court: Yes, sir.

Mr. Wallace: Apparently the clerk has left, thinking the Court had recessed.

The Court: I will put them in my papers and have that done.

Mr. Keenan: Off the record, please.

(Discussion off the record.)

Mr. Keenan: Can we say this, that the defendants Bayer offer that part of HR 7528, passed by the United States
2706 Senate on October 24, 1942, by a vote of 58 to 5, which was as follows:

> "Section 7: No person under twenty years of age inducted under this Act shall be placed in actual combat duty beyond the territorial boundaries of the Continental United States until after he has had at least one year's military training following his induction."

From the Congressional Record of the 24th day of October, 1942, on page 8934.

This tender is not objected to by the United States Attorney because of the failure to present adequate formal proof, but is objected to on the ground of its claimed irrelevancy.

Mr. McGohey: The Government objects to it on the ground that it is irrelevant and immaterial.

The Court: Which objection the Court sustains.

Mr. Keenan: And an exception is noted.

Mr. McGohey: May the record also show, your Honor, that this resolution which was passed by the Senate never became law? 2708

Mr. Keenan: It is so conceded.

The Court: Very well.

(Recess to 2 o'clock p. m.)

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AFTERNOON SESSION.

Mr. McGohey: Your Honor, before we proceed, may those exhibits be marked now and sealed?

The Court: Yes, they will be marked as the Court's Exhibit A.

(Marked Court's Exhibit A.)

The Court: All right, gentlemen, are you ready to proceed? 2709

Mr. Keenan: Have you any further questions of the previous witness?

Mr. McGohey: Yes.

The Court: Come back, Mr. Sullivan.

JOSEPH SULLIVAN, resumed the stand.

*Cross-examination by Mr. McGohey.*

Q. Mr. Sullivan, this envelope contains the records which you brought up in answer to the subpoena, does it not? A. Yes, sir.

Mr. McGohey: Your Honor, may I have this series of cards marked for identification?

The Court: Yes.

(Marked Government's Exhibit 27 for Identification,
2711 eleven cards.)

Q. Mr. Sullivan, I show you these cards which are from these records that you brought up—they are now marked Government's Exhibit 27 for Identification—and ask you to tell us what those cards are and what their function is? A. Yes, sir. These cards are known——

Q. Mr. Sullivan, will you please keep your voice up loud enough so that the last juror and all counsel at this rear table can hear you? A. Yes, sir. These cards are known as the morning report locator card. The purpose of them is to record the assignment of the personnel concerned, as he is assigned to various stations so that we always know the location of the individual to whom those cards pertain.

2712 Q. And do those cards show the various t. .nsfers of the man to whom they refer? A. Yes, sir; that is the purpose of the card.

Q. Can you take the card of the earliest date in that exhibit? A. Yes, sir.

Q. By the way, for what soldier are those cards made out? A. These cards are made out for Martin Bayer.

Q. And can you tell from those cards when he first came into the Army? A. Well, when he first came into the

Army, that is evidenced by the enlistment record at the time he enlisted in the Army.

Q. Is there a card there indicating that? A. That is shown on the enlistment record.

Q. What does the card with the earliest date show? A. That card is dated the 22nd of December, 1942.

Q. What does it show? A. It shows that Martin Bayer was attached to Headquarters and Administration, and duty at First Base Headquarters, and Air Base Squadron at Mitchel Field, New York.

Q. What does the next one show? A. The next card, dated the 15th of April, 1942, shows Martin Bayer transferred from First Base Headquarters and Air Base 2714
Squadron at Mitchel Field, New York, to the First Fighter Command.

Q. What is the date of that? A. The date of that card is the 15th of April, 1943.

Q. Does that indicate that that was the date of his transfer? A. This indicates the date he was assigned to the First Fighter Command at Mitchel Field.

Q. What does the next card show? A. The next card, which is dated the 20th of August, 1943, shows him assigned and joined medical detachment, Aviation—I am not sure just what this other designation is—but it is Aviation, probably mechanics' force at New York.

Q. And what is the date of that? A. It is the 20th of August, 1943.

Q. May I see that a minute, please? A. Yes, sir (handing). 2715

Q. What does the next card show? A. The next card, dated the 23rd of August, 1943, shows him assigned to the medical detachment, 882nd—the designation here of the organization is perhaps a code term, but it was at Bradley Field, Connecticut.

Q. You are reading from here (indicating)? A. Yes, sir.

Q. Medical Detachment 882, and then the letters ABEN-GEN. Would that mean Airborne Engineers? A. It possibly does.

Q. At Bradley Field? A. It probably does.

Q. And the date of that is the 28th of August, 1943? A. Yes, sir.

Q. What does the next card show? A. The next card, dated the 25th of November, 1943, shows him assigned to the 715th Training Group.

Q. And what is the date of that? A. That is the 25th of November, 1943. This particular card does not show the station, however.

2717 Q. Very well. What does the next card show? A. The next card, dated the 7th of July, 1944, shows him assigned to the 1060th Army Air Force Base Unit at Greensboro, North Carolina.

Q. And the next card? A. The next card, dated the 21st of December, 1944, shows him a casual with this particular unit, with a shipment number—known as a shipment number in the War Department. It is AQ 448. And he was with the APO, 16795A, New York, which is also a temporary APO number.

Q. And APO stands for Army Post Office, does it not? A. Yes, sir.

Q. What does the next card show? A. The next card, dated the 23rd of January, 1945, shows him assigned to the port of debarkation at Army Post Office 881, New
2718 York.

Q. The next card? A. The card, dated the 1st of February, 1945, shows him with the 147th Replacement Company, Army Air Force, APO New York 494.

Q. And the next card? A. The next card, dated the 16th of February, 1945, shows him with the 412th Air Service Squadron, APO 690, New York.

Mr. Keenan: What is the date of that?

The Witness: The date of this card is the 16th of February, 1945.

Q. And have you another card for him? A. Yes, sir. The next card, dated the 20th of February, 1945, shows him with the 305th Air Service Group, APO 690, New York.

Q. Have you another card? A. No, sir.

Q. Now from those cards it is determinable at what various stations this man served, is it not? A. Yes, sir.

Q. And his various transfers? A. Yes, sir.

Mr. McGohey: I offer this in evidence. 2720

The Court: All right. Any objection?

Mr. Keenan: No objection.

Mr. Robb: No objection, your Honor.

(Government's Exhibit 27, consisting of eleven cards, received in evidence.)

Mr. McGohey: May I have that marked, please.

(Marked Government's Exhibit 28 for Identification.)

Q. I show you this paper marked Government's Exhibit 28 for Identification and ask you is that an official record from the office of the Adjutant General in the War Department at Washington? A. Yes, sir.

Q. And you have produced it here in obedience to the 2721 subpoena served on you? A. Yes, sir.

Q. Will you tell us what it is? A. Yes, sir. This is the enlistment record of the voluntary enlistment in the United States Army of Martin Bernard Bayer, 12219010.

Mr. McGohey: I offer it in evidence.

The Court: Any objection?

Mr. Robb: May I see it, please?

Mr. Keenan: No objection.

Mr. Robb: No objection.

(Government's Exhibit 28 for Identification received in evidence.)

Mr. McGohey: Your Honor, may I read a part of the exhibit to the jury?

It is stated this is the enlistment record of Martin Bayer's voluntary enlistment, and on the second sheet there appears what is called the physical examination with notes under that. Now, I am reading this last paragraph under the various notations that are made

2723 on the physical examination:

"I certify I have carefully examined the applicant and have correctly recorded the results of the examination and that to the best of my judgment and belief he is mentally and physically qualified for service in the Army of the United States."

And then there is stricken out some language which apparently would be used in case he was not qualified.

Mr. Keenan: I object to that. I think that is highly objectionable.

Mr. McGohey: I will withdraw it and point out to the jury that there are words stricken out. The exhibit speaks for itself.

The Court: Yes. Pass it around.

2724 Mr. Keenan: I ask the Court to instruct the jury to disregard those statements of Mr. McGohey.

The Court: I shall so direct. Let the document speak for itself.

Mr. McGohey: It is signed Louis Snyder, Captain, Medical Corps.

The Court: Any further questions?

Q. Do you have any papers similar to Government's Exhibit 28 for Melvin Usdan? A. I do.

Q. Do you have them with you? A. Yes, sir.
Q. May I see them, please? Are they over there?

(A folder was handed to the witness.)

Mr. McGohey: May I have this marked for identification?

(Marked Government's Exhibit 29 for Identification.)

Q. Is Government's Exhibit 29 a record from the office of the Adjutant General in the War Department in Washington? A. Yes, sir.
Q. And you have produced it here in accordance with 2726
the subpoena? A. Yes, sir.
Q. Will you tell us what it is? A. This is the enlistment record of the enlistment in the regular army of Melvin Usdan, 12219208.

Mr. McGohey: I offer it in evidence.
The Court: Any objection, gentlemen?
Mr. Keenan: No, sir.
Mr. Robb: No, sir.

(Government's Exhibit 29 for Identification received in evidence.)

Q. This sheet which was inside of that, is that a part of the enlistment record? A. Well, it is not a part of the 2727
record; it is a record attached to it which shows that the parent has no objection to the voluntary enlistment in the Army of this Melvin Usdan.

Mr. McGohey: I offer that also, your Honor.
Mr. Keenan: No objection.

(Marked Government's Exhibit 29-A.)

The Court: You may hand those to the jury.

Mr. McGohey: May I read partly from this Exhibit 29?

The Court: Yes.

(Mr. McGohey then read from Government's Exhibit 29.)

Mr. Keenan: I haven't any objection that going into evidence, but there is no issue raised about the physical condition of Melvin Usdan. I don't know what the purpose is.

Mr. McGohey: I object to the comment, your Honor.

The Court: All right. It doesn't matter. There is no objection to it. Have you further questions?

2729 Q. Do you have in your papers there a set of cards similar to those which you have just read and described with reference to Martin Bayer? A. Yes, sir.

Q. And those other cards that you have there now refer to Melvin Usdan, do they? A. These cards here refer to Melvin Usdan.

Q. They would show the same kind of things that the cards of Bayer show? A. Yes, sir.

Q. His various transfers? A. That is right.

Q. And the dates of them? A. Yes, sir.

Mr. McGohey: No further questions.

Mr. Keenan: I just have a question or two.

2730 *Redirect examination by Mr. Keenan.*

Q. If I understood you, Mr. Sullivan, those cards would tell where any soldier is when you look at it, would they? A. Yes, sir, that is the purpose of that card.

Q. Where is Melvin Usdan now? A. Melvin Usdan now, his latest report of change card hasn't come into the office.

Q. Where was he before? He is back in this country now, we all know that, he testified yesterday. But where did he come from, as far as your cards are concerned?

A. That would be shown by the latest card we have of record which is dated 10th of July, 1945. At that time he was with the Army Air Forces Base APO 679, New York.

Q. Does that mean he is in New York? A. No.

Q. Where? A. That meant that he was overseas.

Q. Where overseas? A. This doesn't show the geographical location.

Q. It doesn't show anything about it at all except New York, does it? A. It shows he is with the Army Air Forces Base, at the APO No. 679, New York, but those cards don't show the geographical location, but they are overseas. 2732

Q. It doesn't show anything more, your record, than this APO number New York, and that they are some place out of the United States? A. That is right.

Q. Have you got the last card on Martin Bayer? A. That is this other bunch of cards.

(Some cards were handed to the witness.)

Q. What is the date on that? How do you tell where the date is? A. This is the date up here (indicating). 20 February, 1945. At that time he was with the 305th Air Service Group, APO 690, New York.

Q. Does that mean he is in New York or does it mean he is in Burma, India? A. It meant he was overseas, perhaps in the European theatre of operation. 2733

Q. You wouldn't feel any too confident of that, would you, that he was over in the European theatre, from this card? A. Well, the APO number here would indicate that.

The Court: Any further questions?

Q. Do you know where this Exhibit E came from (handing to witness)? A. Yes. This came from the files in the Adjutant General's office in the War Department.

Q. You don't know when it came there? A. I do not. Presumably it came at the time the soldier enlisted in the Army.

Q. When a soldier enlists in the Army, does this waiver of his parents, in case he is a minor, always be sent on to Washington? A. Yes, sir. That indicates he is a minor and has had to get the consent of his parents or parent.

Q. Before he could be accepted into the Army? A. Yes, sir.

Q. Is that right? A. That is required by the recruiting officer.

Q. That is in accordance with the law? A. Yes, sir.

2735 Q. I notice the last statement, "I have no objection to his assignment or to his enlistment in the regular army upon his discharge from his enlistment in the regular army." Can you tell us if that is the regular form, if that is unusual, or if this is the regular form in these waivers of parents? A. That is regular. Apparently this soldier was in what is known as the regular army reserve. He had to be discharged from that component in order to enlist in the regular army, as distinguished from the regular army reserve.

Q. When do you mean? When was he in the regular army reserve?

Mr. McGohey: If he knows, your Honor.

2736 A. Only——

Mr. Keenan: If he doesn't, Mr. McGohey, he won't need anyone to tell him that he doesn't.

Mr. McGohey: I object to that, your Honor.

The Court: I object to these exchanges, gentlemen. Examine the witness.

Answer the question.

A. Presumably he was in the Army, Regular Army Reserve, immediately upon his enlistment in the Regular Army.

Q. Now you say he was in the Army Reserve immediately on his enlistment in the Regular Army. Is that your statement? A. That is my belief, as far as I can find out from these records.

Q. Are you meaning this by that, Mr. Sullivan, that the record shows that he first enlisted in the reserve and then later came into the Regular Army? A. That is what this record indicates.

Q. All right. When does it show that he enlisted in the reserve? A. I don't have those records here, sir. 2738

Q. When does it show that he was taken into the Regular Army from the reserve? A. The date shown on his enlistment paper.

Q. Wouldn't the 201 file have anything at all about any previous service of this soldier? A. It is possible it does not. Those records may be held, and often are, in the service command in which this soldier was living.

Q. Now I will read this to you again and see if you won't throw some additional light upon it. It is so much different from your previous statement.

"I have no objection to his assignment or to his enlistment in the regular army reserve upon his discharge from his enlistment in the regular army."

Isn't that just the other way about, that upon his discharge from his enlistment in the regular army the parent 2739
waives any objection to his assignment or his enlistment in the regular army reserve? Read it and see if that is not so. A. That is what this document states.

Q. As I stated it? A. Yes.

Q. All right. Now, in other words, to clearly understand this document, the parents stated that they had no objection to his assignment but it scratched out "for overseas service or to his enlistment in the regular army re-

serve army upon his discharge from his enlistment in the regular army." That is, there is no objection——

Mr. McGohey: I object to this, your Honor. The exhibit speaks for itself.

The Court: The objection is sustained.

Mr. Keenan: I think this witness has been asked many times to interpret these documents and their meaning by the United States Attorney.

The Court: I sustained the objection.

Mr. Keenan: Note my exception.

The Court: Yes. Go ahead.

2741 Mr. Keenan: I have no further questions to ask this witness.

The Court: Does anyone want to ask any further questions of this witness?

Mr. McGohey: No, sir.

The Court: All right, stand aside. Have you any further testimony, Mr. Keenan?

Mr. Keenan: I call Miss Anne Solomon to the witness stand.

The Court: All right.

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2742 Anne Solomon, called as a witness on behalf of the defendants Bayer, being first duly sworn, testified as follows:

*Direct examination by Mr. Keenan.*

Q. What is your name? A. Anne Solomon.

Q. How old are you? A. Thirty-one.

Q. Where do you live? A. In Brooklyn, 659 Ocean Avenue.

Q. How long have you lived in Brooklyn? A. About twenty years.

Q. Are you married? A. No, sir.

Q. Do you have any family, any brothers or sisters? A. Yes, sir, I have two sisters, one brother, a mother and a father.

Q. Would you hold up your voice a little, Miss Solomon? A. Yes.

Q. You have two sisters? A. Yes, and a brother, a mother and a father.

Q. Where do your sisters live? A. In Brooklyn.

Q. And your brother, where is he? A. In the service.

Q. And what is your business? A. I am a bookkeeper and secretary for Plymouth Thread and Yarn Company.

Q. Who is the head of that? A. Samuel Bayer. 2744

Q. When did you start to work for Samuel Bayer? A. Six years ago.

Q. Where is the place of business? A. 30 West 21st Street, in New York City.

Q. Is that just off Broadway? A. No, that's off Fifth Avenue, sir; between Fifth and Sixth Avenues.

Q. Where is the place of business, is it on the first floor? A. On the first floor.

Q. Where is the office located? A. At 30 West 21st Street.

Q. Is it located on the first floor or second floor, the office? A. You would call it the second floor.

Q. Well, I will call it what it is. Is it the first or second floor? A. It is the second floor.

Q. And is the place of business below the office? A. No, 2745 sir.

Q. Then is the place of business on the first floor or the second floor? A. The second floor.

Q. And how many offices are there there? A. Four offices.

Q. How many employees are there there, approximately? A. About sixteen.

2746 *Anne Solomon—For Defts. Bayer—Direct.*

Q. And the offices where you work are how far removed from the office of Samuel Bayer? A. Well, the office I work in is the next office.

Q. Will you describe the office of Samuel Bayer as to its dimensions, very briefly? A. It is about fifteen by eighteen, I believe.

Q. And it contains a desk? A. It contains two desks, a file, three chairs and a couch.

Q. And a cabinet? A. A file cabinet.

Q. And what were your duties as an employee of the Plymouth Thread Company? A. I am head bookkeeper and secretary at Plymouth Thread and Yarn Company.

2747

Mr. Robb: What was that again?

Mr. Keenan: Head bookkeeper and secretary.

Q. For whom do you seive in your work? A. Samuel Bayer.

Q. You take his dictation? A. Yes, sir.

Q. You write letters? A. Occasionally, sir.

Q. And do you have a telephone girl there? A. Yes, sir, I have a switchboard operator.

Q. Is it a large switchboard? A. It is a plug board; it has four wires.

Q. Four lines? A. That's right, sir.

Q. What is the nature of the business of the Plymouth Thread Company, very briefly? A. Well, we are jobbers
2748 of sewing thread. We ship and sell sewing thread.

Q. What is your compensation in that work? A. $60 a week.

Q. What did you get when you started there first? A. $18 a week.

Q. Do you have any interest in the concern at all? A. No, sir.

Q. Are you anything other than a paid employee? A. No, sir.

Q. Who else has his office there besides Samuel Bayer? A. The salesmen have an office. There is an office there for Louis Goldsmith, who is an associate of Mr. Bayer.

Q. Louis Goldsmith? A. That's right. And Elias Bayer has an office there.

Q. Are they large offices, medium size, or small? A. They are medium size offices.

Q. Do you know the members of the Bayer family? A. Yes, I do, sir.

Q. Have you spent some time at Mr. Bayer's home? A. Yes, I have.

Q. With Mrs. Bayer and Mr. Bayer? A. Yes, sir; and his children. 2750

Q. Do you know his children? A. I know them very well, sir.

Q. And they are three in number? A. Three sons.

Q. What are their names and ages, as you know them? A. Robert is 26; Martin is 21; and Sanford is 18.

Q. I will ask you about your custom in the office when calls are received. When Mr. Bayer is called, as his secretary do you get on the line? A. I get on the line, yes, sir.

Q. Would you tell us something about that? A. When Mr. Bayer received a call I get on the line first to find out who is calling, and then I listen in to his conversation. If it is a mill man who is calling, I usually listen in. If the man wants some information, I have it on hand, and if a customer calls, I usually write out the orders, if the customer gives an order over the telephone. I listen in on 2751 practically all of Mr. Bayer's telephone conversations.

Q. Does Mr. Bayer read and write facilely? A. No, sir.

Q. Has it been necessary for you in your work on that account to pay especial attention to taking orders over the phone? A. Yes, sir.

Q. And making notations? A. Yes, sir.

Q. And is the fact that you are on the wire secret, or do you make comments? A. It is known to everybody, to both the people on the other end of the wire and to Mr. Bayer.

Q. It is a business custom in your office? A. That is right, sir.

Q. Is Elias Bayer connected with the Plymouth Thread Company, do you know, or what is his connection with it? A. Elias Bayer is connected with Thread Converters, Inc.

Q. That is another company? A. Yes, sir.

Q. Do you recall the time when Martin Bayer enlisted in the Army? A. Yes, I do, sir.

Q. Did you know about his enlistment? A. Yes, sir.

2753 Q. That he had enlisted? A. Yes, I knew that he had enlisted.

Q. And did you at that time go frequently to the home of Mr. Bayer to visit? A. Yes, sir.

Q. And do some work there in the evenings? A. Yes, sir.

Q. By the way, have you seen a great deal of Mrs. Bayer? A. Yes, I have.

Q. Her name is Blanche, is it? A. Blanche Bayer.

Q. You have gone around with her from one place to another? A. Yes, sir.

Q. You have gone around with her in town and had meals with her? A. Yes, sir.

Q. And you are, to such an extent, accepted as a member of the family, is that correct? A. I am.

2754 Q. Now, Miss Solomon, do you recall any officers coming in to visit in the office? A. Yes, sir.

Q. Would you tell us when that started, as you best recall? A. I believe it started in about April of 1942.

Q. April, 1942? A. Yes, sir.

Q. Who was the first officer that you saw in April of 1942? A. I saw two officers at that time, a Lieutenant Roeser, and I don't recall whether Colonel Jacobson or Colonel Vidal came in with him at that time.

Q. And you feel quite confident that was 1942, do you? A. Yes, sir.

Q. Was it after Martin went in the Army, or before? A. I am sorry, it is 1943, because Martin went into the Army in December of 1942.

Q. In answering my questions, I would ask you to confine yourself, please, to what you saw and heard in your presence? A. Yes, sir.

Q. Rather than information you may have gained from discussions with people or in the newspapers; is that correct? A. Yes, sir.

Q. Will you describe the first time you saw anyone of these officers come in, as you stated, I think, in 1943, in 2756
April, or about that time. Tell us who they were that came in first, and how they came in, or who accompanied them, if anyone? A. Lieutenant Roeser, and as I said, either Colonel Vidal or Colonel Jacobson, were the first two officers who had come into the office.

Q. Did you meet them? A. Yes, I met them the first day they came in.

Q. And did anyone introduce them to you? A. Elias Bayer introduced me to them.

Q. And did they stay very long, or what happened on that visit? A. They stayed there a short time and they left. There was a discussion of topics of the day; most probably the war situation, and they stayed about a half an hour and left after that.

Q. Did you engage in any conversation with them, with 2757
out telling us what you said? A. Yes.

Q. Was it your habit to converse with them when they came in? A. Yes, sir.

Q. And do you know whether on that occasion in April, 1943, when Lieutenant Roeser came in—are you sure that Roeser was the first man? A. Yes, sir.

Q. But, as I understand it, you are not sure of Colonel Vidal or Lieutenant Colonel Jacobson accompanying him? A. That is right, sir.

Q. It was one of the two, or perhaps both? A. No, one of the two, sir.

Q. Without telling us what any conversation was, will you tell us whether there was anything said that you recall in any manner or fashion having to do with any of the sons of Samuel Bayer? A. No, sir, not that I recall.

Q. Do you remember any subject matter that did come up particularly at that time? A. No, sir.

Q. It was an incidental social call? A. That is right, sir.

Q. Then when else did anything happen that challenged your attention with reference to officers coming in? A.
2759 Well, a few days after that, or a short time after that, Lieutenant Roeser came in with another officer, which was either Lieutenant Colonel Jacobson or Colonel Vidal, because I don't recall who walked in with Lieutenant Roeser the first time.

Q. But whoever it was, if it was Colonel Vidal who came in the first time—and we will leave out the Lieutenant in Colonel—or Colonel Jacobson, it was the other man who came in the second time? A. That's right, sir.

Q. Can you describe to us the approximate interval of time between those visits? A. I don't recall, sir.

Q. Would it be a matter of weeks or days, or do you recall at all, or can you help us on that? A. I don't recall.

Q. All right. Do you recall at that time, at the second visit, any particular matter being discussed? A. No, sir.
2760 Q. Now, to point to some matter, I am asking you now was anything said about any uniforms? Was that subject matter raised at all? A. Not that I recall, sir.

Q. Then what happened the next time? A. Well, one day Colonel Jacobson walked into Mr. Bayer's office and Mr. Bayer had the pictures of two of his sons on the wall.

Q. Of the two sons? A. Yes.

Q. What two sons? A. Robert Bayer and Martin Bayer.

Q. The younger one was about how old then, Sanford? A. Sixteen years of age.

Q. Go on with your story? A. When Colonel Jacobson saw the pictures of the boys on the wall, he asked Mr. Bayer where the boys were stationed, and Mr. Bayer told him that Robert at that time was stationed in Middletown, that is in Pennsylvania, and that Martin was stationed in Mitchel Field.

Colonel Jacobson then asked Mr. Bayer what duties Martin performed at Mitchel Field. He told him he was a clerk. Colonel Jacobson then mentioned that he needed clerks in his department, and that he would ask for the transfer of Martin. Mr. Bayer mentioned to him that he 2762
also had a nephew at the field, and he said he would ask for the transfer of both of the boys to his department.

Q. May I ask you if you had knowledge of these two boys, Martin Bayer and Melvin Usdan, as cousins, as to whether or not they were together a great deal before they went in the Army? A. They were friendly. They lived next door to one another.

Q. Do you know or do you happen to know whether or not they went into the Army at the same time? A. They did go in at the same time.

Q. You have spoken about some pictures of Robert Bayer and Martin Bayer being in the office. Were they exposed to view or where? A. They were hanging on the wall. As you walked into Mr. Bayer's office you could see those two pictures. 2763

Q. And were these boys in civilian clothes or sport clothes, or what? A. They were in uniform.

Q. As soldiers of the United States? A. Yes, sir.

Q. Then what happened after this discussion you have told us about between Samuel Bayer and Colonel Jacobson? A. Well, the next thing we heard was that the boys were transferred to Colonel Jacobson's department or outfit.

Q. Now, I just asked you, please, to leave out what you had heard, and I know it is difficult with the subject matter being discussed. The next visit of anyone you saw into the office? A. After the boys were transferred to Colonel Jacobson's department, Lieutenant Roeser came up with an officer, at that time Captain Radovich, and introduced Mr. Bayer and myself to him as the commanding officer of Martin Bayer.

Q. And is this Captain Radovich that gentleman here in the court room now? A. Yes, sir, he is sitting right over there (indicating).

Q. And that is, he was first brought in by Lieutenant
2765 Roeser? A. Yes, sir.

Q. And was introduced as the commanding officer of Martin Bayer and Melvin Usdan, is that right? A. That is right.

Q. Roeser introduced Captain Radovich to Samuel Bayer? A. Yes, sir.

Q. In your presence? A. Yes, sir.

Q. And while you were there? A. Yes, sir.

Q. Was there a conversation that took place then? A. Just a general conversation.

Q. You don't recall any particular subject matter being discussed? A. No, I don't.

Q. Then thereafter did Captain Radovich come in again? A. Yes.

Q. Or did he stop then? A. No, he came in and called
2766 on the telephone very often.

Q. Who do you mean, he called on the telephone? Do you mean that he used the phone when he came in? A. No, he called Mr. Bayer to say hello to him, if he didn't come into the office to say hello to him at the office.

Q. Would you get such telephone calls yourself? A. Yes, sir.

Q. You would answer the phone? A. Yes, sir.

Q. And when he came in there were you present at the various times? A. Yes, sir.

Q. By the way, did your duties keep you pretty constantly in the office? A. Most of the time, sir.

Q. You have told us that the original visit of these officers started some time in April of 1943? A. That is right.

Q. Will you give us the best approximation you can of the time when Captain Radovich first came into the office? A. Either the latter part of April or the early part of May, 1943.

Q. And then those visits afterwards were they frequent or infrequent? A. Frequent visits.

Q. What would you mean by frequent? What would you describe that to be? A. Well, about four or five times a week. 2768

Q. Four or five times a week or a month? A. A week.

Q. A week? A. Yes.

Q. When these visits were made, were they lengthy visits, were they just for a moment or two, or did they vary? Tell the Court and jury, please, about them in that respect. A. These visits varied. Sometimes Captain Radovich came in and stayed five or ten minutes, and then sometimes he would come in and stay a half hour, and sometimes a little longer.

Q. And when he came in do you know what means of locomotion he used to get there? A. He usually used a staff car.

Q. Did he drive it himself? A. No, sir, he had a boy drive it for him. 2769

Q. Where would the car be in the interim while he was up visiting in the office? A. Parked in front of the building.

Q. Was that a rare occasion or a frequent occasion? A. A frequent occasion.

Q. How long did that go on, Miss Solomon, those frequent visits of Captain Radovich into the office of Samuel

Bayer? A. They went on until some time in August, I believe.

Q. Of what year? A. Of 1943.

Q. So your best description is that they started some time late in April or early in May? A. Yes, sir.

Q. And continued until the latter part of August? A. August some time, around then.

Q. Some time in August? A. Yes, sir.

Q. Do you remember at any time any discussions about any uniforms being acquired there during these visits of Captain Radovich's? A. Yes. I received an invoice from I. Buss Uniform Company one day and I asked Mr. Bayer

2771 what this invoice——

Q. Don't tell us what he said. Did you receive an invoice? A. Yes, sir.

Q. Was that the first you knew about it? A. Yes, sir.

Q. So, any conversations that took place about uniforms or acquiring them, you don't know about? A. No, sir.

Q. All right. Now do you remember any occasion in particular when Captain Radovich came in that stands out in your memory for any reason? A. Yes. Captain Radovich came in one morning and told Mr. Bayer—I was in the office and so was Elias Bayer—that his outfit was breaking up and that he was sending the boys to an overseas outfit.

Q. And when was that, do you think? A. In the summer of 1943.

2772 Q. What if anything did Samuel Bayer say? A. Mr. Bayer asked him if he could possibly have the boys transferred to another outfit on the field, and he said he couldn't do that.

Q. He said he could or could not? A. Could not.

Q. He could not do it. Was anything further said about it that day? A. No, sir.

Q. Then did anything happen with reference to that, thereafter, to your knowledge? A. Captain Radovich came

in the next day and told Mr. Bayer that he had an angle, that he could have the boys transferred to the Medical Corps at Mitchel Field. Mr. Bayer thanked him and then Captain Radovich asked Mr. Bayer if he could see him personally.

Q. Before we get to that, Miss Solomon, had Mr. Bayer been out visiting or entertaining Captain Radovich with you or anyone else to your knowledge? A. Yes, sir.

Q. What visits were made of that description prior to this particular visit where he said he had another angle? A. I don't recall if we had gone out to dinner with Captain Radovich before this conversation or after this conversation; after this conversation, but Captain Radovich and 2774
Mrs. Radovich, Mr. and Mrs. Samuel Bayer and myself had dinner one night with Captain Radovich and his wife.

Q. Where did you have that dinner? A. At the Waldorf Astoria.

Q. In the restaurant or in a room? A. In the Starlight Roof.

Q. I take it you had your dinner there. Did you go any place after dinner? A. No, sir. We spent the evening there and then we went home.

Q. Coming back to the visit, the second visit that you have spoken of, with reference to breaking up the outfit and your statement that Captain Radovich said that he thought of a new angle, what happened after that that you heard of? A. When Captain Radovich asked Mr. Bayer 2775
to see him alone Elias Bayer and I walked out of the office, and I stood right outside of Mr. Bayer's office at the time—

Q. Why? A. Well, because Captain Radovich had never before asked Mr. Bayer to see him personally, and I was just wondering what the conversation was going to be because he said he had an angle and to have the boys transferred to the Medical Corps.

Q. Did you hear what was said? A. Yes, sir. Captain Radovich asked Mr. Bayer to please give him $500 as he had to send his wife back to California.

Q. What did Samuel Bayer say? A. Samuel Bayer told him he didn't have the money and would try to raise it and try to give it to him.

Q. Did you hear any subsequent conversations between Captain Radovich and Samuel Bayer about money? A. Yes. Some time after that.

Q. How long after that? A. A few days.

Q. What other conversation did you hear? A. Captain Radovich came in again and after talking to Mr. Bayer in the presence of Elias Bayer and myself he asked to see him again personally, and after I walked out I heard him ask Mr. Bayer for $500 more.

2777 Q. What did Mr. Bayer say? A. Mr. Bayer told him he didn't have the money and didn't know if he could raise it.

Q. Was anything further said, any other request or demands for money? A. Yes. There was a request a few days after that for $1,000.

Q. Who made that? A. Captain Radovich.

Q. What did Mr. Bayer say? A. Mr. Bayer said he didn't have the money and didn't know where he could raise that money.

Q. If any money was passed, were you present at any such time? A. No, sir.

Q. Did you see much of Major Radovich after these visits that you have spoken of? A. Yes, he came in often.

Q. Was there a time when he ceased to come in regularly? A. After the boys were transferred out of Mitchel

2778 Field.

Q. After the boys were transferred out of Mitchel Field? A. Yes, sir.

Q. What happened then? A. Well, after the boys were transferred out of Mitchel Field, Captain Radovich called the office one day and told Mr. Bayer that he knew who had the boys transferred out of Mitchel Field.

Q. Did you hear the conversation? A. Yes, sir.

Q. Were you on the telephone? A. Yes, sir.

Q. And what else was said? A. And he said that if Mr. Bayer would give him $1500 he could have the boys sent back to Mitchel Field. Mr. Bayer asked him to please forget about it, to leave the boys alone as they were very happy where they were at their new station.

Q. Did you hear any other conversations of that nature? A. Yes. One morning Captain Radovich called from Washington——

Q. Long distance call? A. Yes, sir.

Q. And whom did he call for? A. I don't recall whether he called for Mr. Bayer or myself, but I spoke to Captain Radovich at the time. 2780

Mr. McGohey: Could we have the time of this fixed, please?

Mr. Keenan: Yes.

Q. Fix the time of it as best you can. A. I think it was in November of 1943.

Q. What did he say over the phone? A. He told me that he had to see Mr. Bayer, it was very important, and for Mr. Bayer to meet him at Cavanagh's, that is a restaurant on 23rd Street and Eighth Avenue, for lunch.

Q. Was there any meeting before that? A. Yes, there was a meeting about six—I wouldn't call it a meeting; there was an appointment made.

Q. How long before that? A. About six weeks before 2781 that.

Q. Will you tell us about that, if you know? A. Captain Radovich called one day and Mr. Bayer was either out or on a long distance call, and I spoke to him, and he told me that he would like to meet Mr. Bayer at the McAlpin Hotel that evening for dinner.

Q. Did you tell that to Mr. Bayer? A. Yes, I did.

Q. Did you go with him? A. Yes, I did.

Q. Who was there? A. Captain Radovich, another officer, Mr. Bayer and myself.

Q. What was the rank of the other officer, if you know? A. He was either a first lieutenant or a second lieutenant; I don't recall.

Q. Did you dine together? A. Yes, sir, we had dinner together.

Q. Was any statement made by Captain Radovich about what he was doing then? A. Yes. At the time Captain Radovich was registering at the hotel I was standing near him and he had pulled out a mimeographed sheet and showed me some of his orders, and I didn't understand the
2783 abbreviations of them.

Q. You couldn't understand the abbreviations? A. That is right, sir.

Q. What did he say they were? A. He told me that he had authority to take any plane to travel any place in the country.

Q. Is that all? A. That is all, sir.

Q. Was there anything else of significance that took place at that time, that you recall, at the McAlpin? A. No, sir.

Q. Then the next time I think you have told us was when he called up; and you made an appointment for Cavanagh's Restaurant? A. Yes, sir.

Q. Mr. Bayer was not there then? A. No, he was not at the office then.

2784 Q. But you made the appointment for him? A. Yes, sir.

Q. And did you keep it with him? A. Yes, sir, we did.

Q. Who was present at Cavanagh's Restaurant? A. Mr. Bayer, Captain Radovich and myself.

Q. Just the three of you? A. Yes, sir.

Q. Was there conversation that took place then? A. Yes. Captain Radovich told Mr. Bayer at that time that he was going on a very dangerous mission to the Burma-India front and that this mission would write history, and

if the boys were lucky enough to return they would return in eight months, that is how long that mission was to take. And he then told us that he had sent a radiogram to take both Melvin Usdan and Martin Bayer into this company that he was in.

Q. What did Samuel Bayer say? A. Samuel Bayer asked him why he did that, what he wanted from his life, because he said he never did him any harm, and asked him why he was taking it out on the boys by taking the boys into this dangerous outfit.

Q. What did Captain Radovich say? A. Captain Radovich said he had the authority to do it and he could do anything he wanted, and that if Mr. Bayer would give him 2786
$5,000 he could have this—the boys transferred out of this outfit into some other outfit, and for Mr. Bayer not to think he was going to keep all that money himself—he had to give $2,000 to one man and $1500 to another man, and then he would only have $1500 for himself.

Q. What did Samuel Bayer say to that? A. Samuel Bayer at that time told him that he didn't have that kind of money and didn't know where he could raise it. Captain Radovich told him then that he knew he was a rich man and could put his hands on any kind of money.

Q. By the way, can you tell us what the approximate wealth of Samuel Bayer is? A. About a hundred thousand dollars.

Q. You keep his books and records? A. Yes, sir.

Q. Was there anything more said at that meeting at the 2787
Cavanagh Restaurant? A. Mr. Bayer again pleaded with him and told him that he couldn't possibly raise that kind of money. And he said he was awfully sorry, if he couldn't raise the money the boys would have to go with him on this dangerous mission, and for him not to worry because maybe if the boys were lucky they would come home alive.

Q. At that time do you know whether Samuel Bayer had any information about any movement of his boys from

where they were? A. Martin Bayer had called that morning and had told his father that he and his cousin, Melvin Usdan, were being transferred to Goldsboro, North Carolina.

Q. Did you see Captain Radovich after that? A. Yes. I saw him the following day.

Q. Where? A. At our office.

Q. What time of day? A. I believe it was in the morning.

Q. Was there a conversation that took place in your presence then? A. Yes. Captain Radovich asked Mr. Bayer if he had made a decision about giving him the
2789 $5,000, and again Mr. Bayer told him that he didn't have that money. And he said if he didn't give it to him he would take the boys with him. And he repeated the conversation about not keeping all that money for himself.

Mr. McGohey: Pardon me. May I have the date fixed of this second conversation?

Mr. Keenan: She said the day after the Cavanagh Restaurant meeting.

Mr. McGohey: Oh.

Q. Is that right? A. Yes, sir.

Q. Then did you see Major Radovich after that? A. No. That was the last time I saw Major Radovich.

Q. Do you know where he went when he left the office?
2790 A. He walked out of the office and Elias Bayer walked after him.

Q. That is the last you saw him? A. Yes, sir.

Mr. Keenan: You may have the witness.

The Court: Do you wish to ask any questions?

Mr. Robb: I don't know what order your Honor has been following on this.

The Court: I think you had better examine the witness.

*Cross-examination by Mr. Robb.*

Q. How long have you worked for Samuel Bayer? A. Six years.

Q. Six years? A. Yes, sir.

Q. Is that the first job that you had? A. No, sir.

Q. Can you describe this office of Mr. Samuel Bayer's, the particular office in which he had his desk? A. Well, the office was an office—I believe it was about 15 by 18. It has two desks in it, a file cabinet, three chairs and a couch.

2792

Q. Where was Mr. Samuel Bayer's desk with respect to the window? A. Facing—I would say the window (indicating) was the door and Mr. Bayer's desk was facing the door.

Q. The window and the door were in line? A. There was no window in his office.

Q. Oh, there was no window? A. No, sir.

Q. Where was the desk then with respect to the door? A. It faced the door.

Q. How far from the door was it? A. Oh, I don't know.

Q. Can't you give us an approximation? A. I don't know.

Q. Was it on the opposite side of the room? A. Yes, sir.

Q. So, if the room was 15 feet square, it was approximately 15 feet from the door, is that correct? A. I wouldn't say that, because the desk takes up some part of the space.

2793

Q. Then, that door opened into a hallway? A. It opens out, yes.

Q. Is it a glass door? A. It is pane glass; you can't see through the glass, though.

Q. Now, Miss Solomon, coming to your testimony about the conversation you say you overheard between Captain Radovich and Samuel Bayer, was that the first time that

anybody had ever asked to speak to Mr. Samuel Bayer privately? A. Yes, sir.

Q. The first time in all your six years there? A. Yes, sir.

Q. Nobody had ever done that before? A. No, sir.

Q. Is it your custom always to listen to conversations between Mr. Samuel Bayer and anybody who is talking to him? A. Yes, sir.

Q. Why is that? A. Well, if it is a customer who walks in I usually write the orders, or if it is over the telephone I take the orders over the telephone.

Q. Yes. But doesn't Mr. Samuel Bayer have other visi-
2795 tors besides customers? A. Well, he has—no, he don't; very few social calls.

Q. When he has social callers do you listen to those conversations too? A. Over the telephone or in the office.

Q. You do? A. Yes.

Q. That is the rule of your office? A. Yes.

Q. Samuel Bayer is not to speak to anyone alone, is that right? A. No, I wouldn't say that; but I usually pick up the telephone first and then I listen into the calls.

Q. Yes. Now, suppose somebody came in to see Mr. Bayer on a social visit, would you be there, too, listening to the conversation? A. I would walk in to say hello to the people and if the conversation was of no interest to me or didn't refer to any business and I was busy in my office, I would walk out.

2796 Q. How would you decide whether the conversation interested you or not? A. Well, after hearing the gentleman talk I would know whether I was interested in that conversation, if they were talking about people I didn't know, I wasn't interested in it.

Q. When you say you listened at the outside of this door to hear this conversation, was anybody with you when you were listening? A. Elias Bayer.

Q. What particular part of the door were you listening at? A. I was listening right outside the door.

Q. But what particular part of the door? The keyhole, or where? A. No. The door was open. It wasn't the keyhole.

Q. Oh, the door was wide open? A. Yes.

Q. You were just standing in the door? A. I wasn't standing in the door. I was standing at the side of the door.

Q. In other words, the door wasn't closed; you didn't close the door when you went out? A. No, sir.

Q. Were you and Mr. Bayer—Mr. Elias Bayer—standing on the same side of the door? A. Mr. Samuel Bayer 2798
was in the room.

Q. Mr. Elias Bayer. A. Yes, sir.

Q. He was standing on the same side of the door? A. Yes, sir.

Q. Which one was standing next to the door jamb, you or Mr. Elias? A. I was.

Q. You were. And he was standing— A. Next to me.

Q. Next to you. You had your ears like this (indicating), did you? A. It wasn't necessary to do that.

Q. It wasn't necessary? A. No, sir.

Q. In other words, these people talked in ordinary voices, is that right? A. That is right, sir.

Q. Loud voices? A. No. Ordinary speaking voices.

Q. They could have seen you if they had looked out 2799
there? A. No, they couldn't have.

Q. You were hiding, is that right? A. I wasn't hiding. I was just standing on the side of the door.

Q. How long would you say you stood there? A. Just a few minutes.

Q. How many? A. I couldn't remember that, sir.

Q. You remember what was said pretty well, don't you? A. Yes. I remember what was said because it was a conversation one does remember.

Q. When did you go back in the room? A. As Captain Radovich was walking out of the office, as he went across the threshold, I walked into the office.

Q. Did you greet him? A. I said "Good bye" to him, yes.

Q. How about Mr. Elias Bayer, did he walk in too? A. Yes, sir.

Q. In other words, you were eavesdropping? A. Well, if you want to call it that. I was curious——

Q. Is that your testimony? A. Yes. (Continuing) —to know what the conversation was all about.

Q. It wasn't any business of yours? A. No, it wasn't any business of mine, but Captain Radovich never had
2801 asked Mr. Bayer to see him alone personally.

Q. Nobody else ever had either? A. No, sir.

Q. In all the six years you had been there? A. Yes, sir.

Q. Do you know whether or not Samuel Bayer paid for some uniforms for some other officers besides Major Radovich? A. Yes, I do, sir.

Q. He did it, is that right? A. I didn't—will you please repeat that?

Q. Do you know whether Samuel Bayer paid for some uniforms for other officers besides Captain Radovich? A. Yes, he did.

Q. Who were they? A. Colonel Jacobson, Colonel Vidal, and Lieutenant Roeser.

Q. Do you know whether or not he gave—by "he" I mean Samuel Bayer—gave other presents to Colonel Jacobson?
2802 A. No, sir.

Q. You don't know that? A. No, sir.

Q. Were you present when Samuel Bayer and Elias Bayer gave a statement to Colonel Snyder in your office? A. I was not there present at the time of the giving of the statement, but I had typed up the statement after they had given it to them.

Q. Did you also make a statement to Colonel Snyder? A. No, sir.

Q. Did he question you about this matter at all? A. No, sir.

Q. Never asked you about it? A. No, sir.

Q. And of course you didn't tell him about it, did you? A. No, sir.

Q. Did you know at that time what he was investigating? A. Well, he had told Mr. Bayer that—as he walked in I heard him tell Mr. Bayer that he had come in to ask him some questions about this Radovich case.

Q. What did you do then? A. I walked out of the office. Colonel Snyder, I believe, asked me to walk out of the office.

Q. Did you listen outside the door to that conversation? 2804
A. No, sir.

Q. You didn't eavesdrop on that one? A. No, because the door was closed.

Q. Oh. Who closed it? A. I don't know. I wasn't inside the room to see who closed it.

Q. How about that conversation, Miss Solomon? Did that conversation interest you too? A. Well, while—after I typed up——

Q. No. Did the conversation interest you at the time you walked out of the door? A. Yes, I was interested to know what was being said.

Q. But you didn't stand outside the door, is that right? A. When the door is closed I don't believe you could hear through it.

2805

Q. Did you try? A. No, sir.

Q. That was the second time somebody asked to speak to Mr. Bayer privately, wasn't it? A. Yes, sir.

Q. You typed up Mr. Bayer's statement? A. Samuel Bayer's and Elias Bayer's statements.

Q. You knew that these statements were under oath, didn't you? A. Well, the dictation said so.

Q. Were those statements the truth? A. No, sir.

Q. Did you tell Colonel Snyder that? A. No, sir.

Q. You were trying to protect Mr. Samuel Bayer, weren't you? A. I wasn't asked.

Q. But you didn't tell him, did you? A. I wasn't asked, sir.

Q. Won't you answer the question? A. No, I did not.

Q. Did you tell Colonel Snyder that? A. No, sir.

Q. If he had asked you would you have told him that that wasn't the truth? A. Yes, sir.

Q. You would have told him that? A. I would have told him the truth.

Q. You would have told him Mr. Samuel Bayer was a
2807 perjurer, would you? A. Well——

Mr. Keenan: Just a moment. I object to that. I think that is offensive.

The Court: I don't think it is necessary to use language that strong in cross-examination.

Q. Miss Solomon, it is your testimony that after you say these demands were made upon Mr. Bayer you saw Captain Radovich around there frequently? A. Well, after these demands were made the boys were transferred out of—and the boys were transferred into the Medical Corps.

Q. Can you answer the question? That you saw Captain Radovich around that office frequently? A. I would have to give an explanation on that, I think, sir.

2809 Q. All right, go ahead. A. After the boys were transferred to the Medical Corps Captain Radovich came in, the boys were in the Medical Corps for about a week—after the boys were transferred out of Mitchel Field Captain Radovich didn't come in again.

Q. He did come in after you say he made this demand, didn't he? A. Which demand?

Q. Well, the first demand you have told us about. A. Yes, he did.

Q. Each time you stood outside the open door and listened? A. Well, no. There were intervals when he came in between the two demands and I stayed in the office and listened to the conversations.

Q. And the conversation was pleasant, was it? A. Yes, sir.

Q. Just a social visit? A. Well, he would tell us that the transfers are being worked on and that——

Q. Yes. But there wasn't any unpleasantness about it? A. No, sir.

Q. Nobody was offended by this demand you say he had made? 2810

Mr. Keenan: I object, your Honor. That is calling for the conclusion of the witness. He might be surprised by the answer——

The Court: I should rather think so.

Mr. Robb: I think she has answered it anyway, if your Honor please.

Q. Did you ever listen in on any phone conversations between Samuel Bayer and Colonel Jacobson? A. No, sir.

Q. You didn't listen in on those? A. I didn't know Samuel Bayer called Colonel Jacobson.

Q. Did he ever have a call from Colonel Jacobson? A. No, sir.

Q. Would you say that you are positive about that? A. I know Colonel Jacobson called Elias Bayer a number of 2811 times.

Q. But you weren't in on those calls, is that right? A. I never listened in to Elias Bayer's or anyone else's calls.

Q. You wouldn't listen— A. Only on Samuel Bayer's.

Q. Who listened in on Elias' calls? A. Nobody does.

Q. Did you ever hear of a call from Samuel Bayer—from Colonel Vidal? A. No. Colonel Vidal used to call Elias Bayer, too.

Q. How about Roeser? A. He would call Elias Bayer, too; they were his friends.

Q. You told us in some detail about the calls you would listen in on from Captain Radovich to Samuel Bayer. Now, when those calls first came in there wasn't anything unusual about them, was there? A. No.

Q. But you do recall what was said? A. Well, the first call that came in Captain Radovich said that something happened and that he had to see Mr. Bayer, and he was coming over to the office immediately.

Q. Who else called Mr. Samuel Bayer on that day? A. Oh, a lot of other people may have called him because he
2813 gets a lot of telephone calls.

Q. Can you tell us what any of those people said to Mr. Samuel Bayer? A. They were calls from customers, calls from—maybe Mrs. Bayer called. She usually calls.

Q. Did you listen in on her calls, too? A. Yes, I do.

Q. Did you make notes on what she said? A. No. I talk to her while Mr. Bayer is talking to her, too.

Q. You say you went out to dinner with Mr. and Mrs. Bayer and Captain and Mrs. Radovich, is that right? A. Yes, sir.

Q. You went up to—where is it? A. The Starlight Roof at the Waldorf-Astoria.

Q. Did you ever go out to dinner with Mr. Bayer without Mrs. Bayer? A. Yes, I did.

Q. How many times? A. I don't remember how many
2814 times, sir.

Q. Frequently? A. Not too frequently, no.

Q. And where do you say you lived? A. In Brooklyn.

Q. And are you alone or living with your family? A. I live with my family.

Q. Now, you say you went down to have lunch, I think it was luncheon or dinner, at Cavanagh's Restaurant, where you met Captain Radovich. Why did you go along

with Mr. Bayer? A. Because Captain Radovich said he would like to see Mr. Bayer for luncheon and I just followed him, went along with him. He asked me to come along with him.

Q. Do you usually go out to luncheon with Mr. Bayer? A. Yes, I have lunched with him very often.

Q. Very frequently? A. Yes, sir.

Q. Where is Cavanagh's Restaurant with respect to your place of business? A. Two street blocks and two and a half avenue streets.

Q. Who paid the check at that luncheon? A. I did.

Q. You did. Your money or Mr. Bayer's? A. Mr. Bayer refunded it to me. 2816

Q. Were you ever interviewed by the F.B.I. in this matter? A. Yes, I was, sir.

Q. When? A. I believe it was a year ago October or November. I don't recall exactly.

Q. You told them at that time that you didn't know anything about it, didn't you? A. No, sir. I gave him a whole detailed report of it, everything that I could recall.

Q. Have you discussed with Mr. Bayer what your testimony was going to be in this case? A. No, sir.

Q. You haven't talked to him about it at all? A. Well, we spoke about the case, yes.

Q. Did you talk to Mr. Bayer about the case before you talked to the F.B.I.? A. Well, we spoke about the case, yes.

Q. How long before you talked to the F.B.I.? A. Well, after Colonel Snyder came in. 2817

Q. Oh, then you talked to Mr. Bayer about the case, is that right? A. Yes, sir.

Q. And at that time did you discuss what you were going to tell the F.B.I.? A. No, sir.

Q. When did you talk about the F.B.I. with Mr. Bayer? A. We never discussed what I was going to tell the F.B.I. Mr. Bayer told me to tell them the truth, and that is all.

Q. Did you ever have any discussion with Bayer about whether or not he would try to put the burden of this case on Captain Radovich? A. No, sir.

Q. Never discussed that? A. No, sir.

Q. Never discussed with Mr. Bayer whether or not you would try to make the jury believe that Captain Radovich was an extortionist, did you? A. No, sir.

Mr. Keenan: Just a moment. I object to that, to the form of the question.

The Court: She is being cross-examined. I will overrule that objection.

2819

Q. You never discussed with Mr. Bayer whether or not to save himself he would try to accuse Captain Radovich of extortion? A. No, sir.

Q. And, of course, you would not tell an untruth to help Mr. Bayer, would you? A. I would not, sir.

The Court: Are there any further questions?

Q. By the way, Miss Solomon, did you ever go on any trips with Mr. Samuel Bayer? A. Yes, sir.

Q. Where? A. North Carolina.

Q. Where in North Carolina? A. Charlotte, North Carolina, and in that vicinity.

Q. How often did you go down there? A. About once

2820 a month.

Q. How long would you stay? A. A few days.

Q. Pardon? A. A few days.

Q. And then you would come back? A. Yes, sir. Mr. Bayer has a mill down there.

Q. Did you ever go to Florida with him? A. No, sir.

Mr. Robb: That is all.

The Court: Do you wish to cross-examine?

Mr. McGohey: No cross-examination.

The Court: Any redirect examination?

Mr. Keenan: Just a question.

*Redirect examination by Mr. Keenan.*

Q. Miss Solomon, the story that you gave to the Federal Bureau of Investigation, when was that given? A. I believe it was last year, October or November of last year. I gave it to Mr. Wallace.

Q. Mr. Wallace? A. Mr. Wallace was there, and Mr. Flynn and Mr. Brown.

Q. Mr. Flynn. Do you see Mr. Flynn in the courtroom? 2822
A. Yes. Mr. Flynn is over there (indicating).

Q. And Mr. Wallace, who is he here? A. Sitting in the center (indicating).

Q. How long were you there with the F.B.I. agents, Mr. Flynn and Mr. Brown? A. From about 10 o'clock in the morning until about 4.30 or 5 in the evening.

Q. And did you answer all the questions they asked you? A. I did, sir.

Q. And did you refuse to answer any of them? A. No, sir.

Q. Did you answer any of them falsely that you know of? A. No, sir.

Q. Now, there has been a good deal of talk or there has been some talk about some trips which you made with Mr. Bayer. Has there ever been any wrongful conduct of any 2823
kind between Mr. Bayer and yourself? A. No, sir.

Q. At any time? A. No, sir.

Q. Were these trips made with the knowledge of Mrs. Bayer? A. Yes. She went with us on some of those trips.

Q. And you have been asked whether or not you would tell any story to throw the blame on any other soldiers for what Mr. Bayer did. I will ask you if you would perjure yourself for anyone? A. I would not, sir.

Q. And was the statement written up that you gave to the F.B.I. agents, do you know? A. Yes, there was a stenographer taking the dictation.

Q. And that took from 10 o'clock in the morning until late in the afternoon? A. That is right, sir.

Q. And were you asked to come down at any later date? A. No, sir.

Q. Were you asked questions about your relations with Samuel Bayer at that time? A. I was, sir.

Q. Whether or not they were chaste and decent? A. That's right.

Q. And did you reply then? A. I did, sir.

2825 Q. Are you willing to answer any questions about any trips you made with anybody in your life? A. Yes, sir.

Q. Any place? A. Yes, sir.

Q. As to whether or not you are a decent woman? A. I am, sir.

Mr. Keenan: That is all.

*Recross-examination by Mr. Robb.*

Q. Miss Solomon, this time that you made the statement to Mr. Wallace, was that after Samuel Bayer had made a statement to him? A. No, sir. It was before Samuel Bayer had made a statement to him.

Q. How long before? A. I don't recall.

2826 Q. Was it a matter of days or weeks or months? A. I think it was weeks.

Q. Weeks? A. Yes.

Q. And had you talked at that time with Mr. Keenan? A. At the time I made the statement?

Q. Yes. A. I don't believe I had known Mr. Keenan then.

Q. You talked with Mr. Samuel Bayer before you went in, did you not? A. The only thing I spoke to him about was that he knew I was going down there.

Mr. Robb: Yes.

The Court: Is that all?

Mr. Robb: That is all.

Mr. McGohey: May I at this point ask just one or two questions?

The Court: Have you something further, Mr. Keenan?

Mr. Keenan: No, I thought they were all through with the witness. 2828

The Court: If you have a question, you may ask her.

*Recross-examination by Mr. McGohey.*

Q. You have testified, Miss Solomon, that you were examined and that you answered all of the questions that were asked of you? A. I did.

Q. And that was in Mr. Wallace's office? A. Yes.

Q. Was that the first time you were in Mr. Wallace's office? A. Yes, sir.

Q. Had you not been there on one occasion before that? A. No, sir.

Q. Were you ever in Mr. Wallace's office accompanied by Mr. Cohen? A. I don't believe this was Mr. Wallace's 2829 office. The first time I was in that building was in a small office, and then the second time I was in a much larger office.

Q. Well, weren't you interviewed some time by Mr. Wallace prior to the time that you answered all these questions? A. Yes, I was.

Q. And at that time did you decline to answer any questions? A. Mr. Bayer's attorneys were there at the time.

Q. Mr. Cohen? A. Yes, sir.

Q. Were you advised by them not to answer any questions? A. Yes, sir.

Q. And you did not answer any questions? A. Yes, sir.

Q. And the interview then terminated? A. That is right.

Q. It was some time after that that you came in and answered questions? A. Yes, sir.

Q. How long after your first visit did you come in and answer questions, if you recall? A. I don't recall.

Q. Would it be a couple of weeks, or three weeks? A. It was a matter of weeks, I believe.

Q. Some weeks? A. Yes, sir.

2831

The Court: Any further questions?

Mr. McGohey: Yes, your Honor.

Q. Now, between the first visit and the second visit, Miss Solomon, did you see Martin Bayer, young Martin Bayer, the soldier? A. I don't remember, sir. I believe I did. I believe after the first visit I had gone to North Carolina and Martin Bayer was at Greensboro at that time.

Q. Were you accompanied by anybody when you went to Greensboro? A. Mr. Bayer.

Q. You and Mr. Bayer together saw Martin Bayer? A. Yes, sir.

Q. Did you have any conversation about this case? A. Well, Martin Bayer had told his father that he was ques-
2832 tioned, and he asked his father what it was all about, and his father had told him there was nothing to any of the questioning and to just answer the truth.

Q. But you talked to him about this case? A. Martin Bayer, no, sir.

Q. I say you and Mr. Bayer talked with Martin Bayer about this case? A. Martin Bayer asked what all the questioning was about.

Q. Yes, and then it was subsequent to that that you came back to New York and then came in and answered these questions, is that correct? A. That's right.

Mr. McGohey: I have no further questions.

Mr. Keenan: One question.

*Redirect examination by Mr. Keenan.*

Q. Where was Martin Bayer at that time? A. He was in the hospital in Greensboro. He had contracted pneumonia and was very sick in the hospital.

Q. During that time? A. Yes, sir. 2834

Mr. Keenan: That is all, your Honor.

The Court: All right, you will be excused. Is there anything further?

Mr. Keenan: Your Honor, at this time the defendants Bayer, having already given their testimony through the lips of the exhibits——

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: —we rest.

Mr. Robb: We object to that, if the Court please.

Mr. Keenan: Wait a minute. You object to it?

Mr. McGohey: I object to any speeches of this kind, your Honor.

The Court: Yes. Do you rest?

Mr. Keenan: I have not rested, your Honor, if there 2835
is an objection to that speech. Is there any objection to it?

Mr. Robb: Yes, sir, I object to it.

Mr. McGohey: My objection has been made.

Mr. Keenan: I want to know what the ground of it is.

The Court: Whether or not there is an objection, I am going to strike it out. I asked the question whether you wished to rest or not.

Mr. Keenan: Your Honor, we rest.

The Court: Now you gentlemen, counsel for the defendant Radovich, have you anything further to offer?

Mr. Ansell: We have nothing further.

The Court: Have you any rebuttal?

Mr. McGohey: The Government has no rebuttal, your Honor.

The Court: Then pursuant to the plan we agreed upon yesterday afternoon, gentlemen, if I recall correctly, I may now, pursuant to our understanding, discharge the jury until Monday morning. Does that
2837 accord with your understanding?

Mr. Ansell: That was my understanding.

Mr. Keenan: That is our understanding, your Honor.

Mr. McGohey: And the Government's, also.

The Court: Ladies and gentlemen of the jury, the situation is a little bit peculiar. Frankly, if I were home down in the Western District of Virginia, I would have finished this case this week, but I understand that it is your practice here, or it is the practice in this District Court, not to require jurors to attend on Saturdays. I am frank to say that that is not the practice in my district. We do not keep jurors in attendance as long as you attend. You attend, if I am
2838 correct, a month at a time, and I think it is proper to follow the customs which you have, and, consequently, it is not my desire to run this case into a situation where you would have to serve all day Saturday.

So I am going to adjourn you now, the evidence having been concluded, over until Monday morning, at which time you will hear the summations of counsel followed by my charge to you as to the law, and then the case will be submitted to you for your determination.

2839

It is desirable, if it can be worked out, to submit the case to you the first thing in the morning because I understand it is extremely difficult to secure hotel accommodations, or, rather, I am told that it is impossible to accommodate jurors overnight should there be any occasion, because they just cannot find hotel rooms. And certainly it is not my purpose to submit the case to you at any such hour where you might be required to spend a night in the jury room. So I am undertaking to arrange it so that the case may be submitted to you for your consideration the first thing in the morning.

2840

I wish it were so that we could go right through with it conveniently, because I would prefer for the case to be submitted to you while the evidence is as fresh as possible in your minds. Under the circumstances, the only practical way to do it is to adjourn you now until Monday morning.

Now that the case has reached this stage, I want to again repeat what I told you when you first got in the jury box, about not discussing the case amongst yourselves, and, more particularly, not discussing it or permitting anyone outside to discuss it with you. With that, ladies and gentlemen, it being noted of record that all evidence of all parties has been submitted, and the taking of evidence concluded, I will excuse you now until Monday morning.

2841

It does not really inconvenience any of us to be here by 10 o'clock, does it?

All right, I am going to adjourn you then until Monday morning at 10 o'clock.

(Adjourned until Monday, October 22, 1945, at 10 A. M.)

New York, Monday, October 22, 1945,
10 A. M.

TRIAL RESUMED.

(The following proceedings were had in chambers, not within the presence of the jury:)

Mr. Keenan: The defendants Bayer renew the motion made at the end of the Government's case that the jury be directed to return a verdict of not guilty, and renew the request of the Court for the continuance of this cause until the return of Martin Bayer, because of the development of evidence in the case demonstrating the necessity 2843 of his appearing as a witness as to matters most material.

And the defendants Bayer move now to strike out all parts of the statement—withdraw that, let it go.

The Court: The motion of the defendant Samuel Bayer—

Mr. Keenan: Another thing I would say: Furthermore, the defendants Bayer renew their motion for dismissal on the ground that the indictment fails to state a cause of action, that if the indictment be interpreted as depending solely upon that portion of Section 88 of Title 18, having to do with defrauding the United States Government, and if it be interpreted that said section covers the alleged offense contained in the indictment, that such was the intention of Congress in enacting such Section 88 of Title 18, 2844 the same is against and in violation of the Constitution of the United States, as is demonstrated by the case of Cohen Grocery Company v. United States. I will give you the citation of that in a minute, your Honor.

The Court: All right. The motions of the defendant Samuel Bayer and Elias Bayer by counsel are overruled.

Mr. Keenan: And I would like to renew the motion on account of Elias Bayer on the ground that the evidence now shows no connection of Elias Bayer with any so-called

agreement, arrangement, confederation or conspiracy to defraud the United States.

The Court: Motion overruled.

Mr. Robb: The defendant Radovich renews the motions made at the close of the Government's case to dismiss the case and to direct a verdict in his favor upon the ground of the insufficiency of the evidence and upon the ground that the evidence now reveals that the defendant Radovich has been tried twice for the same offense.

And the defendant Radovich also renews the motion made at the close of the Government's case to strike out certain portions of the evidence which were specified in those motions. 2846

The Court: Motions of the defendant Radovich by counsel are overruled.

Now, off the record for a minute.

(Discussion off the record.)

Mr. Keenan: I want to go on the record now and I want to state to your Honor that, now that we are in chambers discussing the matter of the order of the presentation to the jury, that is, as to which of the defendants, Bayer or Radovich, shall be required to make the first summation, I want to specifically call your Honor's attention to the unique character of this prosecution, the various indictments that have been brought against the Bayers as individuals, Samuel Bayer as an individual, and against Samuel and Elias Bayer, omitting the defendant Radovich, and the peculiarity of evidence in the case brought out by Radovich's counsel to the effect that pressure was brought upon him of various natures, that he was questioned or asked, indicative of a belief of Radovich that he was indicted because of conferences that he had with the United States Attorney—the clear implication being that he was going to testify in the case, and that, a fair inference to this Court, that brought about the first four indictments against the Bayers which is now the subject matter of this 2847

prosecution; and that the real contest in this case is between Radovich and the two Bayers; that the issue, as Bayer contends in this lawsuit and as appeared in his defense, is that he was subjected to extortion as far as any payments of money were concerned.

And under those circumstances, any summation, and the order of it, is of prime importance. And I make the representation to you that General Ansell and Mr. Robb agreed with me on the order of summation, that in the event our defendants Bayer were not put on the witness stand they would precede myself as counsel for the two Bayers in summation; that there was no revision of that agreement
2849 by any statement until after the close of the case, or no statement that there would be such revision.

And therefore, in view of the fact that General Ansell and Mr. Robb apparently have mistaken the agreement as I view it, and it works a distinct hardship and militates against a fair presentation of the defense of the two defendants Bayer, I ask this Court, on this representation, for permission on that ground to reopen the defendants Bayers' defense for the purpose of permitting them to take the witness stand.

The Court: All right. I would like to hear anything you have to say.

Mr. Ansell: I have already explained to his Honor——

The Court: Pardon me, sir. You see, none of that was of record, and we are now going on the record.

2850 Mr. Ansell: Where did the record begin?

(To the reporter) Just where Mr. Keenan talked the last time.

(Record read.)

Mr. Ansell: Replying to the last part of Mr. Keenan's statement, I am required to say that, as frequently happens, counsel did not understand the agreement in the same way. Therefore, according to my understanding, and it is only out of my understanding that I can speak, there was no

agreement that fitted into the circumstances of what occurred immediately thereafter, namely, the putting on of Miss Ann Solomon, through whose lips poured the defense of the Bayers and an attack upon Major Radovich. Therefore, I do not feel myself bound by any such agreement. I had frankly wanted the case to close and get to the jury and I thought the case was to close except for character witnesses.

Number 2. So far as Radovich is concerned, if Mr. Keenan wants to reopen the case in order that the Bayers may put on their defense and his Honor thinks that that should be done, we do not wish to put ourselves in the position of objecting to that or to any other element of 2852
a full and fair trial.

I find myself, and this is number 3, I take it, in agreement with Mr. Keenan, that because of the peculiar practice here which, as I understand it, does not require a fair opening on the part of Government's counsel, defendants in this case are not put in a fair position; whether Mr. McGohey, who has been very fair and courteous in the trial of this case, would wish, under whatever the rules of this jurisdiction may be, to make an opening is a matter for him and your Honor to decide. I think it would be very clarifying and conducive to greater fairness. I do not believe that either one of us is being treated with the utmost fairness not knowing even the theory of the Government's case as yet and probably will not know until after Mr. McGohey has addressed the jury. 2853

Number 4. I appreciate the statement made by Mr. Keenan, but I do believe that, inasmuch as it is admitted that we are now defending against the Government and are now also defending against the Bayers, co-defendants, we are in a position where your Honor, if you can, should give us the closing of the defense immediately preceding Mr. McGohey. I don't want to enter into any sharp contest, your Honor, about it. Things have to be tried; things

have to be left to the Judge; and whatever your Honor decides we shall abide by, not because we have to, but because we think we ought to.

The Court: As previously indicated, no agreement as to the order of summation was mentioned to the Court until a few minutes ago this morning. There has been no approval of any agreement by the Court, and the Court will not now undertake to construe an agreement made by counsel during the course of the trial and as to the result of which counsel are in disagreement. It therefore becomes incumbent upon the Court to pass upon the question of the order of summation.

2855 Now, Mr. Keenan, let me inquire of you, do I understand you are not, as now, making the motion that the taking of evidence be reopened and that you be permitted to put your clients, Elias and Samuel Bayer, on the witness stand irrespective of the order of summation?

Mr. Keenan: No, your Honor; I am stating that in the event we are required to present our argument for summation first, with no opportunity to answer either the Government or the counsel for the defendant Major Radovich, I am moving this Court to reopen the case so that the result of an unfortunate misunderstanding may be corrected, and that I may have the opportunity to put the defendants Bayer, or either of them, on the witness stand.

The Court: But I want to understand you clearly, and if I do so understand you, Mr. Keenan, you only make your
2856 motion to reopen the evidence in the event that you are required to make your summation first. Am I correct in that?

Mr. Keenan: That is the crux of the matter, your Honor, yes.

The Court: All right.

Mr. Keenan: But I don't want to get into any technical situation.

The Court: I don't desire to put you in any technical position, but I do wish to understand what your position is.

Mr. Keenan: My position is that under the circumstances now we are not certain of having the right to sum up after the defendant's counsel for Radovich, we are now moving the Court for permission to reopen this case for the purpose of introducing the testimony of those witnesses who we decided not to offer because of the agreement that was made between counsel that now seems to have been misunderstood.

The Court: And it follows, I take it, that if you should be accorded the privilege of making your summation for the defendants Bayer after the summation for the de- 2858
fendant Radovich, then you would not desire to reopen?

Mr. Keenan: That is right.

The Court: Now, Mr. McGohey, another suggestion was made, which I want to dispose of now, lest I forget it later, and that is—by General Ansell—that the Government make an opening summation in this case. What have you to say to that?

Mr. McGohey: Your Honor, under the rules of this Court which have been in force for many years, and under the practice in this Court and in this State, which I have followed for many years, that is never done, never has been done, and I decline, respectfully, to make any such opening statement.

Mr. Keenan: Could I ask your Honor if the rule of 2859
Court would be cited to me, than any more definite statement than the rules of this Court? I would like to have that rule by its proper designation.

Mr. McGohey: Well, I don't make the point that it is a written rule, Mr. Keenan, but certainly it is the established practice and has been throughout my time——

Mr. Keenan: I understood that there were instances where judges from other jurisdictions sitting in the Southern District of New York have not followed that practice.

Mr. McGohey: I won't dispute that.

The Court: That is enough on that. From previous experience in the District Court for the Southern District of New York I know that it is the established custom, whether it be a written rule of Court, that the opening statement of Government's counsel made to the jury at the beginning of the case is considered as his opening and he is not required or permitted ordinarily in either this Court or the State Courts to make a summation to the jury after the close of the evidence before the summation made by counsel for the defendant or defendants. I am not disposed and am not going to vary the custom which I am satisfied
2861 is universal in this District and in this State. I shall not require the Government to make an opening summation.

Now as to the order of summations of the defendants in this case, I recognize that counsel for the defendant Radovich and counsel for the defendants Bayer both desire to follow the other. I recognize also that it is some advantage to the counsel who speaks after the other counsel. I know of no rule of law or precedent to govern the matter, and I know of no circumstance which is determinative of the question. I think that one counsel or one set of counsel will have some advantage over the other by reason of the order of their summation. I know of no fairer way to determine the question than by lot, and I am going to determine it that way.

Call the clerk, will you, Mr. Wallace?

2862 (The clerk entered the chambers.)

The Court: Mr. Clark, will you go to your desk in the courtroom and take two identical sheets of paper and on one of them write "First summation" and on the other one write "Second summation," and fold them carefully so that the writing cannot be seen and bring them in to me.

The Clerk: All right, your Honor.

(The clerk left the room.)

Mr. Keenan: Could I say something off the record?

The Court: Yes.

(Discussion off the record.)

(The clerk returned to the room.)

The Court: All right. Now, gentlemen, have you any preference as to the draw?

Mr. Ansell: No.

The Court: All right. I am going to accord the privilege of the first draw to counsel for Samuel Bayer inasmuch as the Bayers appear first in the indictment.

Mr. Keenan: I am going to decline that, your Honor.

The Court: All right, sir, the Court will draw for you. The Court is now drawing for the defendants Bayer. It reads, "First summation." 2864

It will be the order of the Court that the defendants Bayer make the first summation.

Mr. Keenan: The Court will grant us, of course, an exception to that entire procedure.

The Court: Certainly. Now, what about your motion to reopen the evidence?

Mr. Keenan: Now I am making the motion to reopen on the grounds stated.

The Court: And I now understand that counsel for the defendant Radovich makes no objection to it, is that correct?

Mr. Ansell: I make no objection, but I thought it was conditional on the fact that if Mr. Keenan—did Mr. Keenan get the first—I am not going to object to the reopening of this case by anybody, your Honor. 2865

The Court: What has the Government to say?

Mr. McGohey: Your Honor, I neither oppose nor consent to it.

The Court: All right, sir. It will be the order of the Court that the taking of evidence is reopened, and that any person that desires to introduce further testimony may apply for permission to the Court.

Mr. McGohey: If the Government wishes to put any evidence in in rebuttal, your Honor, I take it that would be granted?

The Court: I certainly meant my statement to include the Government as well as all other counsel.

Mr. Keenan: We want to confer with my co-counsel.

The Court: We will sit right here in status quo then.

(Short recess.)

Mr. Ansell: If your Honor please, at Mr. Robb's suggestion and in order to avoid reopening this case and going into many matters all over again, we approached Mr. Keenan and asked him if given the closing argument for
2867 the defendants he would then insist on going ahead and putting on his client, which would possibly entail other witnesses, and he says he will agree to that. I agree to that before your Honor.

The Court: What have you to say, Mr. Keenan?

Mr. Keenan: I say, in view of the General's agreement that he will go forward first and that we may come afterwards, we are perfectly willing to go forward without opening up the case.

The Court: Very well. Let it be so ordered.

(The following proceedings were had in the courtroom in the presence of the jury:)

The Court: Ladies and gentlemen of the jury, as you recall, when we adjourned on Thursday afternoon the evi-
2868 dence in the case was complete. The next step in the case is the summation by counsel to you and the Court. In other words, counsel for all parties will address you and me presenting their theories of the case and the evidence and their views of it. I am going to, and I don't think with undue hardship on you, undertake to complete the summations today. There are four gentlemen who will address you. And some legal questions arose this morning which delayed the opening of the case. Nevertheless I think we have time for completion of the summations today.

I state to you that I apprehend that it is going to be a little later than we would ordinarily quit in the afternoon, but I bespeak for the gentlemen who will address you the same attention to all of them whether you are fresh and vigorous or growing a little tired. I don't think it will be unduly late, but it probably will be, and, if you wish, make any calls during the lunch hour that you will be a little late when we finish this afternoon, but not unduly so.

All right, gentlemen.

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SUMMATION ON BEHALF OF DEFENDANT RADOVICH.

Mr. Robb: May it please the Court and you members of the jury, before starting my argument I wish to express to you the appreciation of myself and General Ansell and our client for the patient and the careful attention that you have given to this case during the long and rather arduous sessions of this trial.

I wish also to say that we are grateful indeed for the courtesy which has been shown to us by this Court, by the clerk and by the bailiffs and the court attendants. We have come here from some distance and we are perfect strangers, and that courtesy has meant much to us.

And let me say also that we are most grateful to Mr. McGohey and to Mr. Wallace for their unfailing courtesy 2871
to us. However much I may differ with them as to the merits of the case which they have put in here, let me say that they have and they deserve my esteem as lawyers and as gentlemen.

Now I said that I was grateful to you for your patient attention, and that is true, because your function here is a most important one. It is your function to decide the questions of fact in this case. You alone have that func-

tion. You alone have that responsibility, and you will, of course, decide those questions upon the evidence. For that reason, without further ado, I propose to analyze the evidence for you, and when I am through my task will be taken up in turn by General Ansell. I shan't attempt to cover it all; he will cover what I do not. In this connection let me say again that I speak only for Major Radovich. I do not speak for the defendants Bayer.

Now what is the evidence in this case so far as it may concern Major Radovich? In the first place, let us emphasize again what you have heard many times during this trial—the statements which were testified about and which
2873 it was testified the Bayers made to Colonel Snyder, and later on to Mr. Wallace; those statements are not to be considered against Major Radovich. That is a rule of law that will be followed, I know, because those statements were not made pursuant to any conspiracy and they were not made in the presence of Major Radovich. So we may lay those statements aside at the outset so far as the case against Major Radovich is concerned.

Now what is the evidence that you wish to consider in connection with Major Radovich? I think at the outset we are confronted with this statement which Agent Flynn testified was made to him by Major Radovich in March, 1945, in the offices of the F.B.I. in this building. Let us consider that Flynn-Radovich statement. Let us see whether or not it is praiseworthy. Let us see whether or not that
2874 statement as testified to by Flynn, is the kind of evidence in which you wish to place your trust to the extent that you will convict Major Radovich.

In the first place, that statement depends entirely upon the credibility of Agent Flynn. He is the only one who testified about it; although some other agent apparently witnessed the statement, he was not called. It depends entirely for whatever weight it may have upon the testimony of Flynn and Flynn alone.

Now let us see whether or not you are going to trust Flynn; what reasons there may be for not trusting him. I will give you some. Reason one: Do you recall Agent Flynn's testimony about the statements that were made to Mr. Wallace by the Bayers? Do you recall how Mr. Flynn inadvertently omitted fact after fact that was mentioned by the Bayers? Do you recall how Mr. Keenan had him on the stand all morning, bringing out these various things which he had inadvertently omitted? And do you recall that, almost without exception, those facts just happened to be things that were very favorable to the Bayers? Does that testimony indicate to you that Flynn is praiseworthy?

Reason number two: Do you recall when Mr. Flynn 2876
was asked by me to describe that crazy ward in which Major Radovich was confined? Mr. Flynn, this trained investigator, couldn't remember whether there were bars on the windows; he could not remember whether the gate had a lock and a grille on it; he could not remember anything about that. Do you believe that? And if you do not believe it, do you think Flynn is praiseworthy? If a witness will lie about one thing he will lie about something else.

Reason three: The statement that was produced here, this Flynn-Radovich statement, is in Flynn's handwriting. There were stenographers available. You recall the long parade of young ladies who came in and testified about the Bayer statement. Flynn did not have any stenographer. Let the District Attorney tell you why, when he gets up to 2877
answer me; make a note of that and see what he has to say. Why didn't Flynn call in a stenographer? You recall Mr. Flynn testified in response to a question by me that he did not put in anything about Major Radovich's record for example because he, Flynn, did not think that was material. Now the Court apparently thought it was material because you heard it read here. Mr. Flynn didn't put that in that statement. And I said to him: Oh, so you put in only those things that you thought were material? And he said

yes. Does Flynn's testimony about the Bayers indicate to you that he is a good and reliable judge of what is and is not material?

Then you remember Flynn's tricky warning. He testified here that he warned Major Radovich that that statement could be used against him in any criminal proceeding, and yet when he saw the statement, what does it say? "The statement may be used in any criminal proceeding." And Flynn just forgot to put in "against."

All those things are items and reasons which I suggest to you, and I suggest you consider them to determine whether or not this man Flynn is a reliable and dependable
2879 hook upon which to hang that statement and hang Radovich.

Now, of course, it may be that the District Attorney will say, we are not trying Agent Flynn here. Of course we are not. But whatever weight that Flynn-Radovich statement has depends upon Mr. Flynn's credibility. And so we are, in a very real sense, trying Mr. Flynn's credibility.

The Court: Let me interrupt you just a moment. I am sure your use of the word was a figure of speech and inadvertently made, but you used the expression, something about using a statement to hang something and hang Radovich. Of course you did not——

Mr. Robb: I used it as a figure of speech.

The Court: But I just do not want any impression made
2880 upon the jury even inadvertently that this is a capital offense.

Mr. Robb: No.

The Court: I know you did not intend that. But while I have interrupted you, let me go further to say that any reference to punishment or possible sentence in the course of summation is improper, and I am not charging you with doing it, Mr. Robb.

Mr. Robb: Oh, no, I had no intention of doing any such thing.

The Court: You were only using a figure of speech, but sometimes those things are misunderstood, and I just wanted to make that clear.

Mr. Robb: Yes, sir.

The Court: I am sorry I had to interrupt you.

Mr. Robb: But now I pass to the real reason, I say real, I mean the biggest reason, the most important reason why this Flynn-Radovich statement ought not to be regarded by you.

You recall that Mr. Flynn testified that before he wrote out this statement in his handwriting in his office in March, 2882
that he produced a statement that had been made or taken by him in September. Remember that. He produced that September statement and he showed it to Radovich and he had Major Radovich read it, and then Flynn read it. Flynn says that the second statement, the March statement, the one that you have been shown, that was just about the same as the September statement.

Now the District Attorney hasn't produced before you that September statement; he doesn't want any part of it. Let him tell you when he gets up to answer me why he has not produced that statement. I don't know what his explanation will be, but I will tell you what the truth of the matter is. The truth of the matter is that that September statement was extorted and coerced out of Major Radovich by a third-degree that was as cruel and as effective as 2883
any treatment with a blackjack and a rubber hose ever was. Now let us see what the situation was. Major Radovich gets back from overseas, he is on the Pacific Coast somewhere, where his home is; he gets orders to report to Mitchel Field, as far away from home as he can get and still stay in this country. He reports to Mitchel Field for duty. No suggestion about what is going to happen to him.

As soon as he gets there what happens? He is thrown in a crazy ward and put in a cell. He is stripped of his uniform. He is given a bathrobe, with no cord on it, and a pair of hospital pajamas. He is not allowed to use the telephone. He does not have counsel. He can't communicate with his wife or his family. He is watched, he is watched night and day. He is watched when he sleeps, he is watched when he goes to the bathroom. He has eyes staring at him. He is deprived of his knife and his fork and he is fed like a wild beast. And this goes on for days and days and weeks and weeks. Locked in that ward with crazy men and screaming drunks, locked there for weeks
2885 under those conditions, held incommunicado.

Let me ask you, if you had the choice of being beaten with a piece of rubber hose and going through weeks of that kind of confinement, which would you prefer? Which would break you down the more? A little beating in some back room of a police station in the old-fashioned orthodox way of giving the third degree, or this kind of subtle, cruel, ceaseless beating of the spirit that Radovich took in the crazy ward? You know which would be more effective. And it was more effective.

And after Radovich had been there for just about a month, Flynn shows up, and Radovich—of course he was broken, he would have said anything that Flynn wanted him to say; and Flynn takes this statement which the District Attorney does not dare produce here. And then in
2886 March Flynn shows this statement to Radovich and he has Radovich read it over.

Now Mr. McGohey may well say to you: Oh, well, in March the nut ward was all past. Of course that was terrible, but it was all over with. Don't you believe it. Have you ever seen a dog that has been beaten cruelly by his master. When that man raises his hand, that dog will cringe; the mere suggestion, the mere threat of force is enough. And so it is with a child who has been cruelly

used by its parents; the mere suggestion on the part of the cruel parent that that child is going to be beaten or mistreated is enough to make that child cry for mercy. It is not necessary for the parent actually to strike the child.

And so it was here. Flynn produced that September statement and showed it to Radovich, and it was just as plain as though he said it in words, "Well, Radovich, we have got the statement from you in the nut ward. Are you going to stick to it or would you like another dose of that treatment? We got you hooked. Are you going to go back on it?"

Now I know Mr. McGohey may say, "Well, Major Radovich was not charged"—but he was a human being, and 2888
human beings are much the same, whether they are five years of age or twenty-five; Flynn, that shrewd, smooth sleuth, he knew how to play on Radovich when he got him in his office in March, 1945; he knew how to use that statement he had taken from him in the crazy ward. And if you don't believe that statement was voluntary, if you think it was induced or coerced by the treatment he received in that nut ward, then you must disregard it, throw it out of your considerations entirely, because that is the law.

But now we pass on. Even if that Flynn-Radovich statement, with all the doubt that surrounds it, with all the array of coercion and third degree that surrounds it, even if that be considered, it still isn't enough because the law is there must be other evidence in the case besides the statement of 2889
a defendant, and the law is very wise in that respect because the law knows that statements sometimes are very, very unreliable. There must be other evidence to fortify this statement even if it is considered.

Now let us see what the other evidence is. In the first place, look it over and you will find it is almost entirely circumstantial. A great many things on their face can be either innoc nt, or, if they are twisted around a bit, they can be construed to indicate guilt perhaps. Those things

are used by Mr. McGohey as a basis for asking you to believe this boy guilty. Circumstantial evidence. In the second place, you will find that this other evidence in the case is full of doubts, full of substantial doubt, full of contradictions, and sometimes full of perjury.

Let us look at it. Take, for instance, the witness, Captain Pepper, who was introduced here by Mr. McGhoey in an attempt to fortify this Flynn-Radovich statement. You remember Captain Pepper. He started out with great assurance, and then I asked him if it was not true that he had been charged with violating the 95th and 96th Articles of War, in that he had lied. He said no, that was not true.
2891 Then I showed him a paper that showed that it was true. And he said, "Oh, yes, I had forgotten about it."

Now you know if that man had been convicted of violating those articles of war he could have been fired out of the Army, put in the penitentiary. Do you think he forgot it? Do you think he ever forgot he was charged with those violations? Or do you think he lied to you about it because he hoped he could deceive you? And if you do not believe he told the truth about that, can you trust him in any respect?

He testified, you recall, that Captain Radovich, then Captain Radovich, said to him, "It will be worth our while to transfer these boys." And then we asked him, "Well, Captain Pepper, when you testified against Captain Radovich at the court-martial last June, you didn't say that, did you?
2892 Didn't you say that Captain Radovich told you that it might be to your advantage, and there was a lot of rank interested in these boys?" And Captain Pepper said, "Well, yes, I did testify to that before the court-martial." "Well, Captain Pepper, which is it?" Well, he was not sure.

And then we asked him, "Well, Captain Pepper, you testified here before this jury that that conversation about it being to your advantage took place at Mitchel Field. Didn't you testify before the court-martial that that conversation

took place when Captain Radovich was in Washington and when he called you on the telephone?" And Pepper said, "Yes, I did testify that way, last June, before the court-martial, and now I am not sure when it took place."

Is that the kind of testimony that you ought to take, that you ought to credit, and that you ought to find will fortify this so-called Flynn-Radovich statement?

Now, take this witness, Colonel Jacobson. He testified in response to questions by Mr. McGohey. He testified that Captain Radovich came to see him when Colonel Jacobson was in the hospital, and Jacobson said, "How did you get mixed up in this thing?" And Radovich said, "Well, it's a crazy thing, I did it for my wife and baby." 2894
That is all he testified to in response to Mr. McGohey's questions. And then I asked him, "Well, Colonel Jacobson, did Captain Radovich say anything about getting any money from the Bayers?" and he said, "Oh, yes." He said he got some money from them. Now mind you, Mr. McGohey hadn't asked him about that. So I said, "Well, Colonel Jacobson, did you tell that to Mr. McGohey? Did you tell that to the F.B.I.? Did you tell that to Mr. Keenan?" "Oh, yes, I told them all about that."

Don't you know that if Colonel Jacobson had ever told Mr. McGohey that Major Radovich said anything about getting money from the Bayers, that Mr. McGohey, as careful and as skillful a lawyer as he is, would have asked Colonel Jacobson about that on the witness stand? And you heard Mr. Keenan and Mr. Levy say, "No, this man 2895
Jacobson did not tell us anything about it."

Well, now, we come to the matter of these uniforms which has been talked about here for days, I guess, and apparently Mr. McGohey relies upon that as evidence fortifying, corroborating, this Flynn-Radovich statement. Now let us see if it does. In the first place, Mr. McGohey says, well, the Bayers got the uniforms for these officers and then they got the records changed to show that the officers and not the Bayers had paid for the uniforms.

Now let us look at that so far as Major Radovich is concerned. The testimony here is uncontradicted. Major Radovich never got his uniform from the I. Buss Company. The thing didn't fit him. He never took it. And one of the Busch brothers testified, "Well, the thing was an odd size and se we had to peddle it out piecemeal." Well, now, why in the world should the Bayers change any records of the I. Buss Company in respect to Radovich's uniform when Major Radovich never took the uniform? He never got it. So what does that record prove in respect to Major Radovich?

Here is another matter about uniforms which I think is
2897 very significant. In this Flynn-Radovich statement Mr. Flynn has Major Radovich say that Elias Bayer took him, Radovich, to a uniform manufacturer named Levine and told Levine to make two uniforms for Radovich, and Levine made the uniforms and Elias Bayer gave Radovich the money to pay for them and Radovich did pay for them. Well, there is something which Mr. McGohey could have corroborated. Why didn't he bring in Levine and have Levine testify about that if that is what happened? If that statement is correct, why doesn't Mr. McGohey bring in Levine. He brought in three or four of these Busch boys —I lost track after about the third; he brought in three of them to testify about this uniform business, and to tell you all about the uniform Radovich never got. Why didn't he bring in Levine if this Flynn-Radovich statement is true
2898 and if it could be corroborated? Now don't let him tell you, well, we ought to have brought in Levine. It is his business to prove Major Radovich guilty; it is not our duty to prove him innocent. The burden is on Mr. McGohey.

Now let us take up for a moment, and I will try to pass over the various items of evidence as best I can, hoping that I can help you a little bit in passing on them—I don't know what Mr. McGohey's theory is going to be because he

has not, of course, made his argument, but I am trying as best I can to touch on these various items of evidence. Let us take up, for a moment, the various transfers about which I anticipate Mr. McGohey will talk quite a bit. Now, there is nothing unusual about those transfers on their face. Everybody knows that men in the Army are being transferred hither and you and here and there every day, for all sorts of reasons, and sometimes for no reason at all. Everybody knows that. I recall Miss Goertz, the lady who testified about the transfer into the Air Commando Unit and then out again; she said that was perfectly normal, that men were being transferred in and transferred out every day, there wasn't anything unusual about it. In other 2900
words, these transfers are another bit of substantial evidence which Mr. McGohey undoubtedly is going to rely upon. When I am speaking about substantial evidence, let me say that substantial evidence is not enough to convict unless that evidence is such that it will exclude every reasonable hypothesis consistent with the defendant's innocence, and unless it points only to the conclusion that he is guilty. If it is equally consistent with innocence and with guilt, it is not enough to justify a conviction.

Now coming back to these transfers. Take up first the transfer from the base out at Mitchel Feld into the First Fighter Command, which was the organization commanded at that time by Captain Radovich. That transfer was arranged by Colonel Jacobson and by Colonel Vidal. They 2901
both testified that that was true. At the time that transfer was arranged and at the time it took place, Major Radovich had never even heard of the man. There isn't any doubt about that. He didn't have anything to do with that transfer. But in his opening statement, Mr. McGohey, on page 5 of the record, told you that he was going to show that that transfer was arranged by Major Radovich. Now let me ask you and let me ask Mr. McGohey, why did Mr. McGohey make that statement to you, as careful a lawyer

as he is, as good a lawyer as he is, as carefully as he has prepared this case, did he make a mistake? Or did he make that statement because Jacobson had misinformed him, because Jacobson had tried to blame Radovich for something that he had nothing to do with, and then when Jacobson took the witness stand and had put his hand on the Bible and testified under oath, Jacobson lost his nerve? Which was it? Did Mr. McGohey make a mistake or had Jacobson lied to Mr. McGohey?

Now take another transfer. Mr. McGohey is going to say Radovich transferred these men into the Air Commandos and then transferred them out. Now, Colonel
2903 Boebel, whom you remember, a very fine looking young soldier, testified that he ordered Radovich to transfer those boys out. He told Radovich to transfer them out. How about that?

Now passing quickly to another item of evidence, and here is one that I know you are going to hear a great deal about from Mr. McGohey, this check for $500 which was apparently drawn to the order of Captain Jack Pepper. You remember good old Captain Pepper. Now, in the Flynn-Radovich statement, Flynn has Radovich saying that Radovich arranged with Pepper that Pepper would keep his eye on these transfers and see that nothing went wrong, and Radovich told Pepper that he would give Pepper $500, and after that, according to the statement, he sent Pepper a check for $500; and then Mr. McGohey pro-
2904 duced a bank from down in West Palm Beach, Florida, I guess it was, who identified a letter to the bank signed by Major Radovich asking the bank to turn over to the Government or, rather, the proceeds of a $500 check to Captain Jack K. Pepper. Now, I think that is the evidence on that particular item.

Let us see if that is evidence which is free from doubt and free from question. In the first place that letter which

the bank produced shows on its face it was written by Major Radovich while he was undergoing that hideous nightmare in the crazy ward, and why he wrote it, what induced or coerced him to write it, the District Attorney doesn't tell you and doesn't show you. Why didn't he? Why don't they tell you more about that? Are you going same infirmity and the same vices as that statement that was wrung from Radovich in that crazy ward. Why all this mystery about turning the money over to the Government? Why don't they tell you more about that? Are you going to trust this kind of evidence that is still full of mystery, so full of unanswered questions?

But all that, all those matters are minor; here is the real 2906
question I have to ask about that Pepper evidence. According to the District Attorney, according to this Flynn-Radovich statement, Radovich sent that check to Pepper pursuant to an agreement that Radovich would pay Pepper $500 and Pepper would watch out for these transfers. Now, he sent that check pursuant to an agreement. In other words, Pepper was a party to this conspiracy. Now, if that is true, and if this Flynn-Radovich statement is true, let me ask the District Attorney why wasn't Pepper indicted? Does the District Attorney believe the Flynn-Radovich statement against Radovich, but against nobody else?

If that check was sent to Pepper pursuant to an agreement, that was a conspiracy—the District Attorney and 2907
the Court will tell you a conspiracy is simply an agreement, that is all it is—why wasn't Pepper indicted? Now, either that check was sent to Pepper pursuant to an agreement having to do with the transfer of these boys or it was sent for some purpose unconnected with this case and about which Pepper does not care to tell you. Now, which was it? Which was it? If it was sent pursuant to an agreement why was not Pepper indicted? Don't let the District Attorney tell you, well, it is up to the Grand Jury to indict

people. The Grand Jury indicts the people the District Attorney presents for indictment. And we all know that. But the District Attorney never even tried to indict Pepper. Pepper was never arrested. Why not? If the Flynn-Radovich statement is the truth, why not? Let Mr. McGohey answer that when he gets up to answer me.

Now, I have about used up my allotted time. General Ansell will follow me and will discuss portions of the evidence upon which I have not touched. Let me say to you in closing that I think that when you go to your jury room and you begin to analyze this evidence calmly and dispassionately, as I know you will, you will find that the
2909 testimony and the evidence against Major Radovich, when you boil it all down, comes to this: one statement, supported only by the testimony of Flynn, sweated out of Radovich by the third degree, that one statement plus a flimsy tissue of circumstantial evidence, full of doubt, full of contradiction, full of perjury. I think you are going to find that this case is based too much on circumstantial evidence, that too much evidence that is worm-holed with doubts, contradictions and perjury. I think you are going to say that that kind of evidence is not enough to support a verdict against this gallant young officer, that will satisfy now and that will not rise to haunt us and plague us with doubt in years to come. I think you are going to say that the only verdict that will satisfy our consciences now and that will not trouble us with doubt and with regret in the future, the
2910 only verdict that would do that is the verdict of not guilty as to Major Radovich.

Mr. Ansell: If the Court please, and you ladies and gentlemen of this jury: I join in all the appreciation for the many courtesies shown us lawyers from a foreign jurisdiction. I think I could say briefly that I have never felt more like a West Point plebe than I do today, since those days. The time was, in a military way, when I was up there, and I happen to know that this distinguished jurist on this

bench was, not way up there, a distinguished soldier, and Mr. McGohey was not way up there and he was a good soldier, and Mr. Keenan. The pranks of life. And don't you know, I am afraid now, I really am, afraid of his Honor, afraid of Mr. McGohey, afraid of everybody, afraid to be here; and if it was not for the slogan that "where duty calls there is no room for fear" I probably would not be here.

You know, after all, I have enjoyed this stay in New York, with all of its hardships. It has been a kind of education of Mr. Pitt of myself. I was educated in New York, spent many years of my life further up the river. I was married there, my children were born there—buried 2912
there—and I am going that way, of course. And yet, I was always afraid of New York; I thought they were a strange kind of people, and they are not. They are courteous and kindly and help an old man across the street, and they are just like the people that I knew so well in an old Southern home.

Now, I can't trust my memory any more. I have notes, but it takes away from the effectiveness of a presentation. I had long ago resolved that never again on this earth would I appear in a military case, and I stood by it a long time. I stood by it until this case came along, and then, in the words of Alfred Noyes, a voice that I thought had long since left me, arose and called to me, and here I am.

I have come to help Radovich, not anybody else, Justice, 2913
justice. I have come here to try to see that he gets justice according to the law of this land. Justice, individual justice where the thing that this government was established for, and it is written in the preamble of our Constitution. It is a biblical truth that justice to the individual, to you, to me—not big guns, to the ordinary man—that, my friends, is the highest interest of man on this earth.

Now, you have been told by Mr. Robb and, of course, it is true that you are the judges of the fact and you are

the sole judges of the fact, and nobody can make you do other than as you think on your conscience and under your oath you ought to do; no judge, no attorney, and no anybody else. It is a great thing, a system that is common only to the English speaking governments of this world, that the Government of the United States when it is engaged in prosecuting one of its own citizens cannot punish that citizen until 12 ordinary people, plain simple people, say that the Government can punish that citizen by your vote of conviction. A glorious thing that I say to you no other country except an English speaking country on God's green earth has this day. I cherish it, I cherish it.

2915 I want to reason with you. If you do not agree with me your duty is perfectly clear. It is my duty to reason with you. I can't orate, I don't want to orate, and I couldn't if I were able to. I just want to reason with you plain human beings and I want nothing else, I don't want to captivate you, even if I could. I am not going to try it. To me—to me, it may not be to you, it will not be to Mr. McGohey, it may not be that way to anybody else on this earth—but to me the evidence against Major Radovich is just as light as thistledown. To me it does not even breed a suspicion. To me it is too flimsy to convict a dog on. To me it ought never to have been brought here. To me, it ought to be kicked into the trash pit.

I say there are only two bits of evidence here against Radovich, only two, and one of them has been dealt with
2916 very fully by Mr. Robb, that is, these F.B.I. statements, Flynn-Radovich statement, nut ward statement. One thing, I would supplement Mr. Robb's argument by saying: If the jury finds that the nut ward statement followed by this statement made by Flynn up here in this building was induced or coerced in the least, in the least extent, you have got to throw it aside. That I believe to be the law laid down by the Supreme Court of the United States.

The other statement is the testimony of Miss Ann Solomon. My own view of that testimony is that, even if it should be regarded as true, it tends to prove (a) the felony of an extortion which is not charged against Radovich here and you would have nothing to do with it. But, you know, when I left here Thursday, I think it was, Friday maybe, when I left here there was a great bitterness in my very soul against Ann Solomon. And that bitterness is no longer there. That bitterness fled the very moment I could get my wits together again, and that bitterness was superseded by pity. If it were not my duty to discuss Miss Ann Solomon, I would not do so. If I were not compelled to do so, I would not do so. I am reluctant to do so. My 2918
duty says to me at least I must, and I shall do so.

To me, Ann Solomon did not tell the truth. To me, Ann Solomon did not tell the truth because of her interest in Mr. Bayer. The story in itself bears unmistakable earmarks of untruth. Ladies and gentlemen of the jury, you are to judge the demeanor of a witness on the stand, and that is just as much a part of the evidence of what that witness says. The story of Miss Ann Solomon was a prepared story, beautifully rehearsed and learned by her. It was too glib, too smooth. Again I say it is hardly a practicable thing for her to have listened in on every telephone conversation that came into that office for Mr. Samuel Bayer. Ann Solomon testified that she listened in on the conversations between Mr. Sam Bayer's wife and himself and that
was apparently a part of her duty. My friends, I don't 2919
believe—I don't believe—that Mr. Bayer would put a wife, to whom he owed the utmost love and loyalty and devotion, in any such position as that. And I don't believe that he would have put a trusted employee who served him in any such position as that. I don't believe that Mr. Samuel Bayer would have added to the derogation of this poor girl to that extent. Any man who in my opinion would do that is a worse rotter than I have known.

Now, some more of Mr. Bayer. Why should Miss Solomon have resorted to the cheap and common eavesdropping at the door, spying on Radovich? Why should she have done it unless she herself was engaged and was induced to engage in another conspiracy? There were other conspiracies than the one charged here, swung all around this little one. Was she in a conspiracy to shield the Bayers and others, not Radovich, other Army officers? Let us be frank about it. Was she in a conspiracy to shield the Bayers and his conspiracy with high ranking officers at Mitchel Field and elsewhere hereabouts.

Described by the formal language in the bill of indict-
2921 ment, language that I hate, because I believe an indictment ought to come out and say, "This is it," and what it intends to prove—"To the Grand Jurors unknown." Many of them, apparently. Was there a conspiracy between the Bayers and Miss Ann Solomon and other officers of high rank, according to Pepper, at Mitchel Field? Was there a conspiracy to shield them and frame this young officer?

I have to ask you, why should Ann Solomon have listened in on a telephone conversation and then divulged that, when that makes her guilty of a felony under the laws of the United States? She can't do that. My friends, either Ann Solomon was possessed of her sentiments or she was told about the old philosophy of Omar, and I don't believe that: Take the cash, take the cash, let the credit go, nor heed this distant drum, the drum of conscience and what is coming
2922 hereafter.

I myself, so far as Miss Ann Solomon is concerned, I pray that the great God may relieve her from the situation in which she was placed, and at last redeem her soul.

Now, my friends this is the strangest case arising out of the military environment that I, out of a long experience, have ever known. I myself know, and I think it is a fair inference to be made in this court, and by this jury, that there was no proper and thoroughgoing investigation made

of any of this, either by the military or by the civil authority. It is my view, according to my view of the evidence, that they framed Walter Radovich to let others off. I do not say that those who ordered the investigation did that in the first instance. You know, my friends, this is like one of the old Greek tragedies, like any of the tragedies that have come up from the Greeks to this day—do you remember, or did you learn in school, or have you seen it, that in every Greek tragedy there was a great stage and on that stage was an innocent person, or at least one that was badly abused; and in the wings of the stage, on either side, there must have been some evil persons, and the shadows of those evil persons flickered across that stage on the 2924
innocent one. Such was the stage setting. It greatly impressed me as a boy. It is dramatic. But drama does not laugh except in so far as it is true to human life, and such is the drama of tragedy to this day.

Throughout this case, you go back to the first investigation and bring it up to date, and the evidence by the witnesses here, bring that up. And there are shadows that are flickering throughout this case, and sometimes the shadow becomes a witness sitting in this box who does not acquit himself well. Had there but been a thorough investigation we would have known where we are. Let us look at some of those shadows materialize, a few of them, as witnesses here.

Colonel Jacobson. Colonel Jacobson was the active agent 2925
in this case in these transfers, and Colonel Jacobson did not tell the truth on that witness stand.

Colonel Vidal, a graduate of West Point, like myself, God save the mark, he was here and he did not impress me as divulging all and telling the truth here.

There were others. Colonel Clark was mentioned. He was active in arranging these transfers, to transfer these boys to a safe spot and keep them from a danger spot.

Colonel Lundberg. Colonel Lipkin. Colonel Jones. Major, later Colonel, Saffron. Captain, or Major, Kogan. Just a few of them. That is all.

My friends, Radovich, youngest of them all, the last one to meet the Bayers, introduced to the Bayers by these particular gentlemen, apparently saw less of them than the other gentlemen did, apparently was less the recipient of their favors and entertainments than the others; after Radovich had gone, after Radovich had gone on a mission, described by the Chief of Staff of the United States Army as a suicide mission—men as a rule don't come back from those missions, and they are lucky if they do, 8,000 miles
2927 away in the jungles of Burma—why didn't these stay-at-homes direct the investigation at Radovich, safe, far away, probably never to return—he will never be heard of again? The War Department has started some sort of an investigation; we will point that investigation at Radovich. To me, that is just as plain as daylight in this case. And they appointed—they got the high ranking officers, and they appointed this—they may have got, and it appears to me they did get, to General Hunter over there; they may have got to Mr. McGohey and used Mr. McGohey as a cat's paw for the military establishment; they got the investigation, those investigations resulting in returning an indictment about a conspiracy upon the part of the three-named people and a lot of other people unknown to the Grand Jury. And, really, honest-to-God, nobody tried to find
2928 out who they were, and if they had found them out they would have found that those people—that conspiracy never included Walter V. Radovich, it would have included many an officer of the United States Army of far greater rank. I know something about Army investigations, and I say to you this investigation was a direct and framed up investigation for the purpose of getting Radovich and letting high ranking men go scot free. God spare me if that belief is not justified.

Time is flying. How much more have I?

The Court: You have twenty-five minutes.

Mr. Ansell: All of that, your Honor? Pardon me, all of that?

The Court: You have that at your disposal.

Mr. Ansell: Yes, I remember your Honor's caution—you don't have to take it all. I might.

When this investigation broke that was aimed at Radovich and finally pinned on him, way back yonder in the winter, the early winter of 1944, why was Radovich permitted to serve on in Burma after that? Why did he go out, mission after mission, day after day, missing never a day, up against the barbarous and most difficult enemy that 2930
the United States has ever had? Why risk his neck every minute of the time in Burma? Why not have brought him home then and given him an opportunity? Of course, they know and I know that that would not be done. They let this boy finish his last mission over there, the mission was done, it was completed, and the southeast monsoon was on and all the operations had to stop; and then he comes home to a redistribution center. Did anybody give him any advance notice that he was coming home to be court-martialed? He might have made some provision for counsel, friends, possibly borrowed a little money if that had been so.

No. To Mitchel Field. To Mitchel Field, this rich man's military paradise over here. He comes here. He lands 2931
there one minute, and the order of the Major General, over all, the most unusual thing ever known to me—not the Commanding Officer of the base, but General Hunter, his own handwriting on the order, not by his Chief of Staff, not by anybody—put Radovich in this cell for the violently insane. That is the reception that a heroic soldier got when he landed over here at Mitchel Field.

I have told you that, from my point of view, this evidence, such as it is, ought to be kicked out of this court by

you, by your verdict. If you disagree with me, in God's name disagree. But if after hearing what I have said and all that Mr. McGohey can say and all that Mr. Keenan can say, and all that anybody else under the sun can say, you still think that I am not only earnest in presenting these facts, but that I have presented them honestly, then let your verdict be for the acquittal of this soldier.

My friends, there has been admitted to you a statement awarding decorations of the highest order of merit to this man: the Air Cross, high up, the Distinguished Service Cross; and every soldier—your Honor knows, Mr. McGohey knows, we all know, and you know, what a Dis-
2933 tinguished Service Cross means, way up and above the duty that can be expected of the ordinary man. He got that not only once, he got it twice. And if you will look over the military reports published to the people of the United States, you will find out how few men get a second Distinguished Flying Cross. And third, the British Government is none too lavish when it comes to bestowing decorations and awards of this kind on even nations of her own allies. Not Britain. But Britain gave Radovich their Cross, of the highest British distinction; it said, "He saved a lot of us in this jungle."

And then the President of the United States—and this is not a usual thing, no matter what we may sit around and think when we see the President of the United States has awarded this unit citation to somebody—look at the num-
2934 bers of them, look at General Marshall's report—but the President of the United States paid a glowing tribute to this Commando or suicide group, the only suicide group known to me in our Army; there may be others, but the only ~~one~~ known to me in this war, except the English group that went over to Brest and did not return; you all heard that read. I was going to read it but I am not going to do it because I think it loses something by reading it. I think they are things that have to be studied. And if

you know how it is done, the officers sit up in the War Department and study every word of those things. Regrettably, to my way of thinking, they are not flamboyant enough, they are couched in too restrained military language; but to a man who has served in the Army he knows they mean much.

Going down on the train the other day, I had not been able to read General Marshall's report covering the last two years, concluding this war—a most interesting document—and I didn't know that he would deal with such a small operation as the Burma-Phil Cochran Commando unit group, somewhere between five and seven hundred men—I didn't know that—and yet he did. And this report, 2936
though addressed to the Secretary, under the statute, by the statute of the United States it has to be sent to the Congress of the United States, the Congress of the United States has ordered its publication to the people of the United States, that you, we the people of the United States, we are the government of the United States, might be informed of what our soldiers did in gaining, achieving the most magnificent victory that any nation of this world ever has won, a war not only on two flanks—something that every soldier dreads—but a war against us all over the world. We did not perhaps appreciate it; but General Marshall says: We can never appreciate how close our Japanese enemy and our German enemy were together; we will never appreciate, and we are learning only now how close it was that China came to be knocked out of the 2937
war. He says that the Cochran Commando group, in this terrible land of the Burma jungles, the thermometer running to 128 degrees, so that one frequently could not hold the stick and had to wear gloves, where your eyes would be burned by the ordinary glasses, to—we will never know how close we were to world domination by our enemies if they had been able to join hands. We could not attack the Japanese in Burma from the south; the Japanese held

it. We could not attack Burma in the east; the Japanese held it. We could not attack through China because the Japanese held the entire coast line and also the road over the Himalayas or the Hump. We had to go around back into India, to which Japan was headed and actually got there, in part, and go around there and come up, and take this Commando group and let them fly over into this Japanese held jungle of Burma and destroy their installations.

And General Marshall says that this great successful war by our enemies reached its crest right then and there and broke, not by the Commando group alone, of course
2939 not; but they were the point of spearhead that dulled the edge of the Jap invasion and set them back, and they never got any farther westward than that.

Well, my friends, I guess I am about over. I had something else here that I thought was important, evidently was not, and in any event I can't find it. My time is short and I have, of course, to conclude.

This indictment charges Radovich with betraying his trust to the United States, defrauding the United States by not rendering the best, honest faithful service that he can render. These medals and citations, character references, are all in point and must be considered. Radovich: As long as I live I shall have admiration for a brave man; he fought my battle; he fought my sons' battles. He did—let us be truthful about it; I would have had to be ordered
2940 to do what he did. I take my hat off to him. Character. A poor boy, in California. A Major at 23 years of age, and because of his expertness in aircraft, and he would have been a Major before that and he was so young that the War Department would not make him such, not that he was not qualified; he goes there and he does these things which I would have done only by orders. I know that. It takes a certain type of man, a fearless man and a man who loves this land just as well as I or he would not be fool enough to do it. He goes there and he does it.

You will have to ask yourselves I think, on your very soul, as to whether a man who performs such service as that was at the same time disloyal to his duty as an officer of the United States. I pray God that, if you honestly think, you will say no, he did not do it.

I thank you all, and I think your Honor.

The Court: Ladies and gentlemen and counsel, let us take a short, ten-minute, recess at this time.

(Short recess.)

Mr. McGohey: If your 'Honor please, I hadn't interrupted before. I notice that the stenographer has been taking down the summations, and I just wanted to ask that 2942
he be directed to continue to take down all the summations.

The Court: All right. Take down everything.

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SUMMATIONS FOR DEFENDANTS BAYER.

Mr. Keenan: May it please the Court, Mr. McGohey, General Ansell, ladies and gentlemen of the jury, at this time in the proceeding we approach the very serious and important function of having a jury pass upon the evidence in this case. I think I need not say to you that there is nothing more important in the civilization that we have fought for and won out with than maintaining the form of 2943
government that we have in our own country. It has cost a great deal to do it; the world was almost smashed in the enterprise, but it is worthwhile. It would be very silly to fight a battle all over the world and to lose the cornerstone of what we are fighting for at home. And there is nothing that I know of that this whole battle of the world was fought over more than the preservation of the proper rights of liberty of individuals.

Now that is not license, that is not the right to commit crime, unpunished; but it does mean that before a man is taken from his family and his walk of life and disciplined severely, punished for a crime, that there are certain procedures that have grown up, as the learned and distinguished general has told you, in the English-speaking world, with certain safeguards, that if we lose those we might just as well quit and let the Atom Bomb finish us right away. And that is, that a jury of twelve people, entirely removed from passion and entirely removed from silly, soft pity—that is fair on both sides—and entirely removed from atmosphere, air, but by solid facts in ac-
2945 cordance with the law and obeying it as his Honor states it, will see whether or not when they get through that they can honestly, before their own consciences and Gods, say: We have decided this on these facts, let the chips fall where they may, and we have no doubt whatsoever of our finding.

Now why do I speak of that? It is a very usual thing to have lawyers be mighty sure that they do not offend juries. You will forgive me if during the course of this trial I have had my attention riveted upon the record and upon the facts of this case and I have lost a little time not ogling you people and trying to curry favor with you or perhaps seeing that your throats don't get parched with a glass of water now and then—that is the job of other people, and it is our job to stick by our knitting and do an honest day's work.

2946 We have spoken of Jimmy Durante. He said over the radio the other night about this subject matter of politeness that he had a horse that was so polite that when he came to a fence it stopped and insisted that he go over it first.

Now the late Oliver Wendell Holmes was not talking about this rule because he died, oh, I think back some ten years ago, but he was a very great character, and all of the lawyers, his Honor I am sure will agree with me in say-

ing that he was one of our great jurists; he said this, in an article in Readers Digest, September, 1945, where they say, "Would a lawyer pick you as a juror?" I am going to quote what he said: "No lawyer, no matter what his experience, can possibly conceive how little the jury understands the case."

Now, Mr. Justice Holmes did not say that about you and I am not saying that about you to offend you in any way, but I am telling you that that is true of almost every juror that ever came into a court room. Why? Because the lawyers in the case who make it their business to spend their lives in trial court, his Honor who graces the bench spends his life, since he was appointed by the late President Roosevelt, every day in chambers or in his court room 2948
with one type of case or another, and we all understand a good deal about these things.

It so happens that this is the second criminal trial that I have participated in as a lawyer for the defense in my life, but I don't purport to be ignorant about the procedure or ask pity on that account or sympathy. I don't say that in any conceited way, but I have sat and been around the other side of the trial table, and you learn something about the procedure on both sides that way. But I say that we are accustomed to these things and we are very apt to take for granted that the jury will know many things that we know by rote, just like if we gentlemen tried to go into your businesses or into your homes, kitchens or drawings rooms—there is a lot that we would learn, and 2949
that many don't know, of the difficulty of keeping house. So, therefore, I am going to spend a few moments in analyzing the charge in this case.

Now if I can make head or tail out of this complaint, because that is really what the indictment is—it is like a neighbor coming alongside or bringing you down to a police station, "Lock this man up." "What for?" "Because he has done something." And they tell what he has done—

that, I want to say, is not evidence as it is stated; it is proven by the documents offered or by the statements from the witness stand. I have struggled with great care and attention to try to find out just what this indictment charges my clients with and I have had a great deal of trouble finding it out. And I have had the honor, as the evidence shows, of heading the Criminal Division of the United States for three years, and being in other superior positions in the Department of Justice, as First Assistant, and three years more having to do with the same thing, where we have been in this building many times; but yet I don't understand clearly what this indictment charges, and I say
2951 that if I don't, and I am honest in that statement to you, then I have a right to expect that the twelve members of the jury, who come in for a few weeks, maybe never again in your life, perhaps never before—we don't know; I imagine the United States Attorney would know something about that, but we are perfect strangers when we come in here, we don't know anything about it, excepting your name and what your business is—that is all we know—and we don't know how long you have been here, deliberating in any other case, we don't care; we are here to take the jury as representatives of our own community, feeling in our own hearts that that juror is going to be honest with his own peers and with his own judgment. And you are not here, ladies and gentlemen—this is not a beauty contest or a popularity contest—to find out whether you like
2952 the United States Attorney better, or you happen not to like me particularly, or you think a great deal of General Ansell. This is serious business. It gets way beyond that. This is a fierce relentless prosecution of a type I have never known in my professional existence in or out of the Government; just what is behind it I am not able to understand.

But I say that if you are to just take them for granted and say if these people were not guilty they would not be

here, or the United States Attorney is nice, this Judge is a nice man, he wouldn't let this thing go through if there were something wrong, then I want to tell you you are ripping our entire system of criminal jurisdiction to pieces. You might just as well scrap democracy and all we fought for. And, don't you forget it, after this jury does pass upon this situation, or any other, you may not hear it from the United States Attorney while we are arguing the case, but afterwards, then he will tell any other judge, "Oh, the defendant had every opportunity in the world, all twelve jurors had to agree and they had to agree that they did not have any reasonable doubt in their mind at all." And then the jury becomes absolutely independent of him and of 2954
the judge and everyone else. And that is the way it should be, all the way, to both sides, and that is all we ask is fairness in your deliberations.

Now coming back for a moment, what was it George Cohan used to say: The 17th of August the old fellow sat back on the chair and he says, "What's all the shooting for? What's this thing about?" To me, ladies and gentlemen of the jury, if I understand it, doing away with double talk, it is a very simple situation. I remember a very distinguished character in our country about a year ago over the radio saying to another distinguished prosecutor, "Oh, yes, I am four years older than I was four years ago but I am too old to try to learn how to talk out of both sides of my mouth at once."

I would like to know what is the claim of the Govern- 2955
ment in this case. As I understand it, it is a claim that the Bayers, Samuel and Elias, and Radovich got together in an agreement to defraud the United States Government by doing—what? By paying Radovich money, $7,000—they mention the amount—and by uniforms or starlight roofs, or whatever, buying the freedom of those two boys from doing their honest job in the Army. Now is that a fair summation of what you understand, if there is any sense to this charge?

Let there be no doubt about this, ladies and gentlemen: Bribery is as old as human nature. Everybody in the world knows what bribery is. Why, when our little children come into the world the first thing we do is bribe them so they won't cry; and when they get old enough we try giving them a little candy. It is bribery, it is innocent bribery but that is what it is. But when it comes to a point that a public officer or a man holding responsibities and trust for the Government, in any capacity, takes a sum of money for doing something wrong from another man, that is plain, simply, unadulterated bribery. You bet your life it is. And everybody in this court room knows it. And
2957 it will never be denied that that is what it is. And yet throughout this trial we hear the statement made: This is no charge of bribery and it is not any charge of conspiracy to bribe. What is all this double talk about? And the language that is used in the indictment, "defrauding the United States Government"—I am going to read the words that I have taken out—"and with divers other persons whose names to the Grand Jury are unknown," and still unknown to this jury, too, "to defraud the United States of its right to the conscientious, faithful, disinterested and the unbiased services and judgment of an officer of the Army, free from corruption, partiality and improper influence, bias, dishonesty, and more particularly of its right to the conscientious, faithful, disinterested and biased services and judgment of the defendant Walter Radovich as an
2958 officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud."

Well, if you claim that Samuel Bayer and his brother of their own volition, free from intimidation, did pay sums of money to Walter Radovich to keep their sons from going overseas, in the name of common sense why don't you say so and let it go at that? That is enough. That carries sufficient consequences. I am not permitted to discuss the matter of punishment. But it is sufficient to take it seri-

ously in a court room. Why don't they say that, ladies and gentlemen? What is all the double talk about?

The evidence in this case shows indictments, indictments, indictments, indictments, and then dismissed, and then another indictment. What is it all about? Why have we been three weeks in this court room, almost every hour of which was taken up by the United States Attorney bringing in evidence? Why? If that is the situation as it is claimed, why, it all could be described in a very few minutes. It all could be disposed of in a day's time, and we haven't unduly delayed matters in this court.

I ask you if at the very beginning you won't ask yourselves the question, what is behind this situation? Why 2960
didn't the Government come right out and say there has been bribery in this case and we are going to charge him with that and bring in the evidence, whatever it is? Because I want to tell you that there isn't any great difficulty about finding what the facts were.

Now I want to tell you that, as far as General Ansell is concerned, I have generated in this court room a very deep and tender affection for him. I am capable of that. And that is the real feeling I have towards him. And for Major Radovich, he has been a great hero in this war, and as far as ripping his character to pieces or trying to assassinate him in that fashion, you are not going to hear it from me.

Now I have my two clients sitting here before me. And
as Abraham Lincoln said in his speech with Douglas back 2961
before the Civil War——

I beg your pardon, your Honor. The war between the States.

He said, "Oh, you can get all of your favors from Mr. Douglas with his magnanimity and his great position in the United States and he undoubtedly will be the next President"—he was not—and he said, "Nobody can ever look at my lean face and see any cabbages sprouting from it."

I can't show any medals on Sam Bayer and Elias Bayer, I am sorry; I couldn't even tell you about a citation that I may have possessed myself in the last war. I have to stick to the facts in this case. And there are no citations and medals for Sam Bayer. But I want to tell you something else, ladies and gentlemen of the jury, that although a prosecution has the right to be vigorous, faithful to its Government, it hasn't any right, as the Supreme Court of the United States says in the Burton case, Mr. Justice Sullivan speaking, "to strike foul blows." And I am going to tell you of a foul blow that was struck right here before your eyes in the language of this indictment.

2963 May I have the indictment in this case, Mr. Clerk? I had better take the original.

"That theretofore, to wit, beginning on the 1st day of September, 1942, and continuing thereafter up into and including the date of the filing of this indictment"—July 15, 1945—"at the Southern District of New York within the jurisdiction of this Court Samuel Bayer, alias Samuel Bayarsky, Elias Bayer, alias Elias Bayarsky——"

What is that done for? You heard the witnesses from the stand talk about the character of Samuel Bayer. They would not give him license to bribe anybody if he were a good man all of his life up to that time. But I say to this jury, if there is anything proved beyond peradventure of doubt—and, ladies and gentlemen of the jury, is it too much to ask you to apply the Golden Rule in your own deliberations, to ask that you treat others the way you would like to be treated or your own would like to be treated? How do you like the idea, after hearing this man's banker and his lawyer and his neighbor and his rabbi come before you and tell you of a reputation for fair dealing and honesty and good citizenship that he had earned in a lifetime in this country, without a single whisper of a word from the distinguished United States Attorney? Oh, he would get them out of the way without a question, so you can forget

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all about it; never a word. "Any question?" "No." "This man—oh, let him go." "Who is this?" "Oh, he is just another character witness."

Now let me tell you ladies and gentlemen of the jury that it is the character witness that you would like to get if somebody falsely accuses you of some kind of an offense. And you say: Here, I have earned this reputation all my life of being a decent, honest person and now I am accused of fraud. I would like to have you talk to my neighbors and see what kind of individual I am.

And they would have you believe that this man, whom you heard, these excellent statements from some of the outstanding people of our community, who certainly would 2966
have no occasion to commit perjury on the witness stand, who says that he met his bills—the president of his synagogue—he happens to be a member of the Jewish race and he took care of his charities and he took care of his obligations and church; that doesn't give him any license to steal and cheat or to defraud, but it still establishes his character. And this organization, which I have had the honor to head at one time in my capacity at Washington, the Federal Bureau of Investigation came under my jurisdiction, and I took great pleasure and pride in the fine institution it is, brought out by a man for whom I have the utmost respect and regard and whom I regard in his work, it is part of the work of the Federal Bureau of Investigation to look up a man's character. When I was appointed in 1933 by the
President of the United States, from Cleveland, Ohio, they 2967
went and they combed my neighborhood from one end to the other to find out what kind of a man they thought I was. Mr. McGohey was chosen as the United States Attorney, or assistant, as he was first, under Judge McNally, they looked up his character with a fine tooth comb because they know how to do it, that is one of their chief functions, and when, last but not least, his Honor, a very able jurist who presides over the trial here, was considered by the Presi-

dent for appointment, they looked him up, too, very carefully. So they know how to do it.

And do you think with all of this investigation that went on with this case that they didn't know the full reputation of Samuel Bayer, when they could send all the way over to Tokyo to bring back Captain Kogan to tell about the lollipops and the Raggedy Ann dolls that his children got? Do you think that they didn't know that Samuel Bayer, at least before he ran into this situation, was an honored, honest and stable member of his community? Is there any doubt about that? Does the Government claim to the contrary?

But they tossed in the stink bomb, like the racketeer, 2969 that is what it was. And it said, "Ah"—some cruel mind did that, I don't know who it was—"alias Samuel Bayarsky, and we will tell the jury in a sly way that he comes from a foreign country and they may—start to apply a little more poison in there, too, in one way or another."

May I ask, in the name of God's good justice why in this indictment they apply the same aliases to these men? Alias means a crook, a slicker that you can't find. He is John Brown here, he is John Smith here, he is Ned O'Brien here; you can't put your finger on him. Is that the fair description of Samuel Bayer or Elias Bayer? And I say if it wasn't a deliberate attempt to prejudice the jury, to squeeze every bit of venom they could into this fierce and relentless prosecution, then let them tell you why they used the term "alias" and let them tell you, if they dare, 2970 that it doesn't have the connotation of a dishonest person who hides his identity in his own community, and then you pass upon that fact yourself.

Let us be logical, ladies and gentlemen of the jury, even though the Government called him a slicker and said his reputation was bad and he was alien, he went under false names, that wouldn't give him the license to commit a crime. I am not so claiming. You know, in this Federal jurisdiction of New York we have here, I know of no place

else like it in this respect: I have to give my entire argument, I never get a chance to answer the District Attorney at all; when I am all through then the United States Attorney says anything that he thinks he wants to, and with the same atmosphere of fairness I have to sit quiet in my chair without ever having an opportunity. You people know what a debate is, you know how many people would willingly go into that kind of a debate, when I am the man standing by the breech, standing facing the onslaught that is trying to take this man away from his position of responsibility that he has earned—well, ladies and gentlemen of the jury, I could talk a long time about that. I think you know what I am talking about. I think we had 2972
a right to fairness in the trial of a case. I think I have a right to come to you twelve strangers, or thirteen—I hope it is a lucky number for us this time—I have a right to come to you and say, wherever I come from, whoever I am, please don't misunderstand me; I am allowed to mention the fact that I did hold the position, it came out in this courtroom, but that doesn't give my client the right to do anything wrong or doesn't give me—if I had any reputation for honesty or probity, or for striking down racketeering, I don't want that in any way to be considered any license; indeed, I know you haven't held it against me that he had to go to Washington to get somebody, he was in so much trouble. That is not true.

I heard this man's story. And, there are two things that 2973
happened in my life, ladies and gentlemen: One was I lost my mother in 1918 when I was overseas in the Army, and I lost my son, who was just coming into manhood, and I have never completely got over either one of those two things. That is the reason I am in this courtroom today, and I am going to advert very briefly to it, only for a moment, but I don't want you to think that any reference that I am making to my experience means that I am setting myself up to be any superior erudite character. I am full

of faults, and I am doing the best I know how to say what I think about a man's life which is being erroneously attacked for reasons that I will go into.

Now I told you at the beginning that I believed we should keep away from atmosphere, and I intend now to go right into the meat of the coconut. I don't know yet who the United States Attorney claims, what officers he claims, were bribed—well, forgive me—were affected or disinterested or biased or partisan services. You know what that charge makes me think of. It makes me think of picking up a newspaper or hearing a neighbor talk, "Say, what's the matter? My neighbor John Brown is in a little trouble."

2975 "Goodness, no. What is it?" You pick up the newspaper and, "What is the trouble? What has he done? John Brown, I thought he was a decent fellow. What is it?"

"Well, wait a minute, don't be so impatient. I can't make this out so quickly."

"Well, read it out loud." "Well, what is it?"

"Well, said John Brown—what—was indicated; he did violently, wrongfully, illegally and wickedly take his right hand and his thumb in his first index finger and press it with great force and violence against the trigger for such a sufficient period of time that the amount of oxygen and nitrogen failed to penetrate, so that he became blue in the face and poisoned, and was deposited after a sufficient period of time under 12—6 feet of terra firma."

"Wait a minute. Are you joking about the seriousness
2976 of this crime? That is murder, that is homicide."

Why don't they call it that? That is the way I feel about this indictment. I don't know yet whom they are talking about that we are supposed to have affected, so I will leave out the word "bribe" from this time on because the Government isn't charging that, or conspiracy to bribe. That is the subject matter of other affairs. I will just use the general term, wrongfully affect the judgment, for the moment.

That is as near as I can group the words without going through 10 or 15 giant terms, as we used to call it when we were children, to find out what they are talking about.

What do they say? What officers do they say we attempted to wrongfully influence? Now, ladies and gentlemen of the jury, if they are coming around with some kind of proposition in their definition of "defrauding the United States Government", that you defrauded the United States Government out of the honest and faithful functions and services of any employees of the United States you had better watch out when you are talking to the elevator girl coming up, because if you get her to spend 30 seconds of her time looking away from her job you are defrauding 2978
the Government out of her honest services and you are liable to get her in a lot of trouble, too. That is the type of charge, ladies and gentlemen, that is brought here. They use the word "fraud" with nothing to hook it up. Any kind of way, and possibly anybody, anytime, anywhere. Indeed, it sounds like "Of Thee I Sing", one of the old comic operas, where they have the judge dressed up in the court.

Now this whole case, ladies and gentlemen of the jury, is based upon an alleged—an alleged—a claimed, agreement. I have been groping around in this courtroom from the beginning to try to find out who made the agreement, what were the terms of the agreement, when was it started, the conversation with whom? I have read some cases on 2979
conspiracy, every lawyer has in the courtroom, and conspiracy can be called the grand holiday of the prosecutor; you throw in the kitchen sink and everything you can in a conspiracy. But it must have an agreement. Remember that, ladies and gentlemen. You can't get away from that. You can be led around through a lot of labyrinths and up in the air and befogged, but when you get all through, when you are in your juryroom, won't you ask one another

this question: "All right, folks, what is the agreement? Who entered into it? When? Where, and how?"

Now it is true it does not need to be in writing, neither typewritten nor handwritten, nor witnessed or signed and sealed. It is not like an agreement for the lease of your house or employment. We admit that. But I don't know how people can reach an agreement without talking about it unless they use the deaf and dumb language. They could do it then. Get it somewhere else. Or you can do part of it I guess by talking about it and you can write shorthand and say I will do that; that would be by signs or something.

2981 But the mere fact that you don't have to put an agreement in writing, and the mere fact that it does not all have to be made at one particular second or time, and the mere fact that it may be difficult sometimes to prove, does not do away with the necessity of proving that there was an agreement. And you are entitled, ladies and gentlemen, to come to your decision—that is the first thing I would suggest; it is not for us to tell you what to do; I suggest, when you go into the juryroom you get together and say, "All right, what is the agreement?" And you must be convinced. That is our American system. That is where you are apt to be misled with the generalities and the atmosphere and there is some little remark I am going to advert to in a minute. You must decide that there is an agreement that all twelve of you can agree was the agreement

2982 made, no more and no less than just what you find that you can agree on, because you must agree among yourselves what the agreement was and who joined it and when, or else if you have any reasonable doubt on that one point then the Court and the law says that is the end of your deliberations and you come back and say, "I have a doubt about the agreement," and "a reasonable doubt", not a fanciful one, but the same kind of doubt that you apply dealing with your children, whether the episode just hap-

pened, when he was a little boy, or a grown boy, or if you are being told the truth or if you are in the land of reality —is it true? Would you be satisfied to have the same test applied towards you in your business life about what are facts, or is there a doubt? Because, then, if you have a doubt about it then the law gratefully says, and it is a very good reason we have it—I wish I had the time to tell you about experiences I have had in prosecuting celebrated cases, where there have been defendants, and where the jury came back and said, "Not guilty", and I thanked God a year later when I walked into court with the real culprit. I haven't the time. We have to confine ourselves to the time allotted to this case. 2984

But first of all, let us have an agreement. Now another thing, even though it does not have to be in writing, even though it does not have to be made at one time, it has to be made and it has to be of a nature that you can understand it and agree was made. And then I am going back again to the jury—I hope I don't make you mad because I don't want to, but if you don't understand it don't let it go by you; say "Not through me", the iron duke or the iron duchess, as it may be; you will have to come at the soul of it, so it is your case to prove it in a way that there is no doubt; "If it is bribery that you are charging then you prove bribery, say it is bribery, then we will go along with you; but if we don't understand what this agreement is we are going to say so."

And when I ask you members of the jury not to give up your independence on that, don't you let anybody sway you in your own judgment, your own conscience; if you have an honest doubt don't be afraid to say, "I don't know, I don't understand it." 2985

When I first started to practice law out in Cleveland there was an old judge that I got to love a lot and he gave me a book called the "Statue of John Orourigan", he poked a little fun at me I think; and it told the story of an Irish-

man who came to this country, made a couple of hundred thousand, and he thought a lot of his own people, he laughed with them and at them, that they were a pretty wonderful people, pretty optimistic and a pretty proud race. So when he got back he went on a tour of Ireland. And he picked up his guide to take him to where the statue was of John Orourigan, and he said to this Irish guide, when he came, "Of course you know John Orourigan, the great patriot that fought in the 1700s against the English."

"Oh yes, indeed I do. Well do I know him. And he was smart and great. Oh yes."

So they went from one town to another. And the end
2987 of the book comes—weeks I think—and he never found the statue of John Orourigan because there wasn't any such gentleman at all.

They have a great tendency in life, a good many people, of saying, "Yes, I understand," because they are a little bit timid to exhibit what they think is their own lack of knowledge. If you ladies and gentlemen of the jury don't understand it, say "I am sorry, but I don't understand this." We lawyers have to do it, everybody has to do it. Now I am not asking you to generate some flimsy doubt in your mind, but if you really don't understand—and it can't be some nebulous idea, it must be an agreement and it must be, ladies and gentlemen of the jury, of a type that is referred to, the precise conspiracy that is alleged in this indictment. All right.

2988 Now I think it is fair to discuss two or three points in order. The first thing is, if I break down the Government's case, if I understand it at all, the first thing they are talking about is a conspiracy of meeting with officers. I am not going to spend very much time on this. Well, what do you say? Do you think it was by chance that Eli Bayer met Colonel Vidal and Lieutenant Roeser in the Copacabana? Do you think it was a chance meeting or do you think that Eli Bayer was lurking around there and had

some kind of talk with Sam beforehand: "Let's see, let's go around to the night clubs, see if you can find some officers." If it is not that, I don't know how there could be any conspiracy or agreement by them, because that is where the Government starts its case—the first witness, they called Colonel Vidal about the transfer. Do you think it was an accidental meeting?

The next point is this: When it comes to the question of uniforms, I would say this so-called misconduct on the part of the Bayers, stripped of all this loose verbiage, or what I call double talk, and I honestly mean that, the first thing is that they said, "You tried to influence officers with uniforms." Now we have heard the statements from the 2990
witnesses on the stand about the uniforms. And for a long time I had a distinguished representative of the FBI, Mr. Flynn—I don't see him around here this morning, it is about the first time he has not been here in this proceeding; but you heard him on the witness stand talk about the statement of Samuel Bayer, that he interpreted for you before the going got so tough that they had to abandon that one and finally put in the written statement, the typewritten statement, because we had it and we forced it—but they didn't ask to put it in this case—and this man was kept on the witness stand—and I want to ask you at this time, anytime you want to read or have read any of this testimony, you in your juryroom, you have the right to come right in this courtroom and ask the Judge and say, 2991
"Here, we would like this, sir; we would like to have such and such testimony read." And I am inviting you to do it because we want to go by the evidence in this case and get away from the atmosphere. All right.

Is there anything clear, ladies and gentlemen, that this was an accidental meeting between Vidal and Roeser and Elias Bayer and not the result of any agreement at all? Is that a fair statement? Resolve that question in your

own minds. A little after lunch I am going to read to you one or two bits of evidence on that if there is any doubt, I think it is a waste of time because I think everybody on this jury knows that it was an accidental meeting, that there is nothing in any way to show that it was different than a thousand other meetings that took place that night.

And the second point is about the uniforms. When the distinguished—the young FBI man got on the witness stand he said the talk came up about uniforms, but when we got down to the meat of the coconut and broke it down and asked the question from one witness after another, every witness in the case said the officers asked Elias
2993 Bayer if he knew any tailors, because he was in the thread business. So it was no agreement, ladies and gentlemen of the jury. You wouldn't like that done to you or yours under those circumstances, finding that that was any kind of agreement that Sam Bayer was in, or any plan to go out and lasso some of these officers and lurking around night clubs. The uniform comes second. There comes along the second point. And every witness in this case—let us hear Mr. McGohey in his closing—I won't have a chance to answer him, but I challenge him now to point out to this jury from this evidence—I am going to read you plenty of it, I have them all marked—one bit of evidence in the case from the mouth of one witness saying that the request for the uniforms did not come from the officers to these men.

2994 In the name of common sense, you will find that the officers came to Bayer, down there, to their office, nobody solicited them, nobody went out and said, "Won't you come into my parlor said the spider to the flies?" Nothing like that. Every bit of evidence in this case shows—what? I can recount it without the record for the moment. First of all, Colonel Vidal said that he was talking to Lieutenant Roeser—and, by the way, before you go to lunch, folks,

where is this man Roeser? Why didn't the Government bring him in this case, the man that knows the whole story? It was Roeser that was met the first night. It was Roeser that brought Vidal down to the office. It was Roeser that brought Jacobson down to the office. It was Roeser that brought Englehart down to the office to get the uniforms. It was Roeser that brought himself down to get a uniform. It was Roeser that brought Radovich down there, the Hamlet of this whole plot. But nary a sight of Roeser from the Government. Roeser, that was the boss of these boys. Roeser, that knew whether they did an honest day's job. Roeser, that knew whether they were put aside to make way for a little girl that came down. No Roeser. He is 2996
not brought in this case. And if they could send all the way over to Tokyo to learn about the Raggedy Ann dolls and the lollipops from Captain Kogan, with all the FBI and all its prosecutors and all the Army, certainly they could lug in that poor little lieutenant and bring him up and tell you what the story was in this case. And why didn't they bring him in? They kept him out of here, the same way that they correctly kept out the statement of September 15, 1944, from that poor semi-temporary demented major that they had in an insane asylum because he had a breakdown and he had that breakdown long before he came to Mitchel Field at all. And, as I am going to argue to you, and I think I can show it with a fair degree of confidence, Major Radovich, Captain Radovich, 2997
never should have been in this flying business at all, that he had had accidents, he had been dropped down from the sky, his colleagues had been killed, he had been bruised and bumped, injured, and the man wasn't himself. He describes this incident—these little truths pop out from the witness stand—he describes the incident to Colonel Jacobson: He said, "I was crazy, and I tried to do something for my wife and child." And the Government said he was crazy. I hope they do. I would like to know what possible

excuse they could have for this man under guard. And I tell you, I am a bit ashamed, an old friend of the FBI, when I go back over Gerald Flynn's statement on this witness stand and about meeting this man; you would think he was in an ordinary hospital, nothing wrong at all, he didn't see anything. He was like that little animal, "See nothing, hear nothing, know nothing." Here was a man, plain as could be, in a cell with demented people, psychopathic case, temporarily crazy, and the FBI man here on this witness stand indicating to you that there was nothing abnormal about him whatsoever.

Now I will have a little more to say about that later,
2999 as it is time for lunch, and, in the amenities of life, maybe this will be a time I can do a kindly thing for this jury, to adjourn my talk so that you will get something to eat, and we will have a little more to say about this when you come back.

Your Honor, would you mind that?

The Court: No.

Ladies and gentlemen, we will take a recess now until 2.15. Please be back promptly.

(Recess to 2.15 P. M.)

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AFTERNOON SESSION.

3000 Mr. Keenan: Just before the adjournment I was discussing with you, turning now to the testimony in the case which has been written up, and I assume that you will be very much interested in hearing what the testimony from the witness shows as to any attempt made by the two defendants Bayer to influence any one officer in an improper way.

Now of course we will come to the subject matter of Radovich because the only way we have of getting out

that will be through statements; but I assume that it is a fair proposition, now that we are in this wondering stage, to find whom the Government claims and what the names of the officers were. I don't think that anybody will say it is fair that at this time, when the Government is all through with its case, I think we can say: All right, who are the officers that you referred to as having been influenced in any way by the Bayers in this so-called agreement or conspiracy? I think that is fair. I don't see how anything could be fairer because, remember, this is now the Government's case; it starts to put the witnesses on the stand and it offers you proof which is supposed to convince you beyond a reasonable doubt of who they were, 3002
and you can't guess it, you can't infer it. We are entitled to some solid testimony on this point. All right. Let us, as the late Governor said, look at the record and call the roll.

The first witness that was called was Colonel Travis. Well, he just came here to testify about records, nobody ever saw him, nobody ever claims that they saw him; he knew no one, he just came, and he gave you the documentary proof about the transfer. He didn't know the Bayers, he didn't know anyone. So I will not bother looking at his testimony.

Now the first witness is Colonel Vidal. Now the Government offers Colonel Vidal, a gentleman, a West Point graduate, as its witness to prove its case that some effort 3003
was made to influence him in some improper way; so we have a right to go right to his testimony, and that is right what I am going to do now.

That occurs, Mr. McGohey, in Volume 2, pages 14 and 17.

And here it is. Here is Volume 2, the testimony, and here is 14, and I am going to read it to you. And, believe me, I don't like to give up all this time, I could spend all

day probably going over it and various matters that I am coming to, but I know of nothing that I could do, with greater respect to this jury and from a more solid defense, than to read you the testimony, although it does take the time. Now here it is, the transcript by the official stenographer and written, and I am going to read it:

"Q. You met Elias Bayer, as far as you know, purely by accident that night at the Copacabana? A. Yes, sir.

"Q. You don't think he was, as far as you know, lurking around on the outside to see you come in there? A. No, sir. * * *

3005 "Q. You came down to his office after that? A. Yes, sir.

"Q. When you say the Plymouth Thread Company, that is located on 20th Street, I believe 21st Street * * *? A. Yes, sir.

"Q. And that is where you met Samuel Bayer? A. Yes, sir.

"Q. You never saw him before that time? A. No, sir.

"Q. Nor had you talked to him before that time? A. No, sir.

"Q. And you didn't know that he had a boy in the service at that time? A. No, sir.

"Q. And nothing was said at your first meeting at 3006 least about his having any boy in the service that you recall? A. No, sir. * * *

"Q. At that time did they ask you to do anything for him?"

Well, they—I am going to read back.

"Q. Well, a conversation took place in their office first? A. Yes, sir.

"Q. At that time did they ask you to do anything for them? A. No, sir.

"Q. At all? A. No, sir.

"Q. Had your uniform at that time? A. No, sir.

"Q. Was there any statement made to you, 'If we get you a uniform you don't have to pay for it'? A. No, sir.

"Q. Or 'If we get you a uniform we will expect you to do something for it'? A. No, sir.

"Q. Or anything implied from the circumstances, as far as you know? A. No, sir."

Now, ladies and gentlemen of the jury, this is the Government witness that the Government puts on the stand and vouches for his honesty and truthfulness and fairness, and these are questions and answers that are being asked of such a witness. This is the stuff. This is not atmosphere. This is the testimony. And does it prove an attempt up to now to in any manner corrupt Colonel Vidal? 3008

"Q. Coming now to the time when you met them outside the gate, I believe you fix that as some time late in July or early in August— • • •

"Q. And you have, I think, made it clear if I recall correctly, that no civilians could get inside that camp • • • ? A. That is true. • • •

"Q. So when Samuel Bayer came out the first time he, as I recall, asked you if you would look up to see whether or not a transfer had taken place? A. Yes, sir. 3009

"Q. He didn't ask you to make the transfer, did he? A. No, sir.

"Q. Or to have anything to do with it, did he, except to look up and see whether it had taken place or not? A. I will qualify that.

"Q. All right, please qualify it. Let us have the whole story."

That is my question.

"A. Yes, sir. After he learned that the orders hadn't been issued, he wondered whether or not I could do anything to expedite them."

Now, what was wrong with that? That was done every day in the week in every camp, with every officer almost throughout the United States, if a man was going to be transferred, asked that the orders be expedited. That in and of itself.

"Q. Yes, that is right. But first he asked you to
3011 look up and see whether or not the orders had been issued? A. Yes, sir.

"Q. And you did? A. Yes, sir."

Now, who would know best, the Government witness? This is the Government witness, it is not ours.

"Q. Was there anything wrong about that, Colonel? A. No, sir.

"Q. Have you done matters like that, or do officers do that from time to time in the Army? A. Yes, sir.

"Q. That has happened with a great big Army and with a lot of people in it; that is not infrequent, is it? A. No, sir.

"Q. Nothing wrong about it that you know of? A.
3012 No, sir."

Now, where is the testimony about anything wrong being done with Colonel Vidal in asking him to do that? Is this testimony or is this vaporizing? Will you get the same kind of testimony read to you by Mr. McGohey when he addresses you, when my lips are closed in this case? I am going to the record. But that is not all.

"Q. You didn't so consider it then? A. No, sir.

"Q. And don't so consider it now? A. No, sir."

All right.

"Q. And you found that the transfer hadn't taken place; right? A. That is true.

"Q. And then you told that to Samuel Bayer? A. Yes, sir.

"Q. Then he asked you if you could expedite it? A. Yes, sir.

"Q. Did he offer to give you anything if you did that? A. No, sir."

That is the fact, ladies and gentlemen of this jury; that is not vaporizing. That is testimony. I have a right to look you all in the eye and I have a right to look the United 3014
States Attorney in the eye and saying, when we come to the point, "What is wrong with the statement? Let us have the testimony. Not vaporizing, not atmosphere." That is not all. I had never seen Colonel Vidal in my life, and he said that from the witness stand. I had no idea what the man was going to say, other than my honest belief in my clients telling the truth. Then I asked him:

"Q. Did he attempt to corrupt you at that time? A. No, sir.

"Q. In any manner? A. No, sir."

And then I asked this question, and I ask you ladies and gentlemen to consider the import of it, when you know how
a lawyer walks into a witness called by the Government 3015
and puts his arms open like that, to be smacked right in the jaw if he is not on solid ground, and here is the question:

"Q. And, by the way, we are here in a court of justice, you are representing the United States Army as a witness called by the Government—did Samuel Bayer, as far as you could determine, attempt to cor-

rupt you in any manner at any time that you have known him up to today?"

And the answer is: "No, sir."

Now, ladies and gentlemen of the jury, in all fairness, when you have to decide an issue and the Court tells you that it must come from the evidence in this case and must convince you beyond a reasonable doubt, how can you say that anything wrong was asked or any attempt made to corrupt Colonel Vidal? Wouldn't he have known it? I have asked him the question, and the reply is: Why, certainly, if there had been anything wrong about it I would
3017 have known it. I could not have been fairer in conducting the examination. That is not atmosphere, that is testimony. But I must march on. They tell us that time marches on.

Let us see who is the next one. The next one is Saffron. That is in Volume III, Mr. McGohey, on page 62.

It took a little of the midnight oil to get this together, ladies and gentlemen, but this is the stuff, this is the meat of the coconut. Here are questions to Major Saffron:

"Q. What I am trying to bring out is, when Samuel Bayer went to meet you on that day in July, as you best fix the time, of 1943, you spoke about some officer coming in? A. Yes, sir.

"Q. That was Lieutenant Fabbricatore? A. Right.

3018 "Q. What you learned about the Bayer matter out at Mitchel Field you learned that evening? A. Exactly.

"Q. You knew nothing about it before? A. Right.

"Q. And of course had nothing to do with it later, did you? A. Right.

"Q. So whatever rumors you heard, or whatever you heard, you acquired that information that evening? A. Right."

I am bringing out that whatever talk he had with him in reference to these boys about shifting their position after they enlisted, that is the sole meaning they have to be there, and if you have any doubt about it, please ask that you have the record shown to you and read it in every detail. You have that right, and everybody has to accord it to you.

Now the question. This is now the second witness, and we can't do more than to go to the Government's witness that they bring in, and again I say I never saw Saffron before, I hadn't the slightest idea what the man would say, except what my client told me as the truth. Here is the question: 3020

> "Q. Did Samuel Bayer ask you to do anything improper that you know of in that evening?"

Now wouldn't you think that would be a question that the United States Attorney would want to have answered, with his own witness that he put on the witness stand and vouching for? The record shows:

> "Mr. McGohey: I object to that—'improper'—your Honor.
>
> "The Court: I am going to overrule the objection.
>
> "The Witness: Will you repeat that question?
>
> "Q. Yes"——

Now, this is my question; it doesn't act as though I thought 3021
I had some criminals that I was representing in this courtroom, with Government witnesses that were sponsored by the Government, if ever a man opened himself up wide to any truth coming back from the witness stand, listen to this question:

> "Q. Yes, I will repeat it, and I am making it very broad purposely. Did Samuel Bayer ask you that evening yourself, to do anything improper?"

Isn't that something that you are interested in finding out? Isn't that what this case is about?

"A. No, sir.

"Q. Did you ever have any conversations with Elias Bayer at all about this matter in any manner, shape or fashion?"

And the answer is:

"No, sir."

Let me interrupt for a moment. Elias Bayer needs a lawyer. I have got so much to do to talk about Samuel
3023 Bayer, I don't know where Elias Bayer comes in this case at all. But I have to go on with my limited time. But here is the first time Elias comes up: "in any manner, shape or fashion? A. No, sir.

"Q. Did you know him well, or— A. Very casually, I met him once.

"Q. Whatever there was to this business"—get this question, ladies and gentlemen of the jury; there is the second witness; don't worry, I am coming to the money part of it and to the talk with Radovich later, that will not be left out at all; but I am coming down to the questions and answers as quickly as I can to give you the heart and soul of this evidence and not atmosphere in this case.

3024 "Q. Whatever there was to this business about the boy, you never had any relation—no questions were asked or no conversations with Elias Bayer at all? A. That is correct.

"Q. Do you know where Martin Bayer, the son of Samuel Bayer, was at that time, in July, whether he was at Mitchel Field or Westover Field? A. I do not.

"Q. Specifically, do you know whether he had been transferred at the time? A. I believe that he was not at Mitchel Field."

So, we find out that at the time of the conversation with Saffron the boy had already been transferred to Westover Field. If there is any doubt about that, ask for the record. It comes out; I haven't the time to go into all of it.

Now, I then asked a stupid question, ladies and gentlemen, and I remember one of the jury smiled at me, at the stupidity of my question. I asked him:

> "Q. So that if he were transferred from Mitchel Field to Westover or Bradley Field, he would be at either one of those two places, as you best recall, at the time of this conversation in July?"

And the witness very properly answered. "I do not understand the question." I got a little confused myself by my question. 3026

Now I am going again to Saffron: and this is marked at page 64 of the same volume:

> "Q. You weren't offered any money of any kind, were you? A. No, sir.
>
> "Q. Well, I know that you indignantly reject the suggestion, but I am saying no one offered it to you? A. That is correct.
>
> "Q. Or anything else of value? A. No, sir."

Where is the attempt made to corrupt Saffron? Here is his own statement. Is this atmosphere? Is this vaporizing? Or am I coming to the Government's own case, with the Government's own witnesses, strangers to me, that the Government offers, asks you to believe their testimony when they offer a man on the witness stand. Well, so much for Saffron. He says no one ever offered him anything of value. And I am reading you the record and quoting it to our friend so that he won't forget to talk to you about that when he comes to his summation. 3027

Now the next one is Captain Pepper, to whom reference has been made by my predecessor. And you will find

Pepper's talk on that point in Volume III, pages 107 to 111:

"Q. I believe you have said that you never met any of the Bayers, either Samuel or Elias Bayer? A. That is right."

That ought to be sufficient; I wouldn't have to go to Pepper any more; how could an attempt be made by Samuel or Elias Bayer to corrupt him, excepting through Radovich? That could be done, of course. But as far as any direct contact with him, he didn't even know the man. So I don't think I ought to be required to spend very much time on
3029 that.

"Q. I didn't ask you whether they were at Mitchel; I just asked you if you ever saw them before, or recognized them? A. They were pointed out to me yesterday for the first time."

And then another question that is not too bright, it may be a little stupid; I said:

"And I assume you never had any conversation with them? A. No, sir.

"Q. Or any communications of any kind? A. No, sir."

Then he was asked this question, while we are on that sub-
3030 ject matter:

"Q. Were you asked to transfer them any place on Mitchel Field by Major Radovich? A. No, sir."

Page 109:

"Q. If you will just answer my questions * * *. Did you have anything to do with the transfer of personnel as classification officer? A. No, sir.

"Q. It wasn't part of your duty at all? A. No, sir."

Now, the conversation between himself and Major Radovich is referred to, and it appears that he was asked in a friendly way to give his opinion, no part of his duty whatsoever, but whatever it was, there isn't one thing in the world that shows that Samuel Bayer in any manner asked Radovich to do anything about going to Pepper or anyone else, because we will come to this in a minute, ladies and gentlemen of the jury—I will have to interrupt my parade of the witnesses for a minute to state this to you:

If I hadn't brought the Bayers in and told them to tell the exact truth to Mr. McGohey, there would be no evidence binding upon either one of them before you today of the payment of a five-cent piece of money, because the Court 3032
will tell you that you cannot consider in any way this statement of Radovich against either one of the two Bayers. That is the law. I am going to be perfectly frank with you and say that I don't think there was a juror that ever lived that could conscientiously hear a statement like that and put it aside and throw it away and say, "I never heard that when I come to consider the case against Samuel and Elias Bayer." But that is the law. That is what I think is the unfair thing about this type of trial, of lumping all this together, instead of charging the defendants with bribery, if that is what the Government's case is, and keeping the other statements out. It is hard for me to keep the thing straight in my mind.

But to go back. Since Pepper didn't know the Bayers, 3033
they never went to him, they never had any conversation with him. So far as their actions themselves are concerned, they couldn't attempt to corrupt Captain Pepper. And as far as Captain Pepper is concerned, he has already on that witness stand said that he was not the subject matter of a court-martial, the charges never were preferred against him, and right in the next page Mr. Robb asked him the question and showed him the charges—it is the

most bald falsehood that has been told in this entire proceeding, and bland as a—I won't say bland as a Chinaman, but bland as can be. He just said: Oh, I didn't know that I was court-martialed for the most serious charge that can be leveled against a man. And he said—I am continuing to try to get it in the record of the particular time—he didn't say, "I just remembered it," but he said, "I didn't remember that I made that statement," because it was in the statement he made to Colonel Snyder that I am going to refer to in a minute. He said, "I forgot when I gave that statement," because it was a statement he had to admit, he was cross-examined. I don't see how anybody
3035 can believe a single word that that man said about anything.

However, as far as Pepper is concerned, we never saw him, never talked with him, and I don't see how that can be considered as any direct attempt to corrupt Pepper.

Now the next one they brought was a young lady, the little Goertz girl. Well, she never saw the Bayers at all. She was the clerk that took the part of the Colonel. She was a rather nice looking little girl that wielded a terrific amount of power in the Army, could take boys out, put them in the Commando Units, back and forth, and the Colonel was sort of a little stooge over in the corner. She never met the Bayers. I am not taking the time to read through the testimony, but everybody on this jury will remember that she never saw either one of them before she
3036 came into court. So, whatever responsibility is there would be through Radovich. We will come to that in a minute. We have no direct contact with her.

Ladies and gentlemen, if you will indulge me for a minute, it is something like a teacher trying to prove a negative and it is not a very easy thing to do, but I have to knock down everything that the Government put up; and I don't have to show you that my people are not guilty; the Government must prove they are guilty, and beyond a reasonable doubt. But I am so confident of the innocence of my

people that I am trying in a logical way, as though I were arguing in this case before twelve judges instead of twelve members of a jury; I am sure of my case, that we need no atmosphere, or trying to please someone, but let us see whether proof of a real crime has been offered in a legitimate way in this courtroom.

The next witness is Boebel. Boebel is in volume 3, page 169. It gets a little tiresome, ladies and gentlemen, but please bear with me, because I am on pretty important matter. Now here is Boebel:

"Did there come a time when those men were transferred out of your organization? A. Yes, sir.

"Q. Do you know where they were transferred to? 3038
A. They were transferred to Headquarters Squadron, First Fighter Command.

"Q. Prior to their transfer, did you have a conversation with anybody with respect to that transfer? A. Yes, sir, I did.

"Q. With whom? A. Colonel Jacobson.

"Q. Now after those two men, private Bayer and private Usdan, were transferred out of your organization at Mitchel Field, did you ever see them again? A. Yes, sir, I did.

"Q. And where? A. At Seymour Johnson Field, Goldsboro, North Carolina."

That is all the evidence of the Government with respect 3039
to Boebel. Certainly none of the Bayers—he never saw either one of them, had no contact with them at all; he didn't even know the boys, to be sure, because the record will show, and I think he was mistaken at that; I believe that young Melvin Usdan—I don't think he ever saw them down there then, I think he was mistaken about it. But, in any event, here is the testimony, on page 169; that covers the whole story as far as Boebel is concerned. And he said

that they were transferred out of there as a result of a conversation with Colonel Jacobson. All right. We don't hear anything more now from him until the boys get down to Goldsboro:

> "A. I told Major Radovich two men had arrived, reported to our organization, whose names were Bayer and Usdan. I asked them—I asked Major Radovich why they were assigned to our organization. He told me that he did it as a favor to Colonel Jacobson."

Colonel Jacobson denies that entirely, he is a Government witness, and the Government is sponsor for Colonel
3041 Jacobson. I don't know which one Mr. McGohey will follow. I don't know whether he will tell you that Colonel Jacobson was telling the truth when he said that he had nothing whatsoever to do with this transfer from Westover Field down to the Commandos, because Boebel says that Radovich said that he did it as a favor for Jacobson. Now Mr. McGohey can pick his poison on that; he can either believe his witness that he offered or he can believe the admission of—or he can believe Boebel or Radovich; but whatever it is, the record shows clearly no conversations, no relation between Samuel Bayer or Elias Bayer with Colonel Boebel whatsoever. Anything else is atmosphere. This is evidence.

Now the next witness in the case is Captain Kogan. That
3042 is the gentleman, ladies and gentlemen of the jury, that came into this courtroom some time last May, where the United States Attorney said that we would be holding up the war on Japan if we did not go right on with this case, because he was such an important witness. He came over here, and what he talked about we will go to right now. I have called it the Raggedy Ann blocks or dolls—I haven't got the details on it; you will have to excuse me but I will do the best I can.

That is found, Mr. McGohey, at page 186, volume 3, and 202. Here it is:

"Q. Do you recall anything else that was said at that time? A. Well, Mr. Bayer said he would like to get Martin into the Air Corps just as his older boy Robert did at the time.

"Q. Did he say anything else that you recall? A. I believe he asked me if he could get to Mitchel Field; would it be possible he would be enlisted for the Air Corps at Mitchel Field.

"Q. Did he say anything else that you can recall? A. No, nothing else I can remember at that time."

3044

Now, surely, when the Government had respect enough for Captain Kogan to send all the way—to fly him back from Tokyo so he could testify in this case, and that is what they said, they ought to have respect enough to pay attention to what he says when he says that is all that was said at the time. They sponsored him. That is his testimony. This, ladies and gentlemen, is not atmosphere; this is the meat and substance of the case; it is the testimony. It is what we go by in a lawsuit.

Now I would like to go right into it. It will take a few moments. You will have to be patient with me because it is the heart and soul of this case. I ask you, I solicit your indulgence if it gets a little trying and tiresome. It is not poetry, but it is certainly the meat and substance, and we are not here to convict people I hope on atmosphere. Page 187:

3045

"A. Mr. Bayer called me and asked me if I knew that all enlistments in the Army were going to be closed on the 15th of December. I told him I did. He asked me what happened to most of the boys who were inducted, what branch of the service they went into. I told him that in my opinion the bulk of inductions

went to the infantry. He said, 'Well, if Martin could get enlisted now, do you think it is still possible for him to get in the Air Corps?' I told him I thought they could. That was about the gist of the conversation at that time."

Now if that is a conspiracy, they had better go and take me in custody right along with them because it is exactly what I did with my son. I asked him to get into the Air Corps. I didn't want him in the infantry because I felt he would have a much better chance for promotion, a much better chance to get on. I don't want to leave anybody
3047 with any false impressions. My son's eyes were no better than most. He was not a flyer but he was in the Air Corps; and he tried to get into that branch of the service. We make no apologies for it. And what is wrong with that?

"Q. Do you recall whether there was anything else said about the infantry by Samuel Bayer at that time? A. Well, Mr. Bayer made it very clear that he wanted his boy in the Air Corps rather than the infantry; he preferred him to be in the Air Corps rather than the infantry.

"Q. What part of the Air Corps, do you recall? A. Well, as ground crew, I think.

"Q. Did Martin Bayer then enlist in the Army? A. Yes, he did.

3048 And since when did it become a crime to want your boy in the ground crew of the Air Corps if he can't fly? I don't suppose, ladies and gentlemen, that there is one out of 2500 men who try to fly that ever get by these rigorous tests. Is there something to be ashamed of in wanting him in the ground crew? There is no family shame in that. People get into other branches of the service where they think they can do the most good. There is nothing wrong

in being in the Quartermaster's Corps. We don't all have to fly planes. We are not all men that have fine coordinated muscles and faculties that would make us flyers. I don't know whether Mr. McGohey would be able to fly, or his associate. Perhaps he would, perhaps he would not. I don't know about myself. I can tell you this: I was in the artillery in the last war and I never made any effort to become a flyer, and I don't make any apologies for it at all. Since when did that become a crime?

All right, we go on. Kogan. Let us see the worst that there is about it, so we don't cover anything up.

> "A. Mr. Bayer told me that his brother had met quite a few officers from the First Fighter Command, that 3050
> they had become very friendly, and one officer, Colonel Jacobson, had recommended that the boys be transferred to work for him over in the Fighter Command, that it was a good assignment and looked good for a while."

Anything wrong about that?

> "A. * * * I told Mr. Bayer that I thought it was a very poor deal to get into, get involved in, and I did not think anybody could promise anybody where they could be, because they never knew the next day where they would be themselves."

Is there anything wrong about that, going around talking, people talking, having discussions about what branch of 3051
the service they could go in, or where they will be, more likely? If you want to, let us reach it right now, on the question about overseas, if we are going to be free from hypocrisy. I remember, and I would not have a misunderstanding upon this, that when they took away our last great President I lost a dear friend, and I want to tell you that nothing ever said could cause me to say one single word

that would ever in any way reflect upon his memory, but I mean now if he were sitting right here, he would ask me to go ahead and say it. But you recall a lot of people felt that our young boys should not go overseas at the beginning, and there were debates that you could read in the New York Times about whether boys 19 or 20 years of age should be taken or whether they should have a year's training. I know many of you ladies and gentlemen have read the papers on this subject and you know what I am talking about. There even were Acts of Congress, passed in the Senate, in which they—one branch voted that they could not send them abroad until they were 21; that was in
3053 the public press. And is there anyhing wrong about that, ladies and gentlemen?

Let us get to the meat of the coconut right now, another aspect of this case. It is a lot different to take a boy, one out of three, who has had some weakness, rickets, early in his life; who has a spot on his lung, who expectorates blood, and who has shown a tendency not to be one of the rugged boys; that happens in every family. And then, as I mentioned to you, with Samuel Bayer in this room right now, I described him as an old clucking hen—that is what he had in mind, ladies and gentlemen, in this case; he had in mind not to keep his boy out of service. He had three lovely boys, as lovely as you ever laid an eye on. And the unfairness of the prosecution, ladies and gentlemen of the jury, they didn't even want to let you
3054 get a look at his picture of this boy Martin who is now admittedly over in the jungles of Burma, and we couldn't have him come in to testify in this case; and in his place I asked that a poor humble photograph be shown to this jury and Mr. McGahey says, "I object. It is immaterial. I don't want this picture shown to the jury." That is the purport of his objection.

Since when did it become wrong—the loveliest instinct that is in a parent's heart. And remember, ladies and gen-

tlemen, if he was solicitous for the welfare of his boy, and it must be within limits, he is displaying one of the loveliest things that the human character has. It wasn't for somebody else's boy. There is the lady sitting at the side of Ann Solomon in this case, his wife, sitting on the end. It was her boy. The only wife he has ever had. And it was his own flesh and blood. And he was following the instinct that is put in the heart of all of us, even those who are not civilized, even the animal. It is a human instinct to look out for your own young. And if any man in this world should ever have—not pity; if he is guilty I am not cringing, I am not asking for special consideration, but if a jury should have what the Good Book calls an understanding heart, it ought to be in the man's conduct 3056
toward one of the three boys.

We didn't make the story up, it was not manufactured. Sam Bayer didn't give his boy double pneumonia for the five days before they shipped him over to Burma. That little Melvin Usdan never told a lie to you when he told the story. It wasn't framed or manufactured. It was like a message sent from God Almighty. I hadn't the slightest idea that the boy was about; by accident I found out. I said, "In the name of common sense, where is the boy?" I tried to postpone this trial until I could get Martin here, but they didn't see fit to do it. Let us have Melvin, ladies and gentlemen, bring him in, put him on the witness stand and let us hear his story. And you heard him. A little boy. And the three men got their heads together, and I 3057
remember, after he testified, toward the end of the day, the learned Judge said to Mr. McGohey, "Will your cross-examination be brief or will you have much to say?" He said, "Oh, there will be several questions certainly of this witness." And how they did put their heads together, these skillful lawyers and the F.B.I. men and the Army and Navy, to try to break down the truth. But you may just as well break down the mountains and the eternal hills as

God Almighty's truth when it comes from the mouth of a young boy. Was there guile in this boy's manner?

Listen, ladies and gentlemen of the jury, they did a good job on these boys that were footballs and kicked around long ago, these officers and men whoever they were. I would never have known it. How would we know? I had never seen Melvin Usdan. His uncle saw him for an hour or two. There seems to be quite a grave complaint about that, about the young boy's wife seeing him and the boy's widowed mother. And she had dinner with him at the Grand Central Station. We have explained how he got the time, going overseas. Is that wrong, for an hour and
3059 a half or two hours, with his mother and with his uncle, who acted as a human father would? But there was the boy on the witness stand. There, he came. We used to have an old lawyer out in Ohio, in the Sandusky region, and he used to call a witness like that God's witness.

Well, it seemed like it to me. We did not have very much in this case, with all these officers swarming around like locusts, and just what could we do, to ask them questions and took the answers, or whatever they would say. I on one side and Mr. McGohey on the other; and Mr. Wallace on the other; and taking down Ann Solomon, from ten o'clock in the morning until four o'clock in the afternoon, and the little Busch man was down there ten and a half hours, interrogated.

What is all the shooting about? What is behind it?
3060 Fraud of the Government? If they want to do a little cleanup about the fraud of the Government, let them take a good look around New York City because they are pretty—they skate quite a bit around them; then they will know what it is all about. There is nothing so innocent as far as the community.

What is behind this? What is this fraud against the Government, with these two boys, one of them in Burma and the other in the Arctic Circle? They certainly wanted

to play fair with them, so it is split even, and that makes them feel so much better.

Well, anyway, Melvin Usdan came in. And what did he say? He said Martin was his little pal. Ladies and gentlemen, do you feel that in good conscience you can just take that testimony, that came from that boy, under oath, and just throw it out of the window? Was he broken down in his story, with all the skill of this relentless and merciless prosecution—in agreement, all their heads together? And they couldn't shake that boy, not even a little bit. And I was so proud of him as a witness. He was back on furlough, to see his widowed mother, to see his uncle who had been kindness itself to him, standing at the bar of 3062
justice because he tried to get this little boy a little more training. And then he tells the truth to us. And what is it? It is in this record. Captain Pepper testified to it. I knew it anyway, with my own sons, and undoubtedly you know. Every boy that goes in the Army is entitled to three months' basic training, where they send them out in the field, and they make them shovel and they make them get down to work, and they get them ready to meet those Japs that are going to shoot them down from the jungle, or those Germans that are going to shoot, those Germans that carry on their warfare that they have been trained for the last ten or twelve years. It would be merciless to send boys out of school, without giving them some training, and giving them a fair chance to take care of themselves when
they come to meet the foe; boys in their teens, hardly out 3063
of the baby stage—that is the crime of Samuel Bayer. That is why I am here arguing this case to this jury. Why, it is preposterous. Did he try to take them away from Uncle Sam? He took them by the hand, these three sons, and brought them down to the drillmaster and he said, "Take them; enlist." And then he knew any place after that that they went, and what did he see? Oh, he gets solicitous, ladies and gentlemen of the jury, about having them near

his home, out there at Far Rockaway, with the pals that they had been with, so that he could give them a good meal to stuff it in their insides, the mother and father. Is that a crime? Have you seen that go on in this country? Even myself, if I made any remark about that in my own home with my son, I would have to leave home mighty quick if I made any comment about my son being kicked around Washington. It was true. And I said I wanted him to go out in the field. My wife said, "You mind your own business. If I want my boy around here as long as the law allows, to put a little more flesh on him, to feed him and put a little more flesh on him, you go down to your office, you
3065 take care of your business, and you let me alone." I got into a real fight, ladies and gentlemen, and I knew when discretion was the better part of valor.

Now, where are we in this case with these boys? Did he try to duck enlistment? No. He had a weakness, Samuel Bayer; he was sick. There is one thing you can read of in this record. Every single witness that the Government offered, they said he was agitated, very much excited; beside himself, worked up on the verge of nervous prostration. And Jacobson told us the story that when he called up about his boy at Westover Field he fainted. We didn't cook up that story. That is not our witness. True, I went to see Colonel Jacobson, as I had a right, to ask him about what the facts were about the case. But that is his story. And he is a Government witness, and the Government
3066 offers him on the witness stand and stands sponsor for his truthfulness. He is not excited, no charges leveled against him.

While I am on that subject, because we must hurry on to the tires, that may bother you, I don't think there is any doubt at all when these officers came in and talked to Sam Bayer, and asked him about these uniforms and the like, and the tires, he denied everything; and when he was asked by Mr. Wallace about the tires, he made a birthday

gift of these tires to Colonel Jacobson, and he said that he did not. He should have said "Yes, I gave them to him." I don't think that he was truthful perhaps in giving that answer, but thought that Colonel Jacobson was not in this inquiry at all, that he thought he came down about the Radovich matter, he knew there was nothing wrong that Jacobson ever did for him at all, and I think he just wanted to save him from some embarrassment.

However, let us go back again to the record and see what Jacobson says about this. Jacobson is a Government witness. I am not vaporizing, I am talking about the record in this case.

3068

That is volume 5, page 74, and page 77:

"Q. You have spoken about fortification. * * * A. They were doing general clerical work, filing, and some typing, as I remember it, and general clerical work in this section.

"Q. And were you aware of any special consideration that was given to either one of these two boys, Colonel, at any time? A. No, sir.

"Q. Before you left for Albany? A. No, sir.

"Q. Were they treated, as far as you could observe, like any other privates in the Army? A. They were just soldiers.

"Q. Pardon me? A. They were just soldiers."

3069

Now I brought out a letter dated June 26, 1943, that Jacobson wrote Elias Bayer—they were very close friends, and there was nothing shown about any wrong conduct with their friendship; there is nothing wrong about buying a soldier a drink or to go out and have dinner with him. If that has become a crime in this nation, let us build a lot of concentration camps. Let us be honest about it. Let us all go to jail and take a vacation there and not be hypocrites about it in the courtroom.

I asked him:

"Colonel, I call your attention to the date of Exhibit 6, being June 26, 1943, * * * and I believe you just read that letter * * * A. Yes—I scanned it.

"Q. Well, with such attention as you did give to it, I will ask you if under date of June, 1943, anything had occurred in any manner in your relations with any of the Bayers, either Samuel or Elias, to cause you to believe that any effort was being made to in any way affect your judgment as an officer of the United States Army? A. No, sir."

3071 These are Government witnesses. The Government sponsors their truthfulness. This is the Government's case. The Government does not impeach this witness; it doesn't claim anything to the contrary. Not a word of it.

"Q. Is that correct? A. Yes, sir."

Now here is the next question, and Jacobson is an important witness. He may be discussed quite a bit by Mr. McGohey after I can't answer him.

"Q. Or to get you to affect any other officer's judgment in the United States Army on anything? A. No, sir.

"Q. Is that correct? A. That is correct.

"Q. And had you received the automobile tires at
3072 that time? A. Yes, I had.

"Q. And the uniform? A. Yes, I had.

"Q. And the automobile tires I believe you referred to as having received on or about your birthday, is that correct? A. That is right.

* * * * * *

"Q. And was anything said prior to the time that you received the tires, or at the time you received them,

or at any time you were at Mitchel Field to hook them up in anyway with anything that you expected or hoped to do? A. No, sir.

"Q. Or in anyway concerned with influencing your judgment as an officer? A. No, sir."

Page 78, Mr. McGohey:

"Q. Or let me put the matter bluntly, Colonel: Was there any effort that you could discern at that time, up to the time that you went to Albany, to get you to tamper in anyway with what happened to these boys?"

Now, wouldn't you think that Mr. McGohey would want 3074
an answer to that question of his own witness? I am going to read from the record, and here it is:

"Mr. McGohey: I object to that question.

"The Court: Sustained. You ought to ask him about it.

"Mr. Keenan: I will accept, your Honor.

"The Court: Very well.

"Q. Now, how did you happen to get the uniform? Just very briefly will you tell us about that?"

Remember, the story you got from the F.B.I. was that uniforms were discussed and they offered him uniforms, but when you get down to it—"Tell us how you happened to get the uniform." I am asking him that. 3075

"Who mentioned it to you, if anyone, or how you happened to go and get it?"

That is a fair question, isn't it? Isn't it interesting to find out about these uniforms, whether the Bayers—and they didn't give it to him; whether the boys—whether the Bayers offered it to them or said, "Wouldn't you like a uniform?"

Oh, "How do you like uniforms?" "Your uniform doesn't look good." It comes the other way:

"A. Well, I mentioned it. I mentioned I needed a uniform. Summer was coming on and I had only one summer uniform that fitted at the time, and there was in fact several of us that were talking about uniforms. We all were. I mean nearly everybody around the office when the time came to go into a summer uniform.

"Q. Yes. A. And Mr. Elias Bayer was present while we were talking about, and he suggested I. Buss. Well, I went down there and they said that they had never made an Army uniform before, and that they would
3077 take my order for it, and we talked about it, and they gave me a price on it, and I went in and they made the uniform. And the first one they made didn't fit. I did not like it and I refused to accept it. And they made another one and I accepted that uniform."

Now:

"Q. Of course, Colonel, if you had thought that in any manner anyone was trying to influence you in any improper fashion, you would not have accepted it, would you?" That is the Government witness. Wouldn't you think Mr. McGohey would like to have that question answered? He did not.

"Mr. McGohey: I object to that, your Honor.
3078 "The Court: Overruled.
"Mr. McGohey: I submit that has been answered.
"The Court: Overruled. Go ahead, Colonel.

"A. I would in no way compromise myself. I mean, it never occurred to me.

"Q. You would have been angry if you thought anyone was doing that? A. I definitely would, yes, sir."

Ladies and gentlemen, I can't go on reading all this record to you. You will understand that. But, please, if you think that I read just a part of it and a part that is favorable to me, and I don't see how that could be construed as anything other than a story, won't you in your deliberations ask to have the record read to you, and won't you be interested to see what Mr. McGohey will read about the record, about something direct in the case, not inferences, not the fringes, not the vaporizing around the edge, but his own witnesses?

Yes, ladies and gentlemen of the jury, that is the call of the roll on all these witnesses that were offered. I have not skipped one of them. I have gone down to the pertinent 3080
points of every single one of them. Perhaps I could read a little more here and there, but I spent the midnight oil and I tried to bring all the information I could.

So much for the uniforms. Is it fair for me to sum up and ask you to believe that the matter of uniforms came entirely innocently, that Elias Bayer never dreamed he was going to get into trouble when he went into the Copacabana that night, that when they came down to the office and wanted to get uniforms it was understood they were going to pay for them themselves, they were going to get them at cost from the tailors that attempted to balloon into Fifth Avenue tailors that didn't have the money? And what happened? This whole uniform business when you get down to it, these officers—remember, the Bayers couldn't see themselves in a court of justice; they were like other peo- 3081
ple, like people you knew, that you met, and say an officer wants to have a uniform—"can you help me get a uniform at cost?". And if you said, "Sure, I will do that," would you consider that you were trying to do something wrong with these officers? And have we fairly shown to you that the uniform business came from the officers to the Bayers and not from the Bayers to the officers? Didn't the impetus come didn't they ask for it? And was there anything

more done at the beginning in saying, "We will help you get it at cost"? And didn't the Government prove itself with the Buss men on the witness-stand, or the Busch men, whichever one it was, who said: Well, who, which party was going to pay for it? He said he was going to pay for it himself. What? The uniforms weren't any good. And this little man got vociferous. They get more vociferous, ladies and gentlemen, out there at Mitchel Field, close to metropolitan New York, than they would be if they were marched there out in the jungles of Burma, ill now; they wouldn't be thinking about the pink or the blue or the green of this uniform. But that happens. They didn't like the
3083 uniforms, they wouldn't take them. When they didn't take them the little fellows came to Bayer—they picked on him as being a multi-millionaire, though Ann Solomon who was here on the witness stand and kept the books said he was worth $100,000—and oh, don't you think anything was overlooked about the wealth of Bayer. The Government had the right to show that was not true in rebuttal. They have an accountant sitting here from the F.B.I. You have only seen half the operation. There is an accountant looking over the books. But they have you believe that this fellow was a multi-millionaire, corrupting the whole Army, whole battalions of them coming in.

The fact of the matter is that he was like you and I, and hundreds in our lives—the worst thing in the world anybody can do is to go to an in-law to get him to do a
3084 favor for a friend because then you are in trouble, then you have family trouble on your hands and that is not very nice, especially when the Busches said to Sam, "Here, you brought these officers in." What is it? And it all amounted to a few hundred dollars. He said, "Pay for it." And they said to him, when they questioned him down there in Mr. Wallace's office: Isn't it a fact that Radovich didn't pay for the uniform? Yes. And that you did pay for it? Yes. How do you account for the fact that you didn't go and collect that money from Radovich?

Did they think that Sam Bayer was going to sue Radovich for the price of that uniform, he being the commanding officer of his son out there in the field? Do you see any evidence in this case that Sam Bayer said to Radovich: Come in and get a uniform? I haven't time to go into his statement. It is here, you will have it with you. And, by the way, I wish you would take those statements with you in your jury room, especially Sam Bayer's statement and Elias'.

Now we have a situation where I believe we have shown that there was no effort made to keep these boys out of the Army. I believe it is shown, and it is shown by the little Melvin Usdan boy, as best we could. I wanted you 3086
to see Martin Bayer; all I could give you was his picture. Don't you believe, ladies and gentlemen, if that story had not been true about that boy spitting blood, having rickets, that you would have had these Army doctors on the witness stand? They know where to get them and they would have told you how much he ate, that he never was on sick call. They have all that before them. But Martin Bayer was a boy—the other boy described him—he said he had rickets and his chest was bent in. They may have said: We passed him on the examination. They got down to taking a lot of civilians in the Army and they weren't scrutinizing them too closely about their physical deficiencies either. We don't claim that this boy was a cripple or an invalid, but we do claim that he just passed eighteen, a
week after he enlisted, a week before he enlisted, and that 3087
the father wanted him to get some basic training and wanted him to be strong. The boy wanted to go in the Air Corps with his pals.

If you read one thing you will see another bit of this testimony coming through the record, you will see in that statement of Radovich that Sam Bayer asked him if he wouldn't put this boy up on the flying line, get him out of those bases, that wasn't his place as clerk. Look and see if

you can't find that, and then you will know whether or not we are manufacturing this story about this boy being a justifiable subject for some understandable tolerance or weakness on the part of his father.

Now, ladies and gentlemen of the jury, the Usdan boy told you, and it is undisputed in this record, that every boy is entitled to three months' basic training. And you know what basic training is. That is the training with the gun. That is the one thing that makes the difference between a high school boy, an office boy and a soldier. That is three months where you have to get up early in the morning, your muscles sore, but when you are through you are a
3089 soldier.

These boys were kicked around at that field and they never got any basic training. In God's mercy, when they get through playing chase with them out there, those officers, they had Melvin Usdan ready with one week's basic training to fly with the airborne engineers. Just missed it by a flash. Of course, the father went crazy when he found that out.

I want to get to the point of the payment of this money. I am sorry I can't agree with all the views of other counsel in the case, but I have great respect for the common sense of an American jury. It would be idle to tell you that there was not money passed in this case. Technically, I don't think they proved it. By bribery or not you have—but I don't care about that, there was money passed, of course.
3090 Sam Bayer—$7,000. No doubt of it. You heard about it. He told you the story. And I don't claim to be the best lawyer there is or even a fair to middling lawyer, but I surely know enough that when I am bringing him in to the United States Attorney, down to the tender mercies of this Southern District—if anybody knows what I am talking about, of what happened here—and bringing him in, and the case all atmosphere, with Philip Cochran in Time Magazine and all that stuff—but I say that what happened was this: that

Samuel Bayer's son was out—and thoroughly untrue—Radovich told him the outfit was being organized to go overseas. Read Radovich's statement. You will see that no such thing was true at all. Radovich's story is that these boys had to be transferred out of the Headquarters Fighter Command because there was talk out at the field about these uniforms. The boys hadn't done anything wrong. Naturally, the father was interested in his boy being transferred. And read Radovich's statement. Did Radovich say that Sam Bayer—and they are not very friendly, you can judge that—does Radovich say that Sam Bayer said, "Take him and keep him from going overseas"? No such thing. "Radovich," said Sam, "don't do 3092
that. Keep him for a little while longer, a week or ten days." And when he saw that they had transferred him, for some reason that I haven't got time to go into now, it hasn't anything to do with this lawsuit, they transferred him to Westover Field, in the Airborne Engineers, with no training—this boy that was his special weakness—the man went crazy. What happened? You have an old clucking hen like Sam Bayer, with that one weakness that he has for this one boy, that he wanted to have some training, and then you have a crazy man, because that is what Radovich was at the time—he had been dumped out of an airplane on his head or his shoulders, and his colleagues, friends killed; they had to keep him out a year and a half, move him out of the pursuit plane. There is where the fault was. The man was temporarily mad. He says he 3093
was mad. He says to Jacobson, "I must have been crazy, I was crazy." The Government says he was crazy because they put him in an asylum, and that crazy man ran into unfortunate Sam Bayer with his weakness for this boy. And what happened? He said, "Oh, don't transfer him, keep him there for a while." All that happened up to that time, ladies and gentlemen, would never have even been discussed, but Radovich saw a chance to make some money.

He said to Jacobson, "I wanted to take care of my wife and child. I was crazy, so I asked him for some money."

Now, ladies and gentlemen of the jury, there are more of God's witnesses. I wouldn't hurt a hair in Major Radovich's head, and if I could get General Ansell to take me into partnership with him I would be a delighted lawyer—that is what I think of him—but things are more serious, we can't indulge in personalities. I hate to say this, but do you remember when, entirely by accident, I ran into the 201 file, and I found out—did you get the significance of what I found out in that record? I found out that Major Radovich got away with some embroidery——

3095 Mr. Robb: We object.

Mr. Keenan: I will read it.

The Court: Wait a minute. Let me hear what counsel has to say.

Mr. Robb: Just a minute. I don't think that is a fair statement. It is not in this record, and we object to it.

Mr. Keenan: I will read the record.

The Court: You may read the record, you may argue the case.

Mr. Keenan (reading):

"I call your attention to the 8th sheet in this file"—this is Mr. Abram Whipple, that is the Government man that had those records; they were not very complete if you remember, and we had quite a set-to in

3096 getting anything out of them—"I call your attention to the 8th sheet in this file, coming down from the top, which I am unable to find bears any date. Perhaps you could help me. I don't want to disturb it" et cetera, "that is why I haven't disturbed the brads on it. A. That is referring to the basic letter of 24-2-45.

"Q. 24-2-45. And that was a letter from the Infant Jesus Orphanage of Mulagammuda, Travancore, to the

A.G.O.—is that Adjutant General? A. That is right, sir.

"Q. (Continuing) —stating that on February 5th they sent parcel post lace valued Rs. 3272.6 to Major Walter Radovich, A B P O 433 No. 1 Air Commandos Group, New Delhi, and would like help in collecting the debt. Is that right? A. Yes, sir.

"Q. Now does the record show—it wouldn't show anything more than that? A. I can tell you about it.

"Q. What about it? A. That is not the original letter. You have got to understand that military correspondence is entirely different from correspondence that is used in civilian life. That is merely a resume 3098
of what was in that letter from that organization, and all those endorsements that appear under this were endorsements that come through the office but we keep no record of them; you just make a notation as to what was in that particular endorsement. You reply by endorsement. * * * That is just military correspondence. * * *

"Q. I find out $100 was sent there by Radovich after he got back to this country. A. That is what that endorsement says.

"Q. In payment of those laces that he got from the Sisters of Jesus. A. So one endorsement states, but there is no correspondence about that in that file."

Mr. Robb: Is that all, Mr. Keenan? 3099

Mr. Keenan: That is what the record says.

Mr. Robb: If the Court please, Mr. Keenan made a statement before this jury that Major Radovich got away with some embroidery, apparently trying to imply that Major Radovich stole some embroidery from some Sisters out in India. And I say that his statement was highly prejudicial, and I move your Honor because of that statement at this time to withdraw a juror and declare a mistrial.

The Court: Motion overruled.

Ladies and gentlemen, you have heard read the testimony in the case about the incident that has been testified to by a witness and you may draw such inferences or you may draw no inferences from it. The effect of the testimony is entirely for you.

Now what counsel says to you, as he has told you, is not evidence in the case. He has a right to argue to you what he thinks you should draw from that testimony, but that does not bind you. The matter is for you, whether you should draw any improper inference or any inference at all or consider it as amounting to nothing. That is entirely up
3101 to you.

I overrule the motion to withdraw a juror.

Mr. Keenan: Ladies and gentlemen of the jury, what is read in this record is this: They sent parcel post lace valued rupees 3272 to Major Walter Radovich A B P O 433 No. 1 Air Commandos Unit, New Delhi, and would like help in collecting the debt.

Mr. Robb: And he paid for it. May we have that added, since Mr. Keenan wants it completed?

The Court: He has already read that.

Mr. Keenan: Is there anything before the Court, your Honor?

The Court: No.

Mr. Keenan: And he paid $100 for it in pursuance to this letter that was sent to the Adjutant General.

3102 Now, I am not saying that that is the real Major Radovich, but I am saying that that is the record of what happens to men in these strange war times that we lived in. He is nothing but a little slip of a boy himself, and I have great respect for him, for his citations for his bravery. And if we were talking about who was the bravest man in this court room, I don't think anyone could compete with Major Radovich. And I don't think he should be convicted for any offense in this case because I think he was

insane at the time that these transactions occurred; I think he was on his way to it. I think in the case of many of these individuals, great geniuses, they have moments when they have temporary aberrations; they are not using sound common sense. It is the only explanation that I can offer any kindness on, because when I heard the story of what happened I was sure I was getting the truth from Samuel Bayer and Elias Bayer.

There was no monkey business about that, ladies and gentlemen. We went down. And I had so much faith that they could answer any question they wanted, and the record shows that Mr. McGohey said in this case—I think it was in your hearing; anyway, it is not important to state 3104
it—that I was willing to have them examined in my absence or in my presence; and when you read these statements you will see that they are all, as far as Samuel Bayer is concerned, questions that were put by Mr. Wallace, not a single one put through me. And, of course, that is the reason and the only reason, that we did not require him to repeat that story again to you. We thought it was very unfairly presented by the Government when they tried to epitomize it and leave out the important parts when they came down to recite it.

And when we got this story, what was it? It was a story told word for word and incident for incident of what occurred in this case. He told exactly the sum of money, under what circumstances it was given. And the little F.B.I. man on the stand left out the statement, "I didn't 3105
know whether it was a holdup or a loan"—the first thing that was stated. But it was intimidation. He didn't want to leave his boy at the mercy of this man.

He said, "I want $500 to take my wife to California." That is what he said. And he gave them $450. Discouraged him. He didn't want to give the money. Entertainment was one thing. Or perhaps getting him a suit of clothes at discount is another. Men like Bayer, in that type of busi-

ness, they are doing that all their lives, getting things for one another at a discount. There is nothing wrong about it.

So he came down and told him his story. Here were these two boys. You can have your choice of one or two stories; you can't believe them both. And you are asked by this Court—and this is no criticism of the Court, which has my great respect—but the law says, not the Court, the law says that you must consider the Radovich testimony, statement, just for Radovich; Samuel Bayer just for Samuel Bayer, Elias Bayer just for Elias Bayer. I think that is rather a lot of nonsense. I don't think that there was ever a mind that existed, I don't think 12 lawyers could do it,
3107 and, with great respect, I am not sure that I ever met 12 Judges that could do it and be perfectly content in their minds that they hadn't permitted themselves to be influenced by some testimony of a vital nature specifically applicable only to another witness.

Now, ladies and gentlemen of the jury, I am told by the Court that my time is at an end. I have tried in my humble way to stick to facts, to stick to record. It has been very drab and uninteresting. I haven't attempted to create any atmosphere at all. I have stuck to stories that have been told under oath.

I ask you please to take the story of Samuel Bayer and Elias Bayer; it is in writing, it goes into great detail. You will find when you read it a lot of things that have nothing to do with it, that the Government was telling a
3108 cock and bull story, about a lot of insurance policies, about a lot of other names of people—I don't know who told them, I don't know whether it was Radovich in one of the earlier statements that had been made, but this I know: that the Government for some reason or other has not seen fit that you should see the first statement that was taken from Radovich on September 15th—they have it, and that ought to be the best one, and you have never seen it. There was another statement made by Radovich that is part of the

court-martial proceeding referred to, and you have never seen that. We couldn't offer it, because it is binding only against Radovich.

Now, Radovich tells one story. But I want to tell you this. It is a strange thing. Now I wish I were talking to judges and lawyers, because the story that Radovich tells about moving these boys to this Commando Unit and out to another, is *not binding on our men at all under the law*; that you can't consider, so the Court will tell you, as against our clients. I know you will consider it because you can't help it, because you are human beings. I don't think there is anybody who had the capacity to decide things that way, that is, to hold it against one and not consider 3110
it against another. How can anyone, in the name of common sense, divide one statement against another?

Now, I say that Samuel Bayer told an unpleasant story but an honest one. And when you get through you will find out that this sick man, all the evidence shows that, with a boy who was not in good health and who had not received his basic training—he was going to be catapulted overseas without it—struggling with Colonel Vidal, struggling with Jacobson—to do what? To stop it until the boy could be trained so that he would be able to take his chances with the other boys.

Now, I have said to you, ladies and gentlemen of the jury, the Government has not been defrauded. What is all the shooting for? What is the fraud against the Government? The boys are in Burma. The other one is in 3111
Okinawa. Three sons of Samuel Bayer—one is in Okinawa, and you know what that is; one is in Burma, and you know what that is, and the third little boy is on the high seas. After all, young Melvin Usdan is on temporary furlough, back from the Arctic Circle. They have done their job. Has the Government been cheated very much on their account?

I haven't time to argue this case of Elias Bayer. I can only say to you, with the utmost trust in God Almighty, that the lack of any evidence as to him would take you four hours to go through this entire record to show anything of importance. I am getting notes from my colleague that I haven't said anything about him. Because I can't find anything in the record to talk about Elias Bayer or why he is here at all.

Now, ladies and gentlemen of the jury, you are not here to determine whether bribery occurred or not. That would be the subject matter of another indictment. There was such an indictment. It was dismissed. And that is not
3113 your concern. I think you have a perfect right to say: "We have seen no evidence that convinces us beyond a reasonable doubt of any conspiracy to defraud this Government out of anything."

Now, I wish Martin Bayer was here. I told you there were two instances in my life that I never can get over—one of them was the loss of my boy, just coming into manhood and I didn't care very much what happened to me after that, and I never thought I could get up and talk to a jury again in my life, and that didn't happen very long ago. But I guess maybe that boy is listening to me some place and perhaps he can say a prayer in heaven to see that these homes are not smashed. And I can see this boy out in the jungles and perhaps saying, "Mr. Keenan, I can't be there. Won't you say something for me? Am I
3114 not entitled to any consideration? I have suffered jungle fever, I have seen the snakes, the reptiles and the Japs. In the name of God's justice what do they want to do with my father and my family? How many homes do they want to break up?" Samuel Bayer and his wife, who sits here, Elias Bayer and his wife; the young Usdan boy and his wife; Martin Bayer, the little Sanford boy.

Ladies and gentlemen of the jury, the other thought in my mind that I can't get out of was when I lost my

mother and came back to this country after the last war, into New York Harbor. There was no one there to meet me at the dock because I didn't want anyone there. My home was smashed. That is what the war did for me. It took my mother from me.

Now, ladies and gentlemen of the jury, the Fleet is in, and the Fleet will come in with these three boys when this thing is over, I mean, when their tour of duty is over, and they will be coming back to homes, or no homes or smashed homes or smashed lives, all of them. And if Sam Bayer has shown a weakness and parted with his $7,000 and almost ruined his life, hasn't he requited in any weakness on his part? Because a crime never was committed 3116
by that man in attempting to see that his boy got the basic training to which he was entitled.

Now finally, ladies and gentlemen of the jury——

The Court: Your time has expired but I will give you a minute or two more.

Mr. Koenan: I would like to ask a minute, your Honor, just a minute or two and I will be through.

They have spoken of Captain Kogan, he spoke about the toys. I have kept pretty well to the record in this case. I may be allowed a little latitude if I could indulge in a little timely bit of sentiment myself with friendly General Ansell or anyone who wishes to; and I want to say that in considering the story of Captain Kogan it has summed up to me what should be the philosophy of this entire case. It was old Coventry Patmore, the Irish poet, who spoke 3117
about the toys and when I get through telling what he said my lips will be sealed forever in this case in this courtroom. He said:

"My little son who looked from thoughtful eyes
And moved and spoke in quiet grown-up wise,
Have my law the seventh time disobeyed,
I struck him and dismissed with hard words and unkissed,

His mother, who was patient, being dead.
Then feeling lest his grief should hinder sleep, I visited his bed and found him slumbering deep,
With darkened eyelids, their lashes yet with his late sobbing wet,
And I with moan kissing away his tears, left others of my own;
For on a table he had drawn beside his head,
He had put within his reach a box of counters and a red veined stone, a piece of glass abraded from the beach,
And six or seven shells, a bottle with blue bells,
3119 And two French copper coins ranged there with careful art,
To comfort his saddened heart.
And so when that night I prayed to God and wept and said,
When at last we lie with trancèd breath, not vexing thee in death
And thou rememberest of what toys we made our joys,
How weakly understood thy great commended good,
Then fatherly, not less than I, whom thou has molded from the clay,
Thou wilt leave thy wrath and sa
I will be sorry for their childishness."

The Court: Ladies and gentlemen, we will take a ten-
3120 minute recess, after which we will hear the United States Attorney conclude the summations. He will be the last person to sum up.

We will take a ten-minute recess.

(Short recess.)

New York, October 22, 1945.

SUMMATION ON BEHALF OF THE GOVERNMENT.

Mr. McGohey: May it please the Court, General Ansell, Mr. Keenan, and ladies and gentlemen of the jury:

It is now ten minutes of four. We have been arguing this case since about twenty minutes of eleven this morning. I know you must be tired, we are all tired. I want to thank you for the very careful attention you have given to all the summation today. In addition to that, I want to thank you for the careful, painstaking attention that you gave to each witness as the witnesses testified from the stand. 3122

Now, I shan't have the time, I am afraid, at this late hour, to recite any poetry. My task now is to review as well as I can in the time that I have the evidence that has been presented. In my opening I indicated to you what I expected to prove on behalf of the Government, which I represent here, and my task now is to try to recall the evidence as it was presented so that you may recall from that evidence the proof that the crime here charged has been proved beyond a reasonable doubt.

Now, of course, if my recollection of the evidence does not accord with yours, it is your own recollection of the evidence that must prevail because you are the sole judges of the facts. And that is what makes your job so tremendously important. You and you alone are the judges 3123 who will determine whether or not the Government has proved before you beyond a reasonable doubt the crime charged in this case.

Now, what is the charge? The charge is that the three defendants named here, Samuel Bayer, Elias Bayer and Major Radovich, conspired to defraud the Government out of the conscientious service of officers of the United States Army and particularly to defraud the Government out of the conscientious services of the defendant Radovich.

Now, before proceeding to a statement of the evidence I think it may be helpful, it certainly ought to tend to clarification, to indicate what are not issues in this case. No defendant is on trial here for having a deep, abiding natural parental love for his children. It is perfectly normal, and I as a father of a boy in the service and other boys feel that it is a perfectly normal instinct in my having a desire to protect my sons. There are times, however, when this normal instinct to defend and to protect our offspring must give way to a higher necessity. There are times when the nation is in danger, when all of us must set aside our own lives, if need be, and the lives of any
3125 loved ones in order to carry out the defense of that nation. And we have been in such a time, and these acts charged here occurred during such a time. And any person who evades that tremendously important, that sacred obligation violates not only the laws of the United States but he violates a fundamental law of civilization which says, "Do unto others as you would have others do unto you."

It requires no fine spun reasoning on my part to indicate to you the inevitable result of illegal acts such as those which were demonstrated and proved in this case. The task which one man can't perform because somebody prevents him has to be performed by somebody else. And if the answer to that is that the parents of children may let their love of children prevent those children from per-
3126 forming their duty, then what of the millions of parents of millions of sons in our armed services? Are they to be condemned because they didn't resort to the means resorted to here to protect their sons? Will anybody say that the parents of Sergeant Levin in Brooklyn, or Major Bong, out in the West, or for Johnny Basilone, from Passaic, did not love their children just as much as Sam Bayer loves his?

Now, another thing that is not in issue is the courage or the gallantry of this young officer. Major Radovich, of

course, served his country well and bravely, and I as a veteran would be the first to deny that that was not so. But that is not at all material as to his guilt or his innocence in this case. All history and experience demonstrates that physical and moral strength are not always fused in the same individual. History is replete with the moral derelictions of those whose physical courage was never questioned. The laws of this land must be obeyed by all and must be enforced against all, the strong and the weak, the brave and the timid, the rich and the poor. In the eyes of the law, all men are and must remain equal. That is the essence of our democracy. And the standards of guilt or innocence must be the same for all. And so we are not 3128
now concerned with punishment in this case. That varies with an individual and takes into consideration his traits as well as the crime that he commits.

And whether or not these boys Melvin Usdan and Martin Bayer had adequate training is likewise immaterial to the charges here made against these defendants. However, I do call your attention to two bits of evidence in this case, one the enlistment application of both of them, which are in evidence. Those enlistment applications state that the boys were examined and that they were certified to be in good health to be soldiers. And the second thing I call your attention to is Exhibit D, I think it was, that batch of correspondence which contained the application signed by Martin Bayer for his transfer from the First Fighter 3129
Command to the Medical Detachment. He stated in that that he had received his basic training at Camp Upton. And Melvin Usdan, the nice young lad on the stand, testified that he had signed a similar application.

And then one more thing that is definitely not in this case as an issue and that is whether the Bayer and Usdan boys did their duty. I certainly make no claim that they did not do their full duty. They are not charged with that. I believe that those boys did their duty as soldiers

of the United States of America and as well as they could under the limitations that were imposed on them by the acts of these defendants.

And neither are we concerned here with the guilt or innocence of anybody else except the defendants in this case. The fact that others such as Lieutenant Roeser, Captain Kogan, Colonel Jacobson, Colonel Pepper, Major Saffron, Harold Busch, Joe Busch, Phil Busch, or even Miss Solomon or any others may have had knowledge of and may have served the aims of this conspiracy is in no wise material to the issue before you ladies and gentlemen. The guilt of the defendants is not lessened in any degree
3131 by the possible guilt of others.

On the other hand, the Government is here required to show only proof of the charge, namely, that these defendants conspired to defraud the Government of its right to the honest services of this one Army officer, Major Radovich, the defendant on trial.

Now, it is hardly to be expected that a conspiracy of this kind, or indeed any conspiracy, as Mr. Keenan indicated, would ever be evidenced by a writing. In discussions such schemes are usually concocted. The evidence, then, necessarily is largely circumstantial. But in this case we have not merely the usual circumstantial evidence. We have in addition to a mass of circumstantial, compelling circumstantial evidence, the admissions made by each defendant against his own interest.

3132 The evidence outlines clearly occurrences and circumstances related to and integrated with and generating from the plan of the defendants Samuel Bayer and Elias Bayer to defraud the United States of the right to the honest and faithful services of officers and particularly the right to the honest and faithful services of Major Radovich.

The purpose and aim of the conspiracy was to prevent Martin Bayer and Melvin Usdan, the son and nephew of Samuel Bayer, and the nephews of Elias Bayer, from being

sent overseas. The plan orginated with Sam Bayer and Elias Bayer and it was later concurred in and actively furthered by Major Radovich.

Samuel Bayer did not want his son or nephew to be sent overseas. He learned late in 1942 that on December 15th of that year enlistments would end. Captain Kogan and Major Saffron both informed him that men who were drafted had no choice in the arm of the service in which they would perform their duty. Kogan further informed him that most inducted men, men who came through the ordinary draft process, went to the infantry. And so on December 15th, the very last day for enlistments, these two boys were enlisted in the Air Corps of the United 3134
States Army. Ten days later they are asigned to Mitchel Field. They are there classified as clerks and assigned to the Base Headquarters and they remained there until April 15th, approximately, 1943.

Now, during the four months between December and April of 1943 the evidence clearly shows that these two men, the Bayers, wined and dined and entertained various officers in the First Fighter Command stationed at Mitchel Field. Now, I ask you to bear that in mind—the officers they were entertaining were in the First Fighter Command; the boys up to this time were at the base, up to the 15th of April. In addition to that, the Bayers caused to be outfitted some of the officers with uniforms which were paid for by Bayer. At that time, in April, the 3135
Women's Army Corps began to replace clerks at the Base Headquarters in Mitchel Field where the boys were then serving. This information had been received by the Bayers. In addition, they were informed that the boys who were so replaced by the Women's Army Corps were being pooled for shipment to some other military post. The testimony of Colonel Jacobson is that he was told by Colonel Vidal that one of the Bayers had requested him, Vidal, to arrange for the transfer of the boys to the First Fighter Command

because the Women's Army Corps were replacing the clerks in the base command and the boys were scheduled for shipment out of the post as a result of that. The testimony of Captain Kogan is that he was informed by Sam Bayer that he, Sam, was able to arrange for the transfer of the boys to the First Fighter Command, which had become advisable, and that testimony you will find on—we have marked these volumes by letters, and in volume E, pages 189 and 190, that testimony of Captain Kogan will be found. Now, by that time the Bayers had cultivated the friendship of these officers. Bear in mind, I ask you to remember that the officers they were entertaining were
3137 officers in the First Fighter Command. The Bayers had cultivated these officers attached to the First Fighter Command and they were in a position to solicit the aid of those officers toward effecting the transfer which was required in order to avoid shipment of the boys out of Mitchel Field. The transfer we know was effected on April 15, 1943, from the base to the First Fighter Command.

Now, a short time thereafter, about April 21st, the testimony was, 1943, the evidence shows that there was a party tendered to Colonel Jacobson at the Waldorf-Astoria Hotel by Sam Bayer, and that very night Sam Bayer gave a new set of tires to Jacobson. Now, you know as well as I do, ladies and gentlemen, that in April, 1943, it was almost impossible to obtain new tires. And Jacobson's testimony is very clear about that.

3138 Mr. Keenan: I object to that, your Honor. There is nothing in the evidence about how difficult or not it was to get tires.

The Court: I overrule the objection.

Mr. Keenan: Exception.

The Court: Go ahead.

Mr. Robb: We do not object, if the Court please.

The Court: Overruled.

Mr. Robb: We do not object.

Mr. McGohey: Jacobson was quite definite about that, ladies and gentlemen. Jacobson said they were not recapped tires; they were brand new tires.

Now, compare this testimony of Jacobson with the Bayer statement in this office. Bayer denied that he ever gave any tires. I understand Mr. Keenan in his summation to concede that Bayer had actually given the tires. But he denied it in his statement in this office. But you have to compare Jacobson's position with Bayer's position to determine who was telling the truth and who was making an honest, straightforward statement. Jacobson had nothing to gain when he made that admission from this stand; he was testifying to something that was not any credit to an 3140
officer of the United States Army, that he let the father of a couple of boys in his outfit buy him new tires. There was absolutely no reason in the world for Jacobson to lie about that. Jacobson had to be telling the truth when he told that. But when Bayer denied it in February in this office he had every reason in the world to deny that, he had every reason in the world to try to save himself. And he denied it again when he talked to Colonel Snyder, you remember, in August, 1944.

Well, now, to come back to the history of the transfer. Some time in July, 1943, rumors were current at Mitchel Field that gifts had been made to the various officers of the First Fighter Command and that they had been entertained by the Bayers, which, of course, the evidence shows is a fact. It therefore became necessary to get these boys 3141
out of the First Fighter Command in order to avert suspicion from the officers who were identified with the unit. And Radovich was the commander of the First Fighter Squadron. He was very anxious about that, particularly concerned about it, and he told Sam Bayer that. So Sam Bayer says, "Let's have a week." And meantime he works out some plan to get the boys into the Medical Detachment, and all that he needed then, and transferred out of the——

Mr. Ansell: Pardon the interruption, please, sir. You say "he works out some plan." May I ask what the "he" refers to?

Mr. McGohey: Sam Bayer. All he needed then was to get an approval of that transfer out of the First Fighter Command. And the first man along the line that had to give an approval to a request by either Martin Bayer or Melvin Usdan was whom? Radovich, the commanding officer of the squadron in which they were serving. And Radovich undertook to bring that about. The record discloses what happened. Here it is, Exhibit D. Defendants' Exhibit D, the application signed by Martin Bayer asking
3143 to be transferred to the Medical Detachment; first endorsement, passed on for remarks by Major Radovich, then it goes through various other hands, gets over to Fabbricatore and the station hospital at Mitchel Field, then it comes back to Radovich, and on the third endorsement he approves it. Then, you recall, it went on. Finally it got to a commanding general who said he would not approve it because there was a shortage of clerks in the Fighter Command and they ought to put these boys where they would do some good work. And by that I don't mean to impinge or to suggest that the boys, wherever they worked, did not do good work as well as they were permitted to do. Then a mutual transfer was arranged which meant that somebody else came into the Fighter Command in order to take
3144 the place of the two boys that went to the Medical Detachment. And it came back again and Radovich approved it again. That is Exhibit D, ladies and gentlemen.

Now, some of the evidence with respect to the arrangement for that transfer varies. In the statement of Sam Bayer, which is in evidence, he claims that Radovich told him that the boys had to be transferred because the outfit was being broken up and that Radovich thereafter arranged the transfer to the Medical Detachment. Radovich in his statement claims that the boys were being transferred

because of these unsavory rumors around the field about the entertainment. The records, this Exhibit D that we have been looking at, show that the outfit was not being broken up, as Sam Bayer says Radovich told him, but that actually there was a shortage of clerks. And, in fact, the transfer was not able to be effected until two men came into the First Fighter Command to replace Martin Bayer and Melvin Usdan.

Now, I believe that the fact before you supports the statement that the transfers were made because of the rumors regarding these two boys. In any event, these facts we do know and they are uncontradicted, that the transfers could not go through without Radovich's approval, that 3146
Radovich did give his approval, that Radovich received either $1950 or $2,000 in cash from Samuel Bayer either during the period while the transfer was being effected or shortly thereafter. There is no dispute about that. Radovich had to approve, Radovich did approve; Bayer gave about $2,000 and Radovich got about $2,000. It is undisputed that the payment of this money was——

Mr. Ansell: If your Honor please, I certainly am reluctant to interrupt the District Attorney, but we must try to adhere to the facts in the record, and I know Mr. McGohey wants to, but Mr. McGohey has just made the statement that it is indisputably proved in this record that Radovich received $1950 practically contemporaneous with that transfer. I think that Mr. McGohey is not correct in that. 3147

The Court: Ladies and gentlemen of the jury, as I explained to you before, the statements made to you by counsel as to the evidence do not pretend to be evidence themselves. You had heard from counsel for all parties giving you their impressions of what the evidence was and what inferences you should draw from the testimony. Now, with that qualification, or with that caution, I will permit the United States Attorney to proceed.

Mr. Ansell: I thank you, your Honor, and I wish to beg Mr. McGohey's pardon.

The Court: All right, sir. I wish also to call attention of counsel to the fact that, as far as I can recall, Mr. McGohey did not interrupt any counsel during any part of their argument.

All right, sir. Proceed.

Mr. McGohey: Ladies and gentlemen, on that question that has just been raised by General Ansell, in view of the lateness of the hour, I am not going to take the time to reread statements which I read once before, the statement of Major Radovich, but I ask you on that question to look
3149 at page 10 of his statement when you undertake your deliberations, the question of whether or not Radovich got $2,000.

Now, there can't be any question but that Sam Bayer and Elias Bayer were greatly seeking that transfer from the First Fighter Command to the Medical Detachment. I am reading from Volume D, page 9, the testimony of Lieutenant-Colonel Vidal. My question was, "Will you tell us the substance of that conversation? A. I was informed by Mr. Elias Bayer and Mr. Samuel Bayer that Martin Bayer and Private Usdan were being transferred from headquarters First Fighter Command to the base hospital at Mitchel Field. They requested me to ascertain if these orders had been written at that time."

Mr. Keenan: What page?

3150 Mr. McGohey: It appears to be actually 90h.

Then on the next page, 100h, "Q. What, if anything, did Mr. Bayer say to you?

"Mr. Keenan: Which Mr. Bayer?

"Q. Mr. Samuel Bayer. A. Mr. Samuel Bayer? As I recall, he wondered if I could do anything about expediting the issuance of the orders."

Now, then, within a week after assignment the boys were transferred again, this time to the Airborne Engineers—

one of them sent to Bradley Field, in Connecticut, and the other was assigned to Westover Field, in Massachusetts. And when Sam Bayer learned that this transfer was going to take place he and Elias immediately rushed out to Mitchel Field and again they saw Colonel Vidal and they pleaded with him to prevent the transfor. Bear in mind there is no contradiction of Vidal's testimony. I join Mr. Keenan in asking you if you have any doubt about what the truth is in what I say when I quote the testimony to you, you can send for those records—the Government has a set as well as the defense, and we will give you both so that you can see whether we are telling the truth. Vidal says that the two Bayers, both of them, Sam and Elias, told 3152
him that the boys were about to be transferred to an aviation engineers' unit which was scheduled for overseas shipment, that Sam Bayer was very much upset, that he was worried; and Vidal explained to him that the Airborne Engineers was a relatively nice, fairly safe type of work, but Sam Bayer was still wondering whether or not the boys could not be kept from being placed in this outfit. Sam Bayer asked him if he, Vidal, could do anything about it and Vidal told him he could not. However, even after that personal visit, you remember the testimony of Vidal, that they came there, Mitchel Field, and he saw them at the gate; after that they had him on the telephone, and in at least one conversation Sam Bayer again pleaded with Vidal to see if he could not prevent his son and his nephew from being transferred to the Airborne Engineers. Well, 3153
they were not able to get anywhere with Vidal, apparently.

So Sam Bayer then thought of Saffron, Major Saffron. You remember he is one of the men that he talked to in 1942 before the boys went into the ground crew of the air forces. So he called on his brother-in-law Joe Busch and he asked Busch if he wouldn't get in touch with Saffron and find out if the major could do anything to get the boys out of the Airborne Engineers. Busch arranged the ap-

pointment for Saffron to meet Sam Bayer and they met that same evening up at the Governor Clinton Hotel and they had a conversation, Saffron, Sam Bayer and Busch.

Now, it is significant to recall, and you should consider, where the conversation that the three of them had was held. It was in a taxicab driving around the streets in New York. The same kind of furtiveness that characterize the payments, according to Sam Bayer's story, the furtiveness that characterize the payments of various sums of money that make up the approximately 1900 or $2,000 that Bayer paid to Radovich when the boys were transferred from the First Fighter Command to the Medical Detachment. And here
3155 is what Major Saffron says occurred in that taxicab, and I am reading from Major Saffron's testimony, Volume E, page 57, at the bottom of the page:

"Q. Will you tell us the substance of that conversation, what you said and what Bayer said and what Busch said? A. Sam Bayer said, 'I would do anything in my power to keep my boy from going overseas'."

Saffron's testimony is supported by Sam Bayer's own brother-in-law Joe Busch, who was in there in the taxicab with him. Volume D, page 35, the direct testimony of Joe Busch:

"Q. What was that conversation? A. Mr. Bayer asked him if there is anything that could be done for him.

"Q. Mr. Bayer asked whom? A. Major Saffron—if anything could be done for him, and he said, 'Nothing.'

3156 "Q. Did he say anything could be done for him? Did he say what about? A. About the boys.

"Q. And what did Major Saffron say? A. Major Saffron told him that there was a rumor around that Mr. Bayer had spent a lot of money."

That is Bayer's own brother-in-law.

Sam Bayer was unable to get any help from Major Saffron, so next he turned to Lieutenant-Colonel Jacobson, who by this time had left Mitchel Field, you will recall;

and was stationed up in Albany. He called Jacobson on the telephone and he pleaded to do something to get the boys out of the Airborne Engineers, which he described—and by "he" I mean Sam Bayer—in his conversation with Jacobson you will recall Jacobson testified that Sam Bayer said the boys were in a hot outfit, an alerted outfit, and Jacobson stated to him that nothing could be done, that nothing should be done, and that he, Jacobson, thought that Sam Bayer had been a very indulgent father and he thought he ought to let these two boys alone.

You will recall that Jacobson further testified that during that conversation Elias Bayer came on the telephone and said that Sam had fainted, and the following day Elias 3158
called and again he told him that Sam was very sick, that the boy's going had him very worried, and again Elias asked Jacobson if something could not be done.

Now, the next undisputed bit of testimony in this case is that some time in the latter part of August Radovich went to Captain Pepper and he asked Captain Pepper to find out where the boys are located. Pepper did and he told Radovich that they were with the Airborne Engineers, one at Westover Field and one at Bradley Field. Now, it was perfectly natural for Radovich to go to Pepper. Pepper was a classification officer, you remember; he was a man that worked in an office and he was familiar with the procedures of transfer. Radovich asked Pepper if there was any way of getting the boys out of the Airborne 3159
Engineers. He told Pepper that he was acquainted with the boys' families and that he would like to see them transferred out of the Airborne Engineers.

You will find that testimony, Mr. Keenan, in Volume E, page 99.

Pepper informed him that this could not be done because the two units were organized and activated for overseas duty as far as he, Pepper, knew, and they had a relatively

high priority, and that as far as Pepper knew he did not believe they could be transferred to any outfit except some other overseas outfit which had an equally high priority. And two or three weeks later, according to Pepper, Radovich called him on the telephone from Washington and asked Pepper if the boys were still at Bradley and Westover Fields. Then he asked Pepper whether he believed that a request to transfer the boys from the Airborne Engineers to the Air Transport Command would be able to be approved. Pepper told him that he did not think so, that inasmuch as the Air Transport Command was at that time predominantly a continental installation, he did not know
3161 that it had any priority. And some time about the end of September, 1943, Radovich made a personal call on Pepper at Mitchel Field, he came to his office, and he talked again about getting the boys transferred out of the Airborne Engineers. And this time he had a definite plan and he submitted it to Pepper to get his opinion as to whether or not he thought it would work, and asked Pepper if a request for the transfer of the boys to the Air Commando Group would be approved. Pepper told him that since the Air Commando Group was a special mission and had the highest priority in the country, he thought that kind of transfer would be approved. Then Radovich asked Pepper if Pepper thought after Radovich got the boys out of the Engineers and into the Air Commando Group, he could
3162 then get them out of the Air Commando Group. And Pepper's reply to that was that in all fighter groups that he had any familiarity with or any knowledge of, prior to shipment overseas all surplus personnel were dropped from the organization that was going out. Then Radovich said that he was going to request the boys and through a connection which he had in Washington he would transfer them to the Air Transport Command when the Air Commando Group left this country. That is Pepper's testimony.

While these negotiations between Radovich and Pepper were going on, let us see what Sam Bayer was doing about getting the boys out of this Airborne Engineers outfit. According to Captain Kogan, and his testimony is not contradicted in any respect, Sam Bayer some time late in September, 1943, in the company of his son Robert Bayer, visited Captain Kogan at his apartment in Garden City and they had a conversation. And I am reading from Kogan's testimony, Volume E, page 196, at the top of the page:

"A. Mr. Bayer told me at that time that Martin was in an alerted unit for overseas at Bradley Field, the Aviation Engineers, and he asked my opinion, if I thought there 3164
would be any trouble if the boys—that boy, his son there, was transferred away from there. I tried to tell Mr. Bayer at that time that I thought there would be very serious consequences, and Mr. Bayer cried and—" and the answer breaks off.

"Q. What did he say? A. Well, the gist of what he said was he wanted him out of that alerted unit for overseas into another unit."

Now let us get back and see how Radovich was getting along with these negotiations with Pepper. Pepper says that Radovich told him that it would be worth Radovich's while and that Radovich would make it worth Pepper's while to carry out the transfers out of the Airborne Engineers into the Air Commando Unit and thence into the 3165
Air Transport Command. And Radovich, you will remember, made good on that commitment to Pepper. In December, 1943, he walked into the First National Bank in West Palm Beach and he purchased a cashier's check in the sum of $500, drawn to the order of Captain Jack Pepper, and he mailed it to Pepper at Mitchel Field. You will remember that the records of the bank proved that. You will remember they were introduced here by the gentleman, an

officer of the bank, and they are Exhibit 20 in evidence and you can call for them and have a look at them. That check was never cashed by Pepper, as evidenced by the fact that Radovich wrote to the bank the following year, in August, 1944, and his letter is Exhibit 24 in evidence, and he asked the bank what were its requirements in order to redeem the uncashed check.

After Radovich formulated his plan he went to work to carry it out. Miss Goertz, the young lady from the personnel section in the Air Forces headquarters section in Washington, testified, and her testimony is in no wise contradicted; she testified that on the 22nd of November—
3167 please try to remember that date, 22nd of November, 1943—Radovich walked into her office and, as he had the authority to do, asked her to issue an immediate telegraphic order for the transfer of the boys from the Airborne Engineers to the Air Commando Group; and he told her at that time that he was doing this as a favor for a friend. She issued the orders that very day.

Now, two days later, on November 24th—please remember that date—Radovich called her on the telephone from Goldsboro, North Carolina, where the Air Commando Group was stationed, and told her that the group was up to strength and that the two enlisted men were not needed, and he asked her to request the issuance of new orders to take the boys out of that project and to reassign them to
3168 the Air Transport Command in Wilmington.

On the very following day, November 25th, a letter requesting the transfer out of the Air Commando Group was sent from headquarters of the Air Forces in Washington, and that appears in Government's Exhibit 4, which is the actual order that transferred them out of the Commandos and into the Air Transport Command.

Now, ladies and gentlemen, I repeat again that I would like you to direct your attention particularly to those two dates that I have just been talking about, November 22,

1943 and November 24, 1943; those dates are very important and I will come back to them very shortly.

Somewhere about the time that the boys were transferred out of the Air Commando Group to the Air Transport Command, Sam Bayer, through some agents of his, paid $5,000 to Major Radovich. There is no conflict between the statements of the Bayers and the statements of Radovich on that fact.

Now, at this point, the object and the aim which Sam Bayer and Elias Bayer had clung to so stubbornly against the advice of their friends, against the advice of Captain Kogan and Colonel Jacobson and Colonel Vidal and Sam Bayer's own son Robert, was achieved—the boys had been 3170
taken out of the Engineers Division, which was getting ready for overseas duty, and put into the Air Transport Command, a unit which was destined to remain in the continental United States.

At this time, and indeed throughout the entire ensuing period up to February of this very year, the Bayers made no complaint against anyone on account of these transfers or on account of any money that was paid. In fact, the evidence indicates, rather, that they were grateful to Radovich or to anyone else who may have been of any help in effecting those transfers. You will remember that in August, 1944, Colonel Snyder, the Army investigating officer, asked the Bayers to give him whatever facts they might have or they might know concerning Radovich, whom he was then investigating, and he so told them. 3171
Now, instead of seizing on this chance to have Radovich punished if he had been extorting money from him, they denied to Colonel Snyder that they ever paid even for the uniforms, they denied that they ever offered money or gave gifts to any officers, they denied that they ever asked for the transfer of the boys, and indeed they claimed that they had no information of any kind to give Colonel Snyder about Radovich.

Now, of course, when Colonel Snyder was up there asking them these questions, Sam Bayer knew, Sam Bayer knew very well, that there were in existence some records that would show he paid for those uniforms which he denied paying for. So what did he do? He runs down to his brother-in-law, the Busches, and he gets hold of Harold Busch—you remember he testified on the stand here as a man who kept the records for the Buss Company; and according to Harold Busch, Sam Bayer's own brother-in-law, Sam Bayer stood alongside of Busch for a couple of hours, and you will find that in Volume E, page 83, directing the changing of the Buss Company records
3173 so as to obliterate the evidence that the Plymouth Thread Company, Sam Bayer's Company, had paid for those uniforms.

Now, there is in evidence in here, Exhibit 7, and you remember we looked at that at the time it was introduced. Here are some of the changes that were made: Order No. 5512, that was changed and as changed it becomes a job lot of thread to the Plymouth Thread & Yarn Company for $346.99. Order No. 5580, that was changed and as changed it becomes a charge against Plymouth Thread & Yarn Company, one piece of cloth for Ann Solomon. And order No. 5604 was changed and as changed it becomes a charge to the Plymouth Thread & Yarn, one pair of enlisted men's trousers for Robert Bayer. Remember this, you can look at that, ladies and gentlemen.

3174 Now, note the kind of changes. Sam Bayer, the testimony is, sat alongside his brother-in-law Busch, who made these changes. And whose names? His own company, his own secretary and his own son. He picks out three people who in the event of any challenge or question about those changes he knew in the normal course of life, in the normal course of human-relations he could depend upon.

But in addition to this compelling accumulation of independent evidence, we are not relying and we do not have

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to rely in this case on that merely. We have the admissions of each defendant against his own interests. Under the Court's instructions each man's admissions can be considered by you only as against the man that made them, and under that limitation I ask you to let us look at the record, as Mr. Keenan said—quoting the great Governor; well, let us look at the record and see what Sam Bayer's statement shows as to his participation in the conspiracy. It shows the following:

One, that he entertained various officers, all of whom were connected with the unit at Mitchel Field to which the boys were attached.

Two, that he paid for uniforms for those officers.

3176

Three, that he made numerous gifts to Radovich.

Four, that he paid approximately $2,000 to Radovich during the time when the boys were being transferred from Radovich's First Fighter Command to the Medical Detachment at the base at Mitchel Field.

And, five, that he sent $5,000 to Radovich for the transfer of the boys out of the Commando Unit to a unit which was destined to stay in this country.

Now, let us see——

Mr. Keenan: Just a moment. I object to that statement. That summation is absolutely false. He made no such admission in that statement. I object to it.

The Court: Mr. Keenan, it is perfectly apparent that the United States Attorney is not quoting from it; he is giving a summary of what he considers it to mean. The statement itself will be before the jury. The District Attorney is not purporting to read from it. He is arguing what he considers to be a synopsis of the case.

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Mr. Keenan: But, your Honor, he is now quoting an admission, not a synopsis of the case.

The Court: No. He is not undertaking to quote at all. You may proceed.

Mr. McGohey: May I proceed, your Honor?

The Court: Yes, you may.

Mr. McGohey: Thank you.

Now, let us see what Eli's statement shows as to him. It shows, one, that he entertained various officers, all of whom were connected with the outfit to which the boys were attached at Mitchel Field. It shows that he introduced these officers to Sam Bayer and thereafter took them to the I. Buss Uniform Company and made the necessary arrangements for outfitting them with uniforms. Three, it shows that he asked numerous officers to help to get the boys transferred out of the Airborne Engineers.

3179 Four, it shows that he traveled to Goldsboro with the pay-off, when the $5,000 was given to Radovich.

Then let us go on and see what Radovich's statement shows as to him. It shows, first, that he was extensively entertained by the Bayers; second, that he was given the right to sign Sam Bayer's name to checks at the Waldorf-Astoria Hotel, although he denies that ever used that privilege. It shows that he received free uniforms; that his wife received a set of silver, Waldorf-Astoria silver, from Sam Bayer; that he approved the transfer of the boys from the First Fighter Command to the Medical Detachment at the base; that he received approximately $2,000 from Sam Bayer for approving that transfer; that he worked out a plan and arranged for the transfer of the boys from the Airborne Engineers through the Air

3180 Commando Unit to the Air Transport Command; that for doing this he received from Elias Bayer $5,000 in cash at Goldsboro; that he sent a draft for $500 to Captain Pepper at Mitchel Field from a Palm Beach bank in payment for his advice in connection with the plan for transferring the boys out of the Airborne Engineers.

Now, there is no contention that the statements of the Bayers were other than voluntary statements. That claim has not been made. Indeed, the statements themselves show——

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Mr. Keenan: I object to that statement as not in accordance with the record, as your Honor knows it to be.

The Court: I don't see anything improper in the argument.

Mr. Keenan: We have made the contention before this Court in the absence of this jury——

Mr. McGohey: If it was in the absence of the jury, Judge, I submit it should not go in here——

The Court: I may have something to say to the jury about that tomorrow.

Mr. Keenan: I beg leave to state at this time that he is not commenting upon what the evidence is. He says there is no contention upon our part. To the contrary, 3182
the record will so show. And that is not true——

The Court: I will undertake to state what is true. There was objection to the statement——

Mr. McGohey: Before the jury, your Honor?

The Court: No. I do not see anything wrong.

Mr. Robb: If your Honor please, at this time I move for the withdrawal of a juror and a declaration of a mistrial on the ground of prejudicial statements that cannot be corrected at this time.

The Court: Motion overruled.

Now, will you come up?

(The following proceedings took place at the bench out of hearing of the jury:)

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The Court: I recall objection was made to the introduction of the Bayer statement, but I am not definite upon what ground the objection was made.

Mr. Keenan: On the ground that they were induced and therefore were not legal voluntary statements. That is the sole ground of it. The record will show that, your Honor. It is very clear.

The Court: All right, sir.

Mr. McGohey: Not before this jury, your Honor.

The Court: You may have your exception.

Mr. Keenan: I know differently.

(The following proceedings were had in the hearing of the jury:)

The Court: On that, ladies and gentlemen, I anticipated myself a little. I will go into more detail tomorrow. Objection was made to the introduction of the Bayer statements, objection was also made as to the Radowich statement, upon the ground that they were not admissible in evidence because not voluntary. I heard evidence on that
3185 issue and ruled that they were admissible and admitted them into evidence. I have permitted testimony about the circumstances attending the giving of all three statements or what bearing such testimony has in your minds in considering the weight to be given to the statements which you have heard in evidence, and I will be a little more explicit about that tomorrow.

All right.

Mr. Keenan: I ask your Honor to charge this jury that a statement made by the District Attorney that those statements were admitted without any objection is not true and that the jury be so instructed at this time.

The Court: I am not sure exactly what the District Attorney said, but if it was a statement that the statements
3186 of the Bayers were admitted without objection, then that would no be entirely accurate.

Mr. McGohey: I did not say that, your Honor.

Mr. Keenan: He said there would be no contention that these were not voluntarily admitted or given. And that is not in accordance with the record.

The Court: That is not in accordance with the record. And he says he did not say it. Now, proceed with your argument.

Mr. McGohey: I am going to read from Government's Exhibit 8, which was the statement of Samuel Bayer in evidence:

"Q. I understand that you want to make a voluntary statement in connection with the matter on which you were arrested on the complaint some months ago. A. Yes.

"Q. And you have consulted your attorneys in the matter and they have advised you to make such a statement? A. Yes.

"Q. You understand that the statement you do make might or could be used against you later in any criminal proceeding, don't you? A. Yes."

Mr. Keenan: Your Honor, I ask at this time that the 3188
jury be instructed that there are legal questions involved.

The Court: I shall instruct the jury on that tomorrow.

Mr. Keenan: And that the statement, merely a statement of the word "voluntary" as understood by jurors, and "voluntary" as understood by the law, may very well be different.

The Court: I shall mention that in my charge tomorrow. And you may proceed with your argument.

Mr. McGohey: I am reading now from Government's Exhibit 19 in evidence, the statement of Samuel Bayer:

"Q. Mr. Bayer, have you spoken to your attorney about coming in here and making the statement in connection with the matter in which you were arrested some months ago? A. Yes.

"Q. And they have advised you to make this statement? 3189
A. Yes, sir.

"Q. You are making it voluntarily? A. Yes, sir.

"Q. You understand that anything you might say might later be used against you in a criminal proceeding? A. Yes, sir."

Both of those exhibits—the evidence clearly shows that those statements were made in the presence of Mr. Keenan and Mr. Levy, counsel for the defendants Bayer. And the

statements show on their face what I have just read to you, that they were made after consultation with their attorneys.

Now, on behalf of Radovich, on the other hand, it is claimed that his admissions were made under duress. Now, on that matter, again let us have a very careful look at the record. The statement of Radovich, in evidence, before you was made in March of this year in this building. The uncontradicted testimony of Agent Flynn is that Radovich came in at Flynn's request, that the writing out of the statement was begun on the 15th day of March, some time in the afternoon, that it was not completed that
3191 day and that the agent suggested that Radovich come back the following day, March 16th, to complete it; that Radovich stated that he had some other business to attend to on March 16th and he said he would come back on the 17th, and he did come back. And on that day the taking of the statement was completed. It was read by Radovich, he put his initials on each page except the last page, on which he signed his [redacted] name; he did that in the presence of Agent Flynn and [redacted]ent McCabe.

The statement itself recites that it was made voluntarily, with full knowledge of the fact that it could be used against him in any criminal proceeding——

Mr. Robb: If your Honor please, I hate very much to interrupt Mr. McGohey, but the statement doesn't show —it doesn't say that it could be used against the defendant
3192 Radovich.

The Court: You had mentioned that in your argument. I don't think it is proper to repeat.

Mr. Robb: Mr. McGohey says——

The Court: All right.

Mr. McGohey: I am going to read from the statement:

"I, Major Walter V. Radovich, Air Corps, serial number 0416891, make the following supplementary statement to Special Agents E. J. McCabe and G. J. Flynn who have

identified themselves to me and whom I know to be special agents of the Federal Bureau of Investigation. No threats of force, promises of favors or duress of any type has been offered to me, to induce me to make this statement, and I know that anything I may say may be used in a criminal proceeding. I have been told that I do not have to make this statement unless I desire to do so."

The uncontradicted testimony of Agent Flynn is that during the taking of the statement from Radovich on March 15th and March 17th this year, both he and Radovich referred to and read from a prior statement which Radovich had given to Flynn and Agent Brown some time about the 5th or 6th of September, 1944, in the hospital at Mitchel Field. 3194 Flynn's testimony is that the September statement was gotten out and looked at at the suggestion of Major Radovich. You will find that testimony in volume H, page 147.

It is now contended on behalf of Radovich that the statement given by him in September, when he was in the hospital, was an involuntary statement by reason of the circumstances of his confinement. It is further contended that the statement given by Radovich in March is also involuntary by reason of the fact that he was shown the September statement at the time he made the March statement and that they are substantially alike.

Now, let us consider these contentions. You remember Mr. Pender, the man who was the attendant at the hospital, 3195 and according to the testimony of Pender, who was Radovich's attendant in ward 15, Radovich did not exhibit any evidence of mental sickness or insanity. You will remember also Detective Kelly, the man who was the provost marshal guard, who had been a sergeant and who is now a detective in the Nassau County Police; Detective Kelly testified that he was the man who used to take Radovich out for his walks. He testified that Radovich exhibited no evidence of insanity or mental illness to him. The evi-

dence produced by the defense further shows, and this is very important in view of the argument that you heard this morning, their own evidence clearly shows that Radovich was not at that time, while he was in that hospital, a man that was being pushed around or given any third degree treatment.

Mr. Keenan: Just a moment. We want to object to that, your Honor. Counsel for the Government has stated "evidence presented by the defense", and I ask him now to correct that.

Mr. McGohey: I will correct that to say, "evidence produced on behalf of the defendant Radovich."

3197 Mr. Keenan: That is correct.

The Court: All right, go ahead.

Mr. McGohey: You heard Mr. Robb this morning, and General Ansell, after him, talk about this terrible, cruel third degree, much more vicious than the hose beating and the kicking. Well, let us look into that. You remember Kelly's testimony, that the afternoon that he came over there and found the two civilians who turned out to be or who were, in fact, the FBI agents; he says that about that time somebody walked in to Radovich with an order, that Radovich was dressed, you remember—he had gotten into his uniform; he was wearing his decorations—and somebody came in and they handed Radovich an order and he looked at it and he read it, and it was an order which purported to direct him to remove his decorations from his
3198 breast and required him to endorse it on the bottom so that there would be proof that he had seen it. And what did this man that was being third degreed do? He handed it back to the messenger and he said, "I will not take off these decorations—" I can imagine that he probably got very angry about it, and he said, "I won these decorations and I am not going to take them off." And he didn't take them off and he didn't sign the order.

Do you think, ladies and gentlemen, that this young lad, under arrest by the Army, who had been in there long enough to know that the Army has a strong discipline, do you think a lad who would defy an order of that kind was then going to be pushed around by a couple of civilians? You just think about that when you are thinking about this statement of the third degree. Radovich was not third degreed.

And, furthermore, there is evidence in here that Radovich knew precisely what his rights were, not only this business about the decorations, but you will remember that Kelly said he complained to him because he was not able to see counsel, and he told him there was a man on that post 3200
by the name of Bradspies that he wanted to see, and Kelly says he told his superior and that his superior made the arrangement. And Kelly says that Bradspies came to see Radovich and saw Radovich prior to the time that Radovich gave his statement to the FBI agents in the hospital at Mitchel Field.

Now, in view of all that evidence there can't be any doubt whatever that the statement that Radovich gave to the agents in September at the hospital was a completely volumtary statement. There is no basis whatever for assuming that this man who flaunted and defied the order of the Army to remove his decorations would meekly submit and make damaging statements against his own interest to two civilians.

3201

Now, further looking into the record, it discloses that at the end of September at least Radovich was free from the confinement of the hospital and he had the full freedom of the Mitchel Field base, the entire base, except for the Officers' Club. It shows that he had full access to telephone and telegraph so that he could have consulted any counsel of his own choosing any place in the United States.

It further shows that on January 2nd of this year, almost two months before he came in and gave this statement,

which is in evidence, he was completely free from all restrictions except those which any soldier is normally subjected to. There is no testimony whatever that Radovich in March when he gave the statement which is in evidence made any claim to the agents or to anyone else that the September statement had been forced from him. You won't find that any place in that March statement. And there is no testimony that he ever said that. You will find no testimony that he was under duress whatever at the time he made the March statement. And you won't find any testimony whatever that shows that the statements that Radovich made in March were in any wise different from
3203 those he made in September. As to the essential facts regarding the arrangements for the transfers of these boys, the actual transfers, the payments of the money, all of the statements by the Bayers and by Radovich are in substantial agreement and all of them are strongly corroborated by the mass of independent testimony on these points.

Now we come to the claim, ladies and gentlemen, which is not unusual, by persons who have paid money for favors that the payments were involuntary and the product of extortion. The charge here is that the defendants conspired to defraud the United States of its right to the honest services of Army officers and particularly the honest, unbiased services of the defendant Major Radovich. A conspiracy, a plan and purpose to defraud the Government of the honest services of its officials and particularly
3204 of Radovich is a crime, and if in the execution of that scheme the Bayers exposed themselves to Radovich's greed, that is immaterial; that only demonstrates that other crimes were committed in the furtherance of this illegal conspiracy here charged and on trial before you. It is a very common occurrence for a series of illegal acts to be committed in carrying out the illegal conspiracy. One wrongful act does not excuse another. It is no defense to the

crime charged here against the Bayers that they became the victims of greed after their plan and purpose became known to those who were willing to capitalize it.

But let us examine this claim of extortion on the assumption that perhaps it might have some bearing; just let us see whether there is any extortion. Now, in order to give credence to this claim of extortion you would have to disregard the evidence of Colonel Vidal, of Colonel Jacobson, of Captain Kogan, of Major Saffron and of Joseph Bush. Those five witnesses, each one of those witnesses unmistakably testified that Sam Bayer pleaded and begged these officers to help him secure the result which Radovich ultimately accomplished. He pleaded with all to help 3206
him get the boys out of those airborne engineer units. Each of the officers advised against interfering with the movements of the boys. Now, I think it is a fair observation to state that the payments to Radovich by Sam Bayer at least were consistent with the assertion by Bayer, testified to by Major Saffron, that he would do anything in his power to keep the boys from being shipped overseas.

Now, look at the Bayers' conduct. Is their conduct throughout the entire period of the year 1943, from the beginning right up to August, 1944, consistent with extortion, or is it rather clearly the conduct of men desperately determined to accomplish a purpose, looking only for someone to help them and giving every evidence of their willingness and their ability to pay for help? Is their conduct 3207
in August, 1944, when they lied to Colonel Snyder and ran to the Busches to change the records consistent with the victims of extortion? Or, rather, was it the conduct of men driven by their own sense of guilt and their fear of detection? Victims of extortion, ladies and gentlemen, don't go around destroying evidence against their oppressors. And remember that when you think about the changed record. Isn't it perfectly clear to you ladies and gentlemen that.

the claim of extortion was never raised until the investigation began to close about the Bayers? I tell you, ladies and gentlemen, I don't believe there was any extortion.

But it may be that the Bayers paid more than they anticipated paying; perhaps they thought, and maybe they had a right to believe, that after all the lavish entertainment and the gifts they had given to Major Radovich, Radovich might have been a little less exorbitant in the price that he asked; but can there be any doubt that the payments were made for favors which the Bayers avidly and avariciously sought? Can there be any doubt that the Bayers sought to obtain and were willing to pay for and
3209 did pay for favors, for considerations to which they were not legally entitled?

It has been suggested to you that in entertaining and giving gifts to the various officers the Bayers were only expressing normal generosity and gratitude which all Americans feel toward men in the service. Well, let us look at the record on that. You won't find any place any entertainment of anybody except an officer in an outfit where these boys were stationed, and an officer that was able to help them in the role of officers, and outside of Kogan they are all in the First Fighter Command. Were there any enlisted men entertained? Was there any expression of bounty to anybody except somebody that could help with the transfers?

3210 In the light of all this, can there be any doubt in your mind that the Bayers were willing to and did resort to corruption to attain their ends? Before I leave this subject of corruption I would like to recall to your mind what I asked you to remember earlier, namely, those two dates in November, 1943, the 22nd of November and the 24th of November.

You will remember that the evidence shows that the orders transferring the boys out of the airborne engineers to the First Commando unit, that is, to the First Air Commando unit——

Pardon me, your Honor, how much more time do I have?

The Court: You have twenty minutes at your disposal.

Mr. McGohey: You will remember that the evidence shows that those orders getting out of the Airborne Engineers into the Air Commandos down at Goldsboro were requested by Radovich and actually issued on November 22nd, and you will remember also that the orders transferring them out of the Air Commandos and into the Air Transport Command were requested by Major Radovich two days later, namely, the 24th. That is the uncontradicted testimony of Miss Goertz, the young lady from Washington.

Now, Sam Bayer says in his statement that he first 3212
learned of the transfer of the boys from the Airborne Engineers through a telephone call from his son Martin who told him that he was leaving that day from up in New England to go to Goldsboro. On the same day, according to Sam Bayer's statement, that very same date that he received the telephone call from young Martin he met Radovich at Cavanaugh's restaurant in the company of Miss Solomon and that there, at that meeting, in Cavanaugh's in the presence of Miss Solomon for the first time Radovich told him that unless he paid $5,000, that unless he, Radovich, got $5,000 from Bayer he, Radovich, was going to take the boys with him to Burma on a dangerous mission.

Now you will recall that neither Sam Bayer in his state- 3213
ment nor Miss Solomon in her testimony from the stand was able precisely to fix that date of that meeting in Cavanaugh's restaurant, but young Melvin Usdan fixed it precisely. He testified that he and Martin arrived at Goldsboro, North Carolina, on November 25th, and he testified that they had left Westover the day before, November 24th. He testified that the date he left, the 24th, he phoned his family and Martin Bayer phoned his father, Samuel Bayer. So that the date, the date of the telephone

call which informed Sam Bayer of the transfer is definitely fixed, and since that is the date that Sam Bayer says he met Radovich at Cavanaugh's, the date of that meeting at Cavanaugh's is fixed definitely and precisely as the 24th of November, 1943.

So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit
3215 and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.

Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command on the very day that, according to Sam Bayer, he, Radovich, is threatening to take the boys on a dangerous mission that he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived at Goldsboro.
3216 Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando. So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very

little. Well, there is certainly no doubt that $5,000 was paid by Samuel Bayer and there is no doubt that Radovich got $5,000. Radovich says the Bayers offered him the money. The Bayers say the money was paid under threat. Well, I leave it to you ladies and gentlemen to decide on the basis of the undisputed testimony in this case and the records in this case where the truth lies.

But these facts stand out. The Bayers wanted the boys transferred out of the outfits at Westover Field. Read the testimony of Jacobson, Vidal, Kogan and the rest of them on that point. The boys were transferred out of these outfits. Radovich is the one who had them transferred out. Bayer paid $5,000, Radovich got $5,000. 3218
And, of course, you will not forget that previously Radovich approved the transfer out of the First Fighter Command to the Medical Detachment, at which time Sam Bayer paid approximately $2,000 and Radovich got $2,000. So, altogether, from the beginning to the end, Bayer paid $7,000, Radovich got $7,000.

All of the evidence in this case, ladies and gentlemen, demonstrates beyond a reasonable doubt the guilt of these defendants on trial. There is no possible view of the evidence consistent with the innocence of any one of these defendants. There is no verdict which can be justified in reason except a verdict of guilty as to each of the defendants here on trial.

I thank you very much for your patience. I hope I have not tired you too much at this late hour in the afternoon. 3219
Thank you.

The Court: Ladies and gentlemen, I wanted to add my thanks for your patient and attentive attention to all the summations as they have been completed during the day, and it is not any later than I thought this morning. You have heard everyone whom you are required to hear except me. You will be required to hear from me tomorrow morning my charge and giving you the law of the case

which will govern you in your determination of it. Then the case will be submitted to you for your decision.

I repeat my admonition—don't undertake to decide it or discuss it, particularly not to discuss it with anyone else at this late date. It will be given to you for your decision tomorrow morning.

Does it inconvenience any of you to come down at 10 o'clock?

All right. I much prefer that you have ample time to consider.

So adjourn court now until 10 tomorrow morning.

(Adjourned to October 23, 1946; 10 A. M.)

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(The following are the Government's requests to charge.)

The Government respectfully requests the Court to charge as follows:

1. "It is not necessary for the Government to prove the guilt of the defendants or any of them beyond a possible doubt. If that were the rule, few men, however guilty they might be, would be convicted. The reason would be that in this world of ours it is practically impossible for a person to be absolutely and completely convinced of any controverted fact which by its nature is not susceptible of mathematical certainty. In consequence, the law is such
3222 that in a criminal case it is enough if proved that the defendant's guilt be established beyond a reasonable doubt—not beyond all possible doubt."

2. By the term "reasonable doubt" is meant not a capricious doubt, nor every doubt which may flit through your minds in considering this case, but a substantial doubt —a doubt that you can give a reason for if the court called on you to give one.

3. A reasonable doubt of the guilt of the defendants is a doubt based on reason and which is reasonable in view of all the evidence; an honest, substantial misgiving, generated by insufficiency of proof. It is not a capricious or fanciful doubt suggested by the ingenuity of counsel or jury, and unwarranted by the testimony, nor is it a doubt born of a merciful inclination to permit the defendants to escape conviction, or prompted by sympathy for them or those connected with them. Neither can you create sources of doubt by resorting to matters outside the evidence.

4. The term "reasonable doubt" means a doubt for which a good reason can be given in the light of all the evidence. It means a doubt which is substantial and not merely shadowy. It does not mean a doubt which is merely capricious or speculative. Neither does it mean a doubt born of reluctance on the part of a juror to perform an unpleasant duty, or a doubt arising out of sympathy for a defendant or out of anything other than a candid consideration of all of the evidence presented. 3224

5. While the accused, at the beginning of the trial, are presumed to be innocent, yet, whenever proof shows beyond a reasonable doubt their guilt, then the presumption of innocence disappears from the case.

6. Where two or more act together to accomplish something unlawful, a conspiracy is shown, even though there be no direct evidence of an express agreement. In short, a mutual implied understanding is sufficient, so far as proof of a combination is concerned. The agreement is generally a matter of inference deducted from acts of the persons accused done in pursuance of an apparent criminal purpose. 3225

7. It is not necessary that all of the conspirators be acquainted, one with another. It may be that they have not

been previously associated together. One conspirator may only know a few of the others, but, where one who knows that others are acting together to violate the law, intentionally cooperates to further the object of the conspiracy, he becomes a party to it.

8. When men enter into an agreement or conspiracy to accomplish an unlawful end, they become agents for one another and the act of one in pursuance of the common purpose is deemed to be the act of all and to make all responsible for that act.

3227 9. "In determining whether or not a conspiracy existed in a case like the present, you are not to judge the character and effect of the conspiracy by dismembering it and viewing its separate parts, but only by looking at it as a whole."

10. "I do not mean to require of you a finding that all these parties at any one time should meet together and form an express agreement. * * * Of course, I suppose that when men in fact enter into a plan of that character they do not expressly agree. Much is left to unexpressed understanding and it is not necessary that there should have been any moment in which all met and with any formal expression of words agreed upon a plan."

3228 11. And for a conspiracy to defraud the United States, the act to be done need not be a violation of any criminal statute.

12. It is immaterial who originated the conspiracy and if you find that in fact there was a conspiracy and that any defendant joined the conspiracy at its inception or at any time thereafter it is then your duty to convict. All who participate in any phase of the conspiracy with guilty knowledge thereof are liable.

13. If the parties act together to accomplish something unlawful, a conspiracy is shown, even though the individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. They may not have previously associated together. One defendant may know but one other member of the conspiracy, but if knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

14. The indictment in this case charges the defendants with conspiring, among other thing, "to defraud the United States." To defraud the United States does not necessarily mean to do the United States a pecuniary injury. 3230

"It is well settled that these words are broad enough to include any conspiracy for the purpose of impairing, obstructing or defeating the lawful function of any department of the government."

15. Defrauding the United States is a term which is not limited to thought of the definitions upon property right, but is broad enough to include any act which interferes with or hampers the United States in the successful prosecution of any policy established by law notwithstanding the fact that the United States lost thereby not a dollar in value or otherwise.

16. A conspiracy having as its object the impairing, obstructing or defeating of the lawful function of any department of the Government by deceit, craft, trickery, misrepresentation or chicanery is within the purview of the statute. In such a case it is not necessary for the Government to allege or prove any direct financial loss to the United States. 3231

17. It is not necessary that the conspiracy should originate with the person charged. Everyone coming into a

conspiracy at any stage of the conspiracy with knowledge of its existence is regarded in law as a party to all the acts done by any of the parties before or afterwards in furtherance of a common design.

18. It is not necessary to conviction that all conspirators should join in the overt act; for the act of one done in furtherance of the conspiracy becomes the act of all.

19. While the overt act done to effect the object of the conspiracy is essential to render a conspiracy punishable, yet such act need not be a criminal act, much less an act
3233 constituting the crime that is the object of the conspiracy. That is, the overt acts in execution or furtherance of the conspiracy may be criminal or innocent.

20. All overt acts charged in the indictment need not be proved to sustain a conviction. If any one be proved beyond a reasonable doubt, it is sufficient to make out the offense.

21. "Circumstantial evidence is that evidence which tends to prove a disputed fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that the fact exists which is sought to be established. This is legal evidence, and a jury must act upon it as if it were direct, when it is satisfactory beyond a reasonable doubt."

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22. The evidence of previous good character which was adduced at the trial in behalf of the defendants is not of itself sufficient to create a reasonable doubt in your minds as to their guilt. You are instructed to consider such evidence of good character together with all the other facts in evidence brought out at the trial in determining their guilt or innocence.

23. If the jury believes the defendants guilty beyond a reasonable doubt, no previous good character however proved would be any excuse for acquitting them.

24. If any defendants testify in their own behalf: You should specially look to the interest which the respective witnesses have in the case or in its result. Where the witness has a direct personal interest in the result of the case, the temptation is strong to color, pervert or withhold the facts. The law permits a defendant at his own request to testify in his own behalf. The defendants' testimony is before you and you must determine how far it is credible. The deep personal interest which every 3236
defendant may have in the result of the case should be considered by the jury in weighing his evidence and in determining how far or to what extent, if at all, it is worthy of credit.

25. The law permits a defendant at his own request to testify in his own behalf. The testimony of the individual defendants is before you. You must determine how far it is credible. The deep personal interest which every defendant may have in the result of the suit should be considered by the jury in weighing his innocence and in determining how far or to what extent, if at all, it is worthy of credit.

26. "You are instructed that interest creates a motive 3237
for false testimony; that the greater the interest the stronger is the temptation and that the interest of the defendant in the result of the trial is of a character possessed by no other witness, and is therefore a matter which may seriously affect the credence that shall be given to his testimony * * *. The peculiar and deep inteerst which the defendant has in the result of the trial is a mat-

ter affecting his credibility and (is) to be carefully considered by them (the jury)."

27. The indictment contains one count. It is charged that beginning September 1, 1942, and continuing thereafter until the filing of the indictment in July, 1945, in the Southern District of New York, the defendants unlawfully and knowingly conspired and agreed to defraud the United States of its right to the honest and conscientious services of officers of the United States Army. The indictment alleges that it was the aim and object of the conspiracy, among others, to prevent the assignment of
3239 Martin Bayer and Melvin Usdan to a combat unit and, in addition, to prevent the assignment of said men to a unit of the United States Army alerted for overseas duty; it further alleges that towards the ends aforesaid, various gifts and payments were made to various officers of the United States Army stationed at Mitchel Field and more particularly, that the defendants Elias Bayer and Samuel Bayer or either of them paid to the defendant Walter V. Radovich, an officer, to wit, a major of the United States Army, at various times sums aggregating $7,000.

28. The statute under which this charge is made is Title 18, United States Code, Section 88, and the essential elements of the offense are:

3240 (a) two or more persons.

(b) conspire.

(c) to defraud the United States in any manner or for any purpose.

(d) and one or more of the parties do any act to effect the object of the conspiracy.

29. The provisions of the said statute are designed to protect the Government in its rights, privileges, operations and functions against fraudulent operations.

30. The Government means to safeguard itself against being defrauded out of its right to administer an intelligent and honest service of the departments and officers of the United States in the interest of the people and thus if you find beyond a reasonable doubt that the object of this agreement or conspiracy was to defraud the Government of that right by deception or artifice, or if you find beyond a reasonable doubt that this obstructed or interfered with the operations of the Government department, then you will find that the Government was defrauded. 3242

31. The statute under which this indictment is drawn is broad enough to include in its terms any conspiracy for the purpose of impairing, obstructing or defrauding the lawful function of any department of Government. If you find that any conspiracy or agreement existed which was calculated to obstruct or impair the fair, honest and efficient deployment and assignment of military personnel from and to units of the United States Army, that would constitute defrauding the United States.

32. "The word 'fraud' is not limited to the thought of the deprivation of money or property by the acts of wile or deceit, or to depredations upon property rights, but is broad enough to include any act which interferes with or hampers the United States in the successful prosecution of any policy established by law." 3243

33. "The duty is upon you; in considering this statute, to have in mind the object of government in respect to a statute of this kind, as you would have in mind the

object of a statute directing itself against wrongs destructive of individual property rights. The chief aim of government being that of protection and service, it may safeguard itself against conspiracies or combinations, or acts intended to impair its proper administration, or conspiracies to impair any of the functions of the government. It may declare it unlawful to combine for the purpose of doing any act which obstructs or interferes with the operations of government or any of its departments. The government may unquestionably safeguard itself against being defrauded out of its right to administer an intelligent and honest service in the interests of the
3245 people."

34. If upon the evidence presented you find beyond a reasonable doubt that the defendants or any two of them conspired to defraud the United States of its right to the honest and conscientious services of Major Radovich or any other Army officer, and if you further find beyond a reasonable doubt that towards that end payments of money were made, then I charge you that whether the payments followed demands therefor or whether the payments followed offers thereof is immaterial.

35. If the jury find any witness has testified falsely concerning any material portion of his testimony, you must disregard that part of his testimony and you may
3246 disregard his entire testimony.

36. If you find that a defendant manufactured, suppressed, secreted or altered evidence, such as books of account or other records, you may consider that fact as evidence of a guilty knowledge or consciousness of guilt.

37. False contradictory statements by any defendant about the material circumstances of the crime with which

he is charged are badges of guilt and may be accepted as evidence of guilt of such defendant.

38. The sole question before you is whether the defendants named in the indictment are guilty of the charge therein laid against them. Your only task is to determine whether they or any of them are guilty as charged. You have no concern with the guilt of any person or persons not named in the indictment and not defendants in the trial which has just drawn to a close. If the evidence or any circumstances surrounding the presentation points to the guilt of any person or persons not named in the indictment and not on trial before you, you are in no sense 3248
to consider such evidence or such circumstances except in so far as it bears upon the question of the guilt of the defendants or any of them.

39. You are instructed that the question of possible punishment of the defendants or any of them in the event of conviction is no concern of the jury, and should not in any sense enter into or influence your deliberations. The duty of imposing sentence rests exclusively upon the Court. The function of the jury is to weigh the evidence in the case and determine the guilt or innocence of the defendants solely upon the basis of such evidence. Under your oaths as jurors you cannot allow a consideration of the punishment which may be inflicted upon the 3249
defendants, if he is convicted, to influence your verdict in any way.

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DEFENDANTS BAYERS' REQUESTS TO CHARGE.

1. INDICTMENT. An indictment is nothing more or less than an accusation in writing. It is the instrumentality whereby a criminal action is instituted. The fact that a grand jury has returned an indictment against a man is not to be considered as evidence of the man's guilt. On the contrary, the defendants are presumed to be innocent of the accusation alleged against them in the indictment and you are hereby charged, as a matter of law, that it is your duty to presume the defendants to be innocent of the charge made against them unless and until you are satisfied of their guilt by the evidence adduced in support
3251 of the indictment, beyond a reasonable doubt.

2. PRESUMPTION OF INNOCENCE. Every person charged with a criminal act by law is presumed to be innocent of that charge and throughout your deliberations, and until such time as you are convinced, beyond a reasonable doubt to the contrary, the defendants are entitled to this presumption of innocence.

3. This presumption of innocence, under the American system of jurisprudence, is a substantial part of our law and follows the defendants not only when the indictment is returned, but stays with the defendants throughout the entire case, and must not be cast aside by the jury through passion or prejudice. This presumption of inno-
3252 cence, which clothes every person accused of crime, imposes upon the Government the burden of establishing the guilt of a person accused not by a mere preponderance of evidence, as in civil cases, but beyond a reasonable doubt. You are required, therefore, to give careful and weighty consideration to the presumption that the defendants here on trial are innocent of the accusation made by the Government against them and if, after a consideration of the evidence in this case, you have any reasonable doubt

as to the guilt of the defendants, it is your duty to acquit them. You must exercise the utmost caution and care in considering the evidence here, lest you unjustly convict an innocent man.

4. BURDEN OF PROOF. The burden of proof is on the prosecution. The prosecution has the burden of establishing every fact and circumstance essential to the guilt of the accused. Each fact and each such circumstance must be proved beyond a reasonable doubt before a verdict of guilty can be arrived at.

5. If the Government fails to establish each and every 3254
fact material and essential to the guilt of the accused, either because there is no testimony supporting such element, or because the testimony in support thereof does not satisfy you beyond all reasonable doubt of the truth, then it is your duty to acquit the accused for the reason that the Government has failed to establish their guilt. The burden on the part of the Government to prove every element of the crime charged, beyond a reasonable doubt, never shifts but always remains with the Government throughout the trial.

6. The law does not require, and the defendants are not called upon to prove that they are innocent of the accusation made against them, as their innocence is conclusively presumed, until the contrary is established beyond 3255
a reasonable doubt.

7. The fact that the defendants did not take the stand cannot in anywise be charged or urged against such defendants; and you are to draw no inference whatever from the fact that the defendants have not taken the stand in this case. I charge you, as a matter of law, that the defendants are entitled to rely upon the judgment of their

counsel that the Government has made out no case calling for any explanation or testimony on their parts, or in the alternative the judgment of their counsel that such explanation as has already been furnished in answer to the questions propounded to the defendants by the Assistant United States Attorney and now in evidence obviated the necessity of their giving further testimony on this subject.

8. You must bear in mind that the law does not require a defendant in a criminal case to prove himself innocent of the charge made against him by the Government and that the Government has the burden of proving the de-
3257 fendants guilty, beyond a reasonable doubt, in the manner and form charged in the indictment, to the satisfaction of the jury, and unless the prosecution has done so, it is the duty of the jury to find the defendants not guilty and to acquit them of the charge made in the indictment.

9. REASONABLE DOUBT. The term "reasonable doubt" means a doubt of such quality which, were it to arise in your private lives in connection with some important decision required to be made by you, would cause you to pause, hesitate and ponder in that decision. So, if when all the facts in evidence in this case have been considered by you, and you are not abidingly persuaded and convinced, to a moral certainty in your conscience that the defendants are guilty, you have a reasonable doubt.

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10. After a consideration of the evidence in this case, if you feel that the facts established by the Government are as consistent with innocence as they are with guilt, it is your duty to render a verdict of not guilty and acquit these defendants, for you may not base a verdict of guilty upon the evidence in this case unless the facts proven by the prosecution exclude, to your complete satisfaction, every other hypothesis but that of guilt.

11. And where the facts or circumstances proven by the Government are susceptible of two inferences, one pointing to innocence and the other pointing to guilt, it is your duty to adopt the inference pointing to innocence, even though the inference pointing to guilt may be equally weighty.

12. You are charged, as a matter of law, upon the evidence of this case, that unless the hypothesis of guilt flows freely and naturally from the facts proven and unless all such facts are consistent only with guilt, such evidence does not warrant a conviction and if the evidence in this case is reconcilable with the conclusion of innocence, as well as a conclusion of guilt in your minds, I direct you, as a matter 3260
of law, that it is your duty to reconcile the facts with innocence, and you must therefore find the defendants not guilty of the crime charged and acquit them.

13. In considering the evidence offered by the Government in this case, you must always bear in mind that the Government has the duty of establishing each fact and each circumstance essential to the commission of the crime of which the defendants are accused, beyond any reasonable doubt.

14. So, if in your opinion, the evidence introduced by the prosecution is only sufficient to raise a conjecture or a suspicion unfavorable to the accused, it is not such evidence as would justify you in rendering a verdict of guilty, and it is 3261
your duty, under such circumstances, which I charge you, as a matter of law, to acquit the defendants.

15. For, in order to convict the defendants, you must satisfy yourselves, beyond a reasonable doubt, that the practices in which they engaged were in furtherance of a scheme, which they wilfully, knowingly and intentionally conceived and devised, in the very first instance, and at the very outset, with criminal intent and purpose.

16. In this connection, I charge you, as a matter of law, that fraud is never presumed. On the contrary, the presumption in law is that parties, in their business relations, are prompted by honest motives, and this presumption is so well established in law that before you are justified in abandoning that theory of the conduct of the defendants in this case, you must be satisfied, beyond a reasonable doubt, and not by mere conjecture or suspicion, that the defendants intentionally, wilfully and knowingly embarked upon a course of dealings with fraudulent purpose and intent.

3263 17. And unless you find, beyond a reasonable doubt, that the defendants did not act in good faith, it is your duty to acquit them.

18. And in determining the guilt or innocence of the defendants, you must consider whether or not they acted in good faith, for good faith in a case such as this, is a complete defense.

19. CONSPIRACY. The essentials of a conspiracy in a criminal prosecution may be defined as a confederation between two or more persons, to do a criminal or an unlawful act, or a lawful act by criminal or unlawful means.

20. In other words, to constitute a conspiracy, the pur-
3264 pose to be effected by it must be unlawful in its nature, or in the means to be employed for its accomplishment, and to constitute a conspiracy, there must be a confederation of two or more persons; and there must be a unity of design and purpose, for the common design is the essence of the conspiracy.

21. The confederating together is so necessary, as a constituent element of the crime, that several persons may,

simultaneously, actually do, without incurring liability to punishment, that which, if it were the object of a preconcerted design, although not done or attempted, would render the participants liable to indictment for conspiracy; nor will evidence, that each of several defendants acted illegally or maliciously, with the same end in view, support a charge of conspiracy, unless it appears that such acts were done pursuant to a mutual agreement.

22. The mere knowledge, acquiescence or approval of the act, without cooperation or agreement to cooperate, is not enough to constitute on a party to a conspiracy. There must be intentional participation in the transaction, with 3266 a view toward the furtherance of the common design and purpose.

23. Conspiracy implies concert of design and not participation in every detail of execution. The formation of a common design, by two or more persons, is not of itself a criminal conspiracy. Confederation must be corrupt. If the motives of the confederates are not corrupt, no criminality can attach to the confederation.

24. Guilty knowledge of the act done by the confederation is a necessary element, without proof of which there can be no conviction, it being necessary for the Government to show that each of the conspirators had guilty knowledge, no matter how, when or where acquired. 3267

25. WEIGHING THE EVIDENCE. I charge you, as a matter of law, that unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt, it is your duty to find the defendants not guilty of the charge here made, and you must accordingly acquit them.

26. In determining the credibility of the witnesses who have testified at this trial, you must not allow yourselves

to be persuaded to credence by the fact that any particular witness testified at the instance of the prosecution, for Government witnesses are not entitled to any more credence than other witnesses, and if you believe that any witness who has testified at this trial has testified falsely, in any phase of his examination, whether on direct examination by the Government or on cross-examination conducted at the instance of the defendants' counsel, you are authorized, and it is your privilege, to reject all of the testimony of such a witness.

27. You are not to be persuaded in your consideration
3269 of the evidence in this case by the fact that the Government of the United States is a party to this action, and I charge you, as a matter of law, that the Government is to be considered as any other party, and its counsel as any other counsel for any other party.

28. In your deliberations, you must adhere strictly to the following rules, which I charge you upon your oaths, as a matter of law:

(a) You must consider only the evidence in this case;

(b) You are to disregard answers of witnesses which the Court has directed to be stricken out at any stage of the trial;

3270 (c) You must disregard all arguments of counsel, addressed to the Court, upon questions of law, or upon motions for the admission or exclusion of evidence, as well as the rulings of the Court upon such matters, whether in favor of the Government or in favor of the defendants;

(d) You must disregard any suggestion which may have been conveyed in your mind by any question

which was not allowed, as well as any suggestions which may have been conveyed to your minds by things not in evidence;

(e) You are not to construe the denial by the Court of any motions made to dismiss this indictment, as such a ruling is not to be considered by you as any indication of the guilt or innocence of the defendants;

(f) You must not be influenced by anything which the Court has said or done, which may have given you an impression as to any opinion entertained by the Court upon the facts, as you are the sole judges of the facts to the precise extent that the Court is the judge of the law; 3272

(g) You must not indulge in speculation, nor pursue possibilities or probabilities, as you are required upon your oaths to render a decision, solely upon the evidence;

(h) You must render a verdict representing your real opinion and judgment;

(i) While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths and as a matter of law, that each of you has the duty of arriving at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants, for the purpose of preventing a disagreement or arriving at a compromise. 3273

(j) In your consideration of the evidence in this case, you must always bear in mind the fact that you are justified in assuming that the defendants are innocent of the crime imputed to them by charges con-

tained in the indictment, and until the Government has convinced you, beyond any reasonable doubt, of the guilt of the defendants, you, and each of you, must continue to regard the defendants as innocent of the crime of which they are charged;

(k) I charge you, as a matter of law, that you must not permit atmosphere to displace evidence, and that you must not permit passion and prejudice to enter into your consideration of the evidence in this case;

(l) I admonish you, upon your oaths, to be ever vigilant to reject innuendoes which may have been conveyed to you, during the trial of this case, and to decide the same honestly and justly, according to your oaths and to render a true and just verdict, according to your conscience.

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29. I charge you that in the opening statement in setting forth the Government's theory of the prosecution, the United States Attorney stated that evidence would be presented to you, that arrangements were made through the intercession of the Bayers with Major Radovich and other of the officers to have these two boys, Martin Bayer and Melvin Usdan, transferred from the Headquarters of the Base to the Headquarters of the First Fighter Command, the Headquarters Squadron of which Major Radovich was the Commander; there is no evidence in the case to prove this statement made by the United States Attorney and, therefore, you will conclude that the Government has failed to prove that part of its case.

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30. I charge you that the Government's theory of this offense is that the conspiracy claimed to have been entered into by the defendants provided for the transfer or an attempt to transfer the enlisted men, Martin Bayer and Melvin Usdan, from an outfit or organization alerted for

overseas service and unless you find beyond a reasonable doubt that at the time of their transfer from Mitchel Field or Westover or Bradley Fields, the said enlisted men were in such outfit or organization alerted for overseas service then your verdict must be not guilty.

31. I instruct you that the defendants are entitled to have this Court charge to you their theory of defense against the charges set forth in this indictment and I, therefore, charge you that the defendants Samuel Bayer and Elias Bayer assert as their defense that they at no time attempted to induce any officer of the United States to do any act in violation of the said officers' obligations 3278
and duties to the United States and that any gratuities other than sums of money were extended to any officers for no motive and without in any manner being a part of an agreement or plan or combination or conspiracy to induce any officer to in any manner be unfaithful to his obligations to the United States Government and that any payments of money made by him to the defendant Radovich were made involuntarily through coercion, expressed or implied, and I charge you that in the event that you do not find to the contrary, beyond a reasonable doubt, your verdict must be in favor of Samuel Bayer and Elias Bayer.

32. I charge you that the uncontradicted evidence in this case, from government witnesses, establishes the fact that regulations require that the first three months of a 3279
man's service be devoted entirely to basic training. I charge you that the undisputed evidence in this case shows that neither of the two enlisted men, Bayer or Usdan, received more than two weeks' basic training and a failure to provide such basic training for the said enlisted men would constitute a violation of the Army regulations and, therefore, any officer who for any other purpose, prevents the shipment overseas of enlisted men, including Martin Bayer,

and Melvin Usdan, who did not receive the required amount of basic training, would not be found by you on such account to be unfaithful in the performance of his duties as such officer, nor would any agreement or plan or conspiracy to prevent such individuals from being shipped overseas or being retained in camp until such basic training had been received, as provided for by regulation, would not constitute defrauding the United States government and would, therefore, not constitute the basis of an offense against the United States. (See testimony Capt. Pepper, page 114, October 4, 1945 and testimony of Melvin Usdan and testimony of Colonel Boebel.)

3281 33. I charge you that the theory of the defense is that the enlisted men, Martin Bayer and Melvin Usdan were not properly or adequately trained to justify their being shipped overseas. I charge you that the defense theory is that the two enlisted men were being shipped to a commando unit for which they were not properly trained and I charge you that the undisputed evidence in this case shows that to be a fact and, therefore, any effort on the part of Samuel Bayer to prevent such action against his son and nephew, even by the payment of money, would not constitute defrauding the United States.

34. I charge you that the evidence shows that the commando unit was a voluntary organization and that any
3282 payment of any money for the purpose of preventing the transfer of either enlisted man or both to said organization to which they had not consented to be transferred or any agreement to prevent such transfer without their consent, would not be in fraud of the United States and, therefore, if said transfers were made without the consent of said enlisted men or either of them and I charge you that all the evidence herein shows that they did not so consent, I therefore, charge you that you cannot find that the gov-

ernment was defrauded by reason of their being transferred from Westover Field and in that respect, you must find the defendants Bayer not guilty.

35. I charge you that the theory of the prosecution is that as a part of the conspiracy, an agreement or arrangement was made between the defendant Radovich and one or more of the defendants Bayer, that Radovich would arrange or cause a transfer from Westover Field of the said enlisted men from outfits alerted for overseas to the commando unit at Goldsboro, which said commando unit being overstaffed or for other reasons, would require that the said enlisted men be transferred therefrom to another 3284
Army group or organization or unit or outfit. I charge you that there is no evidence in proof of this charge or theory of the prosecution excepting that contained in the statement of defendant Radovich, offered by the government, which as I have charged you, in no manner is binding upon either of the defendants Bayer. Therefore, I charge you that you must entirely disregard and consider unproven this theory of the government and that you must, therefore, find that as to said transfers from Westover Field, there was no such conspiracy, as claimed by the government.

36. I charge you that all of the evidence which you may consider against Samuel Bayer shows that any payments of money were made by him pursuant to requests or de- 3285
mands from defendant Radovich and not otherwise and, therefore, you must find as against both Samuel Bayer and Elias Bayer that any moneys paid to defendant Radovich directly or indirectly were not as a result of offers or suggestions of the said Bayers but entirely by reason of the solicitations and threats of the said Radovich.

37. I charge you that the Government has failed to offer any proof that any gratuity offered by the defendants

Bayers or either of them to any officers was at any time coupled with a request or demand for any return therefor.

38. I charge you that the mere fact that the witness Anne Solomon was and is an employee of Samuel Bayer or any company with which he is connected does not create any presumption that she is an interested witness or that her testimony should be more carefully scrutinized on this account.

39. You are instructed that the offense charged consists of an alleged violation of Section 88 of Title 18 of the United States Code and therefore before you can
3287 convict any of the defendants, you must find that such defendants conspired to defraud the United States Government and therefore fraud against the United States Government is the gravamen of the offense and unless you do find that the intent and purpose of the said conspiracy was to actually defraud the United States Government, you must return a verdict of not guilty.

40. You are instructed that this indictment does not charge the offense of bribery of either giving or soliciting a bribe on the part of any defendant in this case. The Federal criminal laws do provide for such offense. Section 207, Title 18, official accepting bribe provides:

3288 "Whoever, being an officer of the United States, or a person acting for or on behalf of the United States, in any official capacity, under or by virtue of the authority of any department or office of the Government thereof • • • shall ask, accept, or receive any money • • • or gratuity • • • with intent to have his decision or action on any question, matter • • • which may by law be brought before him in his official capacity • • • influence thereby, shall be fined not more than three times the amount of money or value

of the thing so asked, accepted, or received, and imprisoned not more than three years; and shall, moreover, forfeit his office or place and thereafter be forever disqualified from holding any office of honor, trust, or profit under the Government of the United States."

This is a statute providing punishment for bribery of a Federal officer but the Government does not charge in its indictment the violation of this Federal criminal statute. Nor does it charge any conspiracy on the part of Samuel or Elias Bayer or Walter V. Radovich to commit this said offense of bribery so defined. 3290

41. You are instructed that Section 91 of Title 18 of the United States Criminal Code provides for the definition of and the punishment of the offense of "Bribery of United States officer." It provides that:

"Whoever shall promise, offer, or give, or cause or procure to be promised, offered, or given, any money or other thing of value, or shall make or tender any contract, undertaking, obligation, gratuity, or security for the payment of money, or for the delivery or conveyance of anything of value, to any officer of the United States, or to any person acting for or on behalf of the United States in any official function, under or by authority of any department or office of the 3291
Government thereof, or to any officer or person acting for or on behalf of either House of Congress, or of any committee of either House, or both Houses thereof, with intent to influence his decision or action on any question, matter, cause, or proceeding which may at any time be pending, or which may by law be brought before him in his official capacity, or in his place of trust or profit, or with intent to influence him to commit or aid in committing, or to collude in,

or allow, any fraud, or make opportunity for the commission of any fraud, on the United States, or to induce him to do or omit to do any act in violation of his lawful duty, shall be fined not more than three times the amount of money or value of the thing so offered, promised, given, made or tendered, or caused or procured to be so offered, promised, given, made, or tendered, and imprisoned not more than three years."

3293 I charge you that none of the defendants herein are charged by the Government with the violation of this Federal criminal statute of bribery of United States officer nor are they herein charged with a conspiracy to commit such offense. I, therefore, charge you that neither bribery nor conspiracy to bribe is before you for your consideration and you should, therefore, disregard such offense entirely in your consideration since, if such crime has been committed, I charge you that there has been ample opportunity, is now and will be in the future, for the Government to prosecute any individuals or officers, including all three defendants for the commission of the offense of bribery or a conspiracy to bribe.

3294 42. You are instructed that since this is a charge of conspiracy, the Government must prove to you beyond a reasonable doubt first, what the agreement of conspiracy was; secondly, by whom it was entered into; and third, in what manner and at what time; and if at the end of your deliberation, you are confused as to the claim of the Government in any of these respects to the extent that it is not clear to you beyond a reasonable doubt why the agreement the Government charges consist of, or by whom it was entered into or when, then, and in such event, it will be your duty to bring in a verdict of not guilty for all three defendants.

43. You are instructed that for you to convict the defendants, it is not sufficient for you to find even beyond a reasonable doubt that some agreement between the defendants did take place or that some conspiracy was entered into but that you must find that the conspiracy so entered into was the precise conspiracy alleged by the Government in the indictment to have occurred and no other, and in the event that you are not liable to so find by clear and convincing proof, leaving you free from reasonable doubt on this subject, you must acquit all defendants.

44. You are instructed that the Government charges a conspiracy on the part of three persons, Samuel Bayer, Elias Bayer and Walter V. Radovich, and unless you do find that there was a conspiracy entered into between all three defendants named herein to defraud the United States Government in the manner and fashion alleged in the indictment, then you must bring in a verdict of acquittal for all three defendants. 3296

45. You are instructed that this indictment does not describe a devisable offense and that unless you find all three defendants to have engaged in this conspiracy and in the identical conspiracy described in the indictment, you must acquit all defendants.

46. You are instructed that it is not your duty to determine whether some wrong has been done to the Government or some crime or offense has been committed. It is your duty herein to determine solely whether or not you are convinced beyond a reasonable doubt that the offense charged in the indictment has been committed and in the event you are unable to so find by clear and convincing proof, your verdict will be for the defendants. 3297

47. You are instructed that such statements of Samuel and Elias Bayer as have been introduced in evidence and read to you can only be considered by you in the event that you find them to have been made by the said defendants or either of them against their interests and without the same being in any manner procured through inducements. In the event that such statements were obtained by inducements of any kind, they are incompetent and must be disregarded by you.

48. I charge you that said statements contain many questions and answers which are totally immaterial to the
3299 issues in this prosecution; that there is no evidence against either of the Bayers that there was any misconduct on their part with reference to any uniforms ordered or purchased by the defendant Radovich from Mervin Levine; that there is no evidence that either the Plymouth Thread and Yarn Company or Samuel Bayer or Elias Bayer paid any money therefor and I, therefore, instruct you to disregard this transaction entirely; that there is no evidence that the defendant Elias Bayer purchased anything for Radovich; that there is no evidence of any violation of the law on the part of Samuel Bayer or Elias Bayer in reference to any conduct with any person at any night club or wrongdoing in accompanying any officers named throughout this trial to any night club.

I charge you that there is no evidence that Elias Bayer
3300 had any knowledge of or any participation in the alteration of any records.

I further charge you that you can disregard anything in the record concerning a Colonel Clarke or Colonel Dykemeyers or Lieutenant John Gimbel, Jr., or Ed A. Martin or Charles Deninberg, all of whose names were used in questions propounded to Elias Bayer by Assistant United States Attorney Wallace without any evidence being introduced in this hearing to in any manner connect or con-

cern any such individuals with any relevant matter in these preceedings and you are, therefore, instructed to disregard such questions and answers and the names of such individuals.

I charge you that you will likewise disergard any questions and answers of the Assistant United States Attorney Wallace concerning Sergeant Gross, Colonel Johnson or Purdem for like reasons.

49. You are instructed that the Government attempted to introduce evidence through questions asked and answered by Elias Bayer about his purchasing insurance. I instruct you that the Government has offered no proof 3302
of any kind whatsoever in respect thereto, and by reason of such failure you will disregard any such questions or any such subject matter in this proceeding.

You are further instructed that Elias Bayer was asked about various individuals including Feldman and Greenfield and that the Government has offered no proof of any matters concerned with such names and, therefore, you will entirely disregard any such questions and answers.

50. You are instructed that no statement made by the defendant Radovich can in any manner or fashion be considered by you in arriving at a conclusion of guilt on the part of Samuel Bayer and if you are not able to carefully and clearly beyond a reasonable doubt separate in your 3303
mind such testimony from any other testimony in this case so that your mind remains unconfused on this subject, you must return a verdict of not guilty as to the defendant Samuel Bayer.

51. I charge you that you have had read to you Exhibits 19 to 22 inclusive, containing a long statement purported to have been made by Elias Bayer in answer to questions propounded by Assistant United States Attor-

ney Wallace. I charge you that no statement therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Samuel Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Samuel Bayer from those contained in the said statement so that your mind does not remain free from reasonable doubt as to from which source evidence considered by you as to the guilt or innocence of Samuel Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to do so that you are in no manner or fashion influenced in
3305 your conclusion by said statements which I have charged you already are not binding upon Samuel Bayer, then and in that event you must bring in a verdict of not guilty for Samuel Bayer.

52. I charge you that you have had read to you Exhibits 8 to 18 inclusive, containing a long statement purported to have been made by Samuel Bayer in answer to questions propounded by Assistant United States Attorney Wallace. I charge you that no statement therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Elias Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Elias Bayer from those contained in the said statement so that your
3306 mind does not remain free from reasonable doubt as to from which source evidence considered by you as to the guilt or innocence of Elias Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to so do so that you are in no manner or fashion influenced in your conclusion by said statements which I have charged you already are not binding upon Elias Bayer, then and in that event you must bring in a verdict of not guilty for Elias Bayer.

53. You are instructed that it is particularly important in a case of this nature to keep clear in your mind who made the alleged admissions contended for by the Government. You have had read to you three statements. None of these statements may in any manner or fashion influence you in determining the guilt of any of the three defendants other than the single defendant whom you find beyond a reasonable doubt to have made the statement you are considering, and it is particularly important that you keep free from confusion on this vital matter and if upon a careful and matured consideration of all of the evidence you are not free from a reasonable doubt that there has been confusion in your mind as to which of the 3308
three defendants made the admission concerning the fact under consideration, then and in such event I charge you that you will have such a doubt as will require you to return a verdict of not guilty as to such defendant.

54. You are instructed that it will not be sufficient for a conviction of any defendant in this case to find even beyond any doubt that money passed from one individual to another. You must also find that such action was the result of a conspiracy to defraud the United States Government and in the event that you fail to so find, particularly if you find that the action sought to be accomplished in any agreement which you find to have taken place would not constitute a fraud against the United States Government, then in such event you will return a verdict of not 3309
guilty for all defendants.

55. You are instructed that the Government cannot be defrauded merely by transferring one soldier from one company or field to another at the request of any individual including such soldier's parents. If you find that if such transfer, if carried out, would not constitute a fraud against the United States Government, then you are instructed

that any such agreement or concerted plan would not be in violation of the laws of the United States and your verdict herein must be one of not guilty for all of the defendants. If such agreement consisted of an understanding that the soldiers, Martin Bayer and Melvin Usdan, would receive the same treatment and consideration as any other soldier, in such event you would not find that the United States was defrauded and your verdict would therefore be not guilty as to all defendants.

You are instructed that before you can find the defendants or any of them guilty as charged in this indictment, you must find beyond a reasonable doubt that there was a
3311 conspiracy to defraud the United States and I further charge you that that of which the United States is intended by said agreement or conspiracy to be deprived of must be something of substance or value and cannot consist of some vague or fanciful or insignificant matter of no practical consideration and trivial in nature.

56. You have received evidence of gratuities extended to and received by various officers of the United States Army. You are instructed that it is well known that such gratuities were habitually offered to and accepted by soldiers and officers of the United States Army throughout the entire period complained of in this indictment and that such facts unless proximately related to unlawful conduct would not in itself constitute any evidence of guilt on the
3312 part of any of the defendants herein and could not in themselves justify a verdict of guilty at your hands.

57. You are instructed that the Government has the burden of proof beyond a reasonable doubt of showing what the conspiracy consisted of and when it was entered into. Such conspiracies need not be entered into formally or in writing or by the employment of any particular phraseology but this does not relieve the Government from its ob-

ligation of proving to you clearly and unequivocally what the agreement was and between whom and by whom it was entered into. This obligation is the same as any other that the Government assumes in any criminal prosecution.

58. You are instructed that "the rules of evidence in conspiracy cases make them most difficult to try without prejudice to an innocent defendant." And this is especially true where alleged admissions or confessions have been introduced by the Government on the part of each of the three defendants with an admonition that you do not consider any statement contained in any such alleged admission or confession against either of the other two defendants. 3314
You may find this to be a very difficult task and one impossible for you to sustain in good conscience and in the event you do, I charge you to disregard the entire statement and if even then you are unable to be free from reasonable doubt in your mind that you have fulfilled this obligation, then it is your duty in accordance with your oath as a juror to find the defendants not guilty. The obligation with reference to clear and convincing proof beyond a reasonable doubt is one which the law places upon the Government and it is one of the essentials of our safeguards against misfortune of wrongful conviction. You are asked, therefore, to give especial regard and attention to this feature of the prosecution so that unless you are at the termination of all of your consideration in good conscience, free from any reasonable doubt on this subject, you must re- 3315
turn a verdict for the defendants.

59. I charge you that the claim is made by the defendants Bayers that any payments of money were made as the result of duress and threats expressly or impliedly made by Walter Radovich that a failure on the part of Samuel Bayer to pay such money would result in his son, Martin Bayer, being the subject of discrimination in that

he would be sent overseas before the time such action would occur through the normal operation and that he would be taken from the normal channel of operation and transferred immediately to an Air Commando outfit to operate in the Japanese area on a highly dangerous mission and that such demand was tantamount to extortion. I charge you that if you find that any action on the part of Samuel Bayer, including the payment of any money or the causing of the same to be made to Walter Radovich, was brought about through the threats of the said defendant Radovich to use his official position to in any manner discriminate against the fair and impartial treatment of defendant's son, Martin Bayer, in such event you will find the defendants Samuel Bayer and Elias Bayer not guilty of conspiring against the United States Government through making or participating in any manner in such payments.

3317

60. I charge you that all the evidence shows that Martin Bayer and Melvin Usdan were both soldiers in good standing in the United States Army, free from the need of any disciplinary or out of the ordinary action or treatment as such members of the United States Army, and if you find that the defendant Radovich, as an officer of the United States Army, was attempting to move them from Headquarters, First Fighter Command, to any other part of the Army for the sole reason that any officers at Mitchel Field were the recipients of gratuities that such would have constituted unwarranted, unfair and discriminatory treatment of the said Martin Bayer and Melvin Usdan by the said defendant Radovich as an officer of the United States Army and any effort to prevent the same cannot be found by you to be an attempt or conspiracy on the part of anyone to defraud the United States Government and cannot therefore be the basis for finding the defendants Bayers guilty of the offense charged in this indictment.

3318

61. You are instructed that the procuring or agreeing to the transfer of a soldier by an officer would not in itself constitute failure on his part to defraud the United States Government of his fair and impartial judgment and conscientious service unless said officer believed that the said transfer was not for the good of the service. I further charge you that before you find an officer has failed to give the United States Government his conscientious and unbiased services and judgment, it must be found first that he is under a duty to exercise judgment or duty in the premises and if you find that the transfer of enlisted men or said enlisted men's movements did not come within the military duties of the said officer, he nor no one else can be found 3320
to have conspired to defraud the Government out of its right to his faithful and conscientious judgment or service and in such event any action upon his part could not be a part of a conspiracy to defraud the Government.

I charge you that under all of the evidence in this case, Major Radovich was not the Commanding Officer of Martin Bayer or Melvin Usdan in November of 1943 and, therefore, he had no obligations to the Government with reference to their movements at said time. I charge you that under all of the evidence in this case no one had a right to order the transfer of Martin Bayer and Melvin Usdan from the Airborne Engineers at Westover Field in November of 1943, and that they could not be required to leave their posts and accept a transfer to the Commando Group at 3321
Goldsboro, North Carolina, and any effort upon the part of Samuel Bayer and Elias Bayer to prevent such transfer to the said Commando outfit cannot be in and of itself the justification for a charge of criminal conduct on their part. Therefore, if you find that the said Martin Bayer and Melvin Usdan were transferred in violation of their rights to the said Commando unit by the action of Major Radovich, without their own consent, then such transfer was unauthorized and improper on the part of Major Radovich and

any effort to bring about a prevention of the same on the part of the defendants Samuel Bayer and Elias Bayer would not constitute a fraud upon the United States Government.

62. I charge you that there is no evidence in this case that the transfers of Martin Bayer and Melvin Usdan from Westover Field to the Commando Unit at Goldsboro was effected in any manner other than that described by Samuel Bayer and Elias Bayer as far as said defendants Bayers are concerned and in considering the Government's charges against the said defendants Samuel and Elias Bayer in regard to such alleged conspiracy, you are obliged to accept
3323 their statements as true in this regard, in which event you will find that Samuel Bayer was the victim of extortion and that his action in regard to the payment of $5,000 to Radovich would not justify your returning a verdict of guilty against him.

63. I charge you that there is no evidence in this case that there was any agreement on the part of any two or more conspirators to conceal or alter any records or books of account or other indications of any irregularities with reference to any uniforms ordered, made or delivered at I. Buss and Company as charged by the Government in this indictment and, therefore, you will disregard the same as in any manner constituting any part of this conspiracy.

3324

64. You have been charged by me that if any witness has testified falsely concerning any material portion of his testimony, you must disregard that part of his testimony. I charge you that that does not in any manner apply to any of the statements made by defendants Samuel Bayer and Elias Bayer, which are before you for consideration.

65. I charge you that even though you find that a defendant manufactured, suppressed, secreted or altered evidence

such as books of account or other records, you may not consider that fact as evidence of a guilty knowledge or consciousness of guilt if you find that the records so manufactured, suppressed, secreted or altered did concern transactions from which the said defendant was entirely free from wrongful act or motive. In other words, even though you find that Samuel Bayer altered, suppressed or secreted evidence with reference to the uniforms manufactured and delivered by I. Buss and Company; if from all the evidence you are convinced that said delivery of said uniforms to officers of the United States Army was made at the request of the said officers; and that an understanding that the said officers were to pay for the said uniforms and failed to pay 3326 therefor because of dissatisfaction with the same or for any other reason unconnected with Samuel Bayer, and that the mere fact that Samuel Bayer saw fit to pay for the same to his brothers-in-law, who could not afford to sustain the loss, and that such payment was made to avoid the same, without any purpose of corruption or wrongdoing on the part of Samuel Bayer, any conduct on his part thereof with reference to Samuel Bayer would be totally immaterial and should be disregarded by you.

If the jury finds that the facts establish that the defendants Bayer made various gifts to the defendant Radovich for the purpose of obtaining his conscientious, faithful, disinterested and unbiased service and judgment in determining whether to transfer Martin Bayer and Melvin Usdan, both soldiers in the United States Army from units stationed in continental United States to units about to be sent 3327 out of the continental United States, then the defendants Bayers must be acquitted.

If the jury finds that the defendants made various gifts to the defendant Radovich to have the said defendant Radovich perform his lawful duty, then the defendants Bayers must be acquitted.

If you find from the facts that the defendants Bayers made the gifts without the intent to defraud the United States but to obtain the disinterested and unbiased judgment of officers of the United States Army free from corruption, partiality, improper influence, bias, dishonesty and fraud, then you must acquit the defendants Bayers.

The fact that the defendant Radovich did not take the stand to refute the testimony of the defendants Bayers is
3329 a circumstance which may be taken into consideration by the jury in determining the credibility of the evidence as given by said defendants Bayers.

The fact that the defendants Bayers cannot call or compel the defendant Radovich to testify is a circumstance that the jury may take into consideration in weighing the evidence offered on behalf of said defendants Bayers.

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3331

REQUESTS TO CHARGE BY DEFENDANT WALTER V. RADOVICH.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>v.<br>ELIAS BAYER, SAMUEL BAYER and WALTER V. RADOVICH,<br>Defendants. | Criminal No. 120-468 |

3332

DEFENDANT RADOVICH'S PRAYER NO. 1

You are instructed that the indictment is a mere formal accusation or charge, and is not evidence of guilt. For this reason you must not be influenced in any way by the fact that an indictment was returned against the defendants.

*Nanfita* vs. *United States*, 20 F. (2d) 376;
*Cooper* vs. *United States*, 9 F. (2d) 216.

DEFENDANT RADOVICH'S PRAYER NO. 2

You are instructed that the defendants are presumed to be innocent. You must consider this presumption, that the defendants are innocent, as evidence in their favor, and 3333
unless at the close of the entire case the presumption has been overcome by proof beyond a reasonable doubt that they are guilty, then the defendants must be acquitted.

*Coffin* vs. *United States*, 156 U. S. 432;
*Agnew* vs. *United States*, 165 U. S. 36;
*Shepard* vs. *United States*, 236 F. 73.

3334 *Requests to Charge by Defendant Walter V. Radovich.*

DEFENDANT RADOVICH'S PRAYER NO. 3

You are instructed that a reasonable doubt exists, if after an impartial comparison and consideration of all the evidence, you cannot truthfully say that you have an abiding conviction of the defendants' guilt, a conviction to a moral certainty. And in this connection you are further instructed that it is not sufficient for the Government to establish a probability, even though a strong one, that the defendants are guilty. The evidence must establish the guilt of the defendants to a moral certainty; it must satisfy your judgment as to their guilt, so as to exclude any other
3335 reasonable conclusion. If you can reconcile the evidence with any reasonable theory consistent with the defendants' innocence, you must do so and find the defendants not guilty.

*Shepard* vs. *United States*, 236 Fed. 73;
*Arine* vs. *United States*, 10 F. (2d) 778;
*Agnew* vs. *United States*, 165 U. S. 36.

DEFENDANT RADOVICH'S PRAYER NO. 4

You are instructed that the circumstances of a case may be such that an established reputation for good character, standing alone, will create a reasonable doubt, although without it the other evidence would be convincing.

3336 *Edgington* vs. *United States*, 164 U. S. 361.

DEFENDANT RADOVICH'S PRAYER NO. 5

You are instructed that when the Government relies upon circumstantial evidence to support a verdict of guilty, such evidence must exclude every reasonable conclusion, except the conclusion that the defendant is guilty, and must be inconsistent with every reasonable hypothesis of innocence.

It is not enough that the facts proved make probable the guilt of the accused, but they must exclude every other reasonable conclusion. If there is a reasonable explanation of the facts, which is consistent with the defendant's innocence, then the jury must find the defendant not guilty.

*Ferris* vs. *United States*, 40 F. (2d) 837;
*Philyaw* vs. *United States*, 29 F. (2d) 225;
*Kassin* vs. *United States*, 87 F. (2d) 183;
*Van Gorder* vs. *United States*, 27 F. (2d) 939.

DEFENDANT RADOVICH'S PRAYER NO. 6

3338 You are instructed that if the statements claimed to have been made by the defendant Radovich to the government investigators were induced or coerced in any degree by the circumstances of his confinement at Mitchel Field, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to prove beyond a reasonable doubt that the statements claimed to have been made were not so induced or coerced.

*Bram* vs. *United States*, 168 U. S. 532.

DEFENDANT RADOVICH'S PRAYER NO. 6A

3339 You are instructed that if the statements claimed to have been made to the government investigators by the defendant Radovich were induced by any promise or hope of immunity, leniency, benefit, or favor, held out to Radovich by the investigators either directly or by implication, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to show beyond a reasonable doubt

that the statements claimed to have been made by Radovich were not induced by promises or hopes held out by the investigators.

*Bram* vs. *United States*, 168 U. S. 532.

DEFENDANT RADOVICH'S PRAYER NO. 7

You are instructed that the statements claimed to have been made by the defendant Radovich to the government investigators, standing alone, are not sufficient to justify his conviction. Unless you find beyond a reasonable doubt that such statements are corroborated and fortified by sub-
3341 stantial independent evidence, you must find the defendant Radovich not guilty. In this connection, you are further instructed that the burden is upon the government to establish beyond a reasonable doubt that there is such substantial corroborating evidence.

*Tingle* vs. *United States*, 38 F. (2d) 573;
*Forte* vs. *United States*, 94 F. (2d) 236;
*Daeche* vs. *United States*, 250 Fed. 566.

DEFENDANT RADOVICH'S PRAYER NO. 8

You are instructed that if you find that any witness has intentionally testified falsely as to any material matter, then you have the right to disregard all of the testimony
3342 of such witness.

*Henry* vs. *United States*, 273 Fed. 330.

DEFENDANT RADOVICH'S PRAYER NO. 9

The failure of any defendant to take the witness stand and testify in his own behalf does not create any presump-

tion against him; you are charged that you must not permit that fact to weigh in the slightest degree against such defendant, nor should that fact enter into your discussions or deliberations in any manner.

*Bruno* vs. *United States*, 308 U. S. 287.

DEFENDANT RADOVICH'S PRAYER NO. 10

A federal statute makes it a criminal offense for any person not being authorized by the sender to intercept any communication and to divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person. 3344

In this case the witness, Anne Solomon, has testified that she listened in on certain telephone conversations between Major Radovich and Samuel Bayer; and she has testified concerning what was said in those conversations. You are instructed that, if this testimony is true, then Anne Solomon violated the law by listening in and divulging what she heard; and in weighing her testimony and determining whether or not it is true, you may give consideration to this fact, that if true, the testimony would show that the witness violated the criminal law. (See 47 USCA Sections 605 and 501; *Weiss* vs. *United States*, 308 U. S. 321.)

DEFENDANT RADOVICH'S PRAYER NO. 11

3345

You are instructed that if you find from the evidence that the witness, Anne Solomon, was an accomplice or co-conspirator of the defendant, Samuel Bayer, in doing any of the things charged against Samuel Bayer in the indictment, then you will receive the testimony of Anne Solomon with great caution.

3346 *Requests to Charge by Defendant Walter V. Radovich.*
*Proceedings.*

DEFENDANT RADOVICH'S PRAYER NO. 12

You are instructed that you may acquit any one of the defendants, while finding the other two defendants guilty.

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New York, October 23, 1945,
10 o'clock A. M.

TRIAL RESUMED.

3347 (The following proceedings were had in chambers not in the presence of the jury:)

Mr. Keenan: I want to bring to your attention a matter that I think is of very serious import. It just came to my notice last night after the argument, and it is of particular importance in view of the fact that the Government has had all of our books and records from 1943 and 1944 in their possession up to this time and, of course, has access to every movement that Major Radovich has made of importance during this period of time.

Now, for the first time in our peculiar system in this district of having to wait until the United States Attorney argues his case before we have any opportunity to know what he is going to say, and therefore can't answer in
3348 argument, and particularly in view of the fact that no such reference was made in the opening statement of counsel at all, although counsel had, as we all know, the statements of Samuel and Elias Bayer and also the statement of Ann Solomon, counsel fo the first time brings forth its theory of the case that the statement of Samuel Bayer was false about the meeting with Radovich on the 24th of November at Cavanagh's Restaurant, on the ground that Radovich could not have been there, since there is testimony in the

record from Miss Goertz, who produced no records at all, and testified that it was on the 24th of November of 1943 that she received a telephone call from Major Radovich at Goldsboro to her requesting the transfer of the enlisted men Bayer and Usdan to Wilmington, Delaware.

Now I find that I am informing this Court rather than waiting at a later time with newly discovered evidence that on the 24th day of November, 1943, exactly as testified to by Ann Solomon, there was a telephone call from Washington to Samuel Bayer and that this call was collect, and the United States Attorney's Office or the Federal Bureau of Investigation, or whatever agency is handling the matter, has that record of that call, and it is entirely consistent 3350
with our theory that this of course is the call from Radovich. We are having that further checked now with the Telephone Company—we know it was in the morning—to get the exact date. And, therefore, it puts me as counsel on notice that my clients are telling the truth. And with all of the power of the United States Government, and having control of our records, and we not having even access to them for examination, it is grossly unfair at this stage to make the pivot of the argument of Government counsel, with the impossibility of meeting the Government's requirement which is lodged upon and based upon the testimony of this witness, when the Government itself has evidence indicating strongly to the contrary, and of course, has the means and methods of showing exactly the movements of Major Radovich in an airplane on or about the 3351
date.

Now I am therefore asking your Honor that that statement either be corrected before the jury by the Government or else that we have the right at this date to open up our case and present evidence of dependable form of the movements of Radovich upon that date.

I say that because we never had the slightest notion that there was any claim made by the Government that the

statement of Samuel Bayer and Elias Bayer and Miss Solomon, which they had, the latter two, the two Bayers pursuant to our arrangement and the Solomon girl with our knowledge—we never had any notification that there would be any such claim on that part of the Government. And I am stating to this Court, on my honor as a lawyer, that we will prove that Radovich's movements did place him in this New York area and that he was here on the 24th and the 25th, too.

Your Honor has heard the argument of Government's counsel, of grave import, saying that our people are perjuring—are telling falsehoods, and it is all a concocted
3353 story about this meeting and it couldn't happen. It is of vital importance and justice in this case.

The Court: What has the Government to say?

Mr. McGohey: If your Honor please, the testimony of Miss Goertz went in in the regular course and there wasn't anything mysterious about it. She testified definitely that Radovich called her from North Carolina. Melvin Usdan, produced by the defendants, testified that it was the 24th that he called his father from Westover.

Mr. Keenan: We have the record of that call. That is correct.

The Court: What about this telephone call from Washington to New York?

Mr. McGohey: I don't know anything about it, your Honor.

3354 Mr. Keenan: They have our records, and it shows it. It is a collect call.

Mr. McGohey: I don't know whether it shows it or not. The records are—it is true that the records are here——

Mr. Keenan: We don't have them. They have been impounded and taken by the Government.

Mr. McGohey: May I finish?

Mr. Keenan: I beg your pardon.

Mr. McGohey: You will find no order impounding those records. Those records were subpoenaed.

Mr. Keenan: I withdraw that. I did not know that.

Mr. McGohey: They were brought down here. And from the time this case started, I don't know, I personally don't know and I don't know whether Mr. Wallace knows, whether any request was made by anybody on behalf of the defense to see those records. Certainly I know this, that I never refused anybody to have those records and I don't refuse them now and never have refused them.

As I see this, all this is an opportunity to reopen the case and answer testimony that was put in in the regular course. The argument that I drew from the facts in evidence is one thing, but the evidence went in; Miss Goertz testified early in the trial that the call she received from Radovich came from Goldsboro on the 24th. There wasn't any mystery about that; the defendants knew that when it went in. And Melvin Usdan's testimony was perfectly clear.

If you recall, your Honor, I examined him in the afternoon of the day he testified on direct and then during the night he said that he had refreshed his recollection from some memorandum that he had seen, and that he was then able to testify with definiteness that he arrived in Goldsboro on the 25th, that he left the day before, the 24th, and that is the day he called his father and that is the day he saw his father in the evening—not his father, but Melvin Usdan saw his mother and his wife, and Martin Bayer saw his father and mother, and whatever other members of his family. Certainly there wasn't any surprise in that, your Honor, no surprise in that at all. It was in the regular course. What the records of the Bayers show, I don't know. I didn't put them in evidence.

Mr. Keenan: I say, your Honor, that there is talk about impounding. I have misused that word. They were seized.

Mr. McGohey: No, they were not seized, your Honor; they were subpoenaed.

Mr. Keenan: Well, anyway they have been in the possession of the Government authorities before I appeared in this case.

Mr. McGohey: To the knowledge of the defendants.

Mr. Keenan: Not to my knowledge.

Mr. McGohey: To the knowledge of the defendants.

Mr. Keenan: And thereafter requests made by the Busches for their records, I am informed by Mr. Levy, and refused.

Mr. Wallace: Never.

Mr. McGohey: That is not true.

Mr. Keenan: Is that true, Mr. Levy?

3359 Mr. Levy: Yes.

Mr. McGohey: Did you ask for them on behalf of the Buschs?

Mr. Levy: No. They came in and asked themselves.

Mr. Wallace: They did not.

Mr. McGohey: They did not.

Mr. Keenan: Anyway, I would like to make this clear. I am saying that the Government has in its possession evidence of this fact of this telephone call of Radovich to the Bayers from Washington in the morning of November 24, 1943.

The Court: Confine yourself substantially to that. Have you such records?

Mr. McGohey: I don't know, your Honor. I have records of the Bayers; I don't know whether there is any such

3360 record in them.

Mr. Keenan: Have you the telephone records?

Mr. McGohey: I don't know. Have we?

Mr. Wallace: I don't know. We can go right up and find out whether there is any——

The Court: What do you say about that?

Mr. Keenan: I know that on the 24th of November there was a collect call from Washington to the Bayers' office.

That is the exact date that the witness Ann Solomon said she got a collect call from Radovich, from Washington to here. And I do know this, your Honor, in her statement, that I think is not in the record of course, Radovich flew in that day, and there is a record at LaGuardia Field when these men fly in, and the Government, I am sure, the F.B.I., has checked every movement of Radovich about these dates.

Mr. Wallace: I can speak for the F.B.I. on that. They have not checked any such records and we haven't got any such records.

Mr. Keenan: Why not?

Mr. McGohey: That is none of your business.

Mr. Keenan: I think it is my business and I am going to look into it. I know something about how these cases are investigated. 3362

The Court: You may look into it. You say you haven't any such records?

Mr. Wallace: No.

The Court: You don't know whether they are at La-Guardia Field?

Mr. McGohey (to Mr. Keenan): You go ahead and look into it.

Mr. Keenan: I am going to. I want nothing but the truth in this case.

The Court: Wait a minute, Mr. Keenan. Let me make my inquiry.

Mr. Keenan: I am sorry, your Honor.

The Court: Do I understand you to say you haven't a record of LaGuardia Field on the 24th of November? 3363

Mr. Wallace: We haven't, and we never had any such record.

Mr. Keenan: Can that be acquired from the Army?

The Court: I don't know.

Mr. Keenan: Is that not a fair thing, a vital thing, when the liberty of these men——

The Court: I was about to ask a question.

Mr. Keenan: I am sorry.

The Court: Do you know whether it can be ascertained; would there be such record?

Mr. Wallace: I have no idea whether there would be such a record or not.

The Court: How much do you know about the telegram? Do you know that——

Mr. Keenan: Telephone call.

The Court: I meant the telephone call. Do I understand you to say you know there was a collect call from Washington to the Bayers?

Mr. Keenan: On the 24th of November.

3365 The Court: Do you know who made the call?

Mr. Keenan: I don't.

The Court: Does the Telephone Company keep a record?

Mr. Keenan: Yes, they do. And I say this, your Honor——

Mr. Wallace: For a period of six months they keep records.

Mr. Keenan: I know this, your Honor, that the records that have been subpoenaed, I am informed, of the Bayers, the Plymouth Thread Company, would show the receipted bill and it would include this call.

The Court: Well, assuming that to be true——

Mr. Keenan: They could have looked at the thing. The accountant of the F.B.I. could answer that very readily.

The Court: What I want to know is, is there any record 3366 obtainable as to who made the call?

Mr. Keenan: I think there is, your Honor, and I hope, and I think Mr. Wallace is wrong when he said the record is kept for six months.

The Court: I know they destroy them after a period, but I don't know what period.

Mr. Keenan: I can say that Miss Solomon told me that she got this record from her inquiry with the Telephone Company. She wasn't able to get it because the records

were in the hands of the Government. But I do say, your Honor, that there should be no difficulty whatsoever in finding what the movements of Radovich were in an Army plane, on the 24th or 25th of November, 1943.

Mr. McGohey: If he flew in an Army plane would he be likely to be landing in an Army plane at LaGuardia Field?

Mr. Keenan: Yes. That is where they usually land.

Mr. McGohey: I thought they usually landed at Mitchel Field.

The Court: Aren't you mistaken about that?

Mr. Keenan: I know Navy planes land here, because I took off from there in a Navy plane. 3368

The Court: In a Navy plane?

Mr. Keenan: Yes.

The Court: I thought they used service planes at their own airport.

Mr. Keenan: I know that is not so.

The Court: I don't believe LaGuardia Field would have the record of the landing or the taking off of an Army plane.

Mr. Keenan: Yes, I think they have a record of the landing and taking off of every plane that comes in there.

The Court: Would it show the pilot?

Mr. Keenan: It would show the plane and pilot. I think this, your Honor, that there isn't a question in the world in my mind but the investigator force of the Army at least, and I have reservations about any other investigator force 3369 for the moment only, would know about the movements of Radovich; I know they know how to trace those movements, they would have them exactly, and I think this evidence could be very readily ascertained if anyone was interested in getting it.

Of course your Honor will recognize that it is very difficult for us in the preparation of this case, in wartime, and

even after, to get this information from the Army forces. As a matter of fairness, I am suggesting that.

Mr. McGohey: Miss Goertz's testimony is not challenged, your Honor. She was cross-examined.

Mr. Keenan: The import of it was——

The Court: The effect of her testimony is that Radovich called her from Goldsboro on the 24th of November.

Mr. McGohey: That is right.

The Court: That does not preclude the possibility of Radovich being in Washington later during the day, calling from there, and being in LaGuardia Field or being in New York that evening. I am not going to reopen any
3371 testimony, but what I am figuring about is to try to ascertain what would be agreed upon as facts so I may state them to the jury as facts.

Mr. Keenan: I would say, your Honor, I would rather do that and have the truth go before that jury than come back afterwards in the event of misfortune to the defendants in a verdict, to come in and ask that this case be reopened afterwards. That is the purpose in coming in here now, because I say to you that I think this is a terribly vital point in this whole prosecution.

The Court: I am not sold on that. But, still, I want to be fair. Have you any way of knowing from what you have got whether, in the first place, the Bayer records show a collect call from Washington to them on the 24th of November?

3372 Mr. McGohey: I have no way of knowing now, but whatever records we subpoenaed, your Honor, are here, and I am willing to get those records and get them right down here.

Mr. Keenan: Could we ask Mr. Brown if he has ever looked that up either. He is an accountant, and I think he would be the one from the F.B.I. who would check into that.

Mr. Wallace: I will ask him.

Mr. McGohey: Surely, go ahead.

The Court: Will you do that as quickly as you can?

(Mr. Wallace left the room and returned shortly.)

Mr. Wallace: Mr. Brown says that we have telephone records and bills; he has never gone through them, he doesn't know what period they cover, but they are here. They are down in Mr. Sharison's office; you know, he was using that at the time.

Mr. McGohey: All right, have him get them out.

The Court: Tell him to get the November bill and see if a collect call from Washington to the Bayers appears on there.

Mr. Cohen: That might be the December bill, Judge, because our bills run from November to December. The bills 3374
run up to November 23rd, and so forth.

(Mr. Wallace left the room and returned shortly.)

The Court: All right, sir, now go ahead.

Mr. Wallace: I have a bill of the New York Telephone Company, dated December 1, 1943, and attached to it is a list of out-of-town calls. Under the date of November 24th there is a call to Washington, also under the date of the 24th there is a collect call from Washington.

The Court: That is all it shows?

Mr. Wallace: That is all it shows. Also, it shows on the 24th a call to Westover Field and it also shows a collect call from Springfield.

Mr. Keenan: Massachusetts.

Mr. Wallace: It doesn't say. There are a lot of out-of-town calls, too. The bill is to Plymouth Thread & Rayon 3375
Corporation, 31 West 21st Street; $177.23 for out-of-town calls (handing to Court). Here are the calls, from these numbers to these numbers (indicating).

The Court: I thought you said something about two calls to Washington.

Mr. Wallace: There is a call to Washington. That (indicating) is to Washington, and this is from Washington (indicating), both on the 24th. One was $1.70 and the other I think is 70 cents.

The Court: How can you tell whether that is to or from there?

Mr. Wallace: Well, it has "collect" after it.

The Court: I understand.

Mr. Wallace: It is a call that is made. It says, "Place called" at the top of the heading. Westover Field, 23rd and 24th, two calls to Westover Field.

The Court: I am willing to state to the jury that the records of the Bayer concern show a call to Washington on the 24th and a collect call from Washington—only the Washington call—or to include a statement covering the Westover Field and the Springfield.

3377 Mr. Keenan: I think that is immaterial. The point I am raising is about the surprise point that is brought up for the first time in the summation.

The Court: I understand that you are——

Mr. Keenan: That is, I think the fair way to have done it would have been in the opening of the Government to have stated that they would prove that our claim that there was any such meeting as took place at Cavanagh's didn't and couldn't have taken place.

The Court: I am not going into that. I suggest that I am willing to, and will, if desired, state to the jury before charging them, that the record, that is the telephone bill of the Plymouth Thread Company, which is the Bayer concern, shows a collect call to Washington on November 24th.

Mr. Cohen: A call from Washington.

3378 The Court: A call from Washington. And I will mention the one to, also.

Mr. Keenan: If anything, we are interested——

Mr. McGohey: The first call was to Washington, $1.70.

Mr. Cohen: It was before the other one?

The Court: It appears on the list before, but that does not prove anything. They may have billed them differently.

Mr. Keenan: We claim in our defense that we got a telephone call from Major Radovich from Washington in

the morning, and that is shown, and also it is some evidence in my opinion of the unlikelihood of Radovich being in Goldsboro that day. It would be conclusive. But I also would like to have the Government produce its record as to the movements of Major Radovich on that day because I feel certain that they do have that information.

Mr. Wallace: We have no such record.

The Court: The Government has stated that it has no such record.

Now, Mr. Keenan, do you wish me to state to the jury what I said I would state to them?

Mr. Keenan: Yes, I do, and that you would state that you are making that at our request. 3380

The Court: All right, sir.

Mr. Robb: Do I understand that you are going to tell the jury that the records don't show who called, either way?

The Court: Yes, sir. You only wish me to mention the collect call?

Mr. Keenan: Yes.

Mr. McGohey: I think both calls ought to be stated.

Mr. Robb: If your Honor does not mention them both, we object.

Mr. Keenan: But it is not probative of any of the issues in this case.

Mr. McGohey: I think it is.

Mr. Keenan: I don't know, but there is no claim made for it.

Mr. McGohey: You claim—— 3381

Mr. Keenan: There is no claim that the call was or was not made or that anything—the Government makes no claim with reference to any call to Washington on that day, but we do make a claim that there was a call from Washington to us and we think it would be confusing to the jury to put anything other than the collect call that we received.

Mr. McGohey: I think that we ought to have both calls, and I think that the Court should state that those two

calls appear on a bill for the period stated, totalling one hundred seventy some odd dollars for out-of-town calls to various places.

The Court: What would be the materiality of the amount of the bill?

Mr. Keenan: I think your Honor that when that is read it ought to be stated that the Government has claimed that no such call took place.

Mr. McGohey: Oh, no.

Mr. Wallace: We never made any such claim.

Mr. Keenan: That is the——

Mr. McGohey: The Government never made any such
3383 claim and there is nothing in the record to substantiate that statement.

Mr. Ansell: I possibly do not understand the relevancy of this statement, but, of course, if any statement of fact is to go into the record, and if it is a circumstance that might operate to the disadvantage of Major Radowich, why, of course, we become interested at that moment. I probably have not been able to follow——

Mr. Keenan: Might it be stated that these records have been in the possession of the Government by subpoena from more than a year ago, and not in the possession of the defendants Bayer or the Plymouth Thread Company?

The Court: In the absence of any showing that they have been denied to you, I don't think that would be material. It might create an inference——

3384 Mr. Keenan: They had our records, they subpoenaed them, kept them, and never returned them.

The Court: I am not going into that.

Mr. Keenan: I want to except to the failure of the Court to mention that.

The Court: Very well.

Mr. McGohey: I want to state for the record that no demand or request at any time was made to have the records back or to see them.

The Court: All right.

Mr. McGohey: And they were available at all times.

Mr. Keenan: I don't know whether they were or not. I am not accepting that statement at all.

The Court: All right, let us proceed.

(The proceedings were resumed in open court in the presence of the jury, as follows):

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## Charge of the Court.

BARKSDALE, J.: 3386

The Court: Ladies and gentlemen of the jury, I am not going to reopen the taking of evidence but at the request of counsel for the defendants Bayer I will state to you that on a statement by the New York Telephone Company, dated December 1st, 1943, rendered to Plymouth Thread & Rayon Corporation, which is the Bayer concern, there appears an item on November 24th of a collect call to this concern from Washington.

At the suggestion of the Government, I state to you that the record also shows a call to Washington, November 24th, the same day.

You may consider those facts, along with all the other evidence in the case, and give those facts such weight as you may consider them entitled to in connection with any other evidence which you have heard. 3387

Mr. Robb: Would your Honor also say that the record—

The Court: I will also state that the facts which I have stated to you, or all the facts which do appear from this record, that is, the record does not show from whom the call came nor to whom the call to Washington went. All right.

Now, ladies and gentlemen of the jury, you have heard the evidence in this case and the arguments or summa-

tions of counsel, and it now becomes my duty to charge you as to the law of the case, and it will then be your duty to determine the facts from the evidence which you have heard, apply the law to these facts, and render a true and righteous verdict. In arriving at your verdict, you should base it entirely and solely on the evidence you have heard, and the law as I shall declare it unto you.

First I shall charge you as to certain general principles of law which are applicable to this case. You are in no way concerned with any punishment which may be imposed upon these defendants should you find them guilty. In the Federal courts, the Judge fixes the punishment, if
3389 any is to be imposed, and the amount of punishment to be imposed, or which might be imposed, should not enter into your deliberations at all. That is my responsibility. You are charged with one highly important duty, and only one, and that is to determine and say by your verdict whether these defendants, any of them, are guilty or not guilty of the offense charged.

The law presumes that these defendants, as well as all persons charged with a crime, are innocent until by competent evidence they have been proven to be guilty. The indictment creates no presumption of guilt nor does it constitute evidence against the defendants. To the benefit of this presumption of innocence, the defendants are entitled throughout their trial, and it stands as their sufficient protection until it has been removed in your opinion
3390 by evidence proving guilt to a moral certainty beyond a reasonable doubt. The defendants are not required to prove their innocence. The burden of proof rests upon the United States to prove beyond a reasonable doubt the guilt of the defendants before they can be found guilty, and there must be so proved all of the elements necessary to constitute the offense charged in the indictment.

It is not sufficient that the defendants, upon speculative theory or conjecture, may be guilty, or that by the pre-

ponderance of evidence their guilt is more probable than their innocence, for until their guilt has been proved beyond a reasonable doubt, and as charged in the indictment, the presumption of innocence still prevails.

Reasonable doubt does not import mere possible doubt, because everything relating to human affairs and depending on oral evidence is open to some possible or imaginary doubt. A doubt that is engendered solely by sympathy or by a dislike to accept the responsibility of conviction is not a reasonable doubt. A reasonable doubt exists if, after the entire comparison and consideration of all the evidence, your minds are left in such a condition that you cannot say that you feel an abiding conviction of the truth 3392
of the charge. A reasonable doubt is not a strained conjecture, but an actual sincere mental hesitation caused by either insufficient or unsatisfactory evidence.

You are the sole judges of the credibility of the witnesses and the weight to be given their evidence, and in determining this you are entitled to take into consideration their bias, their feeling, their interest in the outcome of the case, if any such appears, their manner of testifying, their candor and frankness, and any other matter which you would ordinarily consider in judging of the weight to be given to the statements of persons with whom you come in contact. If you are satisfied that any witness has testified falsely as to any material fact, you may disregard all of his or her testimony, or you may 3393
disregard such as you believe to be false and accept that which you believe to be true. If you are satisfied beyond a reasonable doubt that any defendant has made contradictory statements or has improperly altered records or caused them to be changed, you may consider such facts in your consideration of the evidence.

If you should believe from the evidence that any witness who has testified in this trial was an accomplice, that is, an active and knowing participant in the alleged con-

spiracy, you should consider the testimony of any such witness with great caution. You should compare such testimony with the other testimony in the case, with all the admitted facts and circumstances, and scrutinize and weigh it with the utmost care so that you satisfy your minds as to the truth or falsity of such evidence, or any part thereof. And any comments which I may make upon the evidence are, at most, only expressions of my opinion, made in an effort to assist you, and are meant in no way to interfere with or impinge upon your function and prerogative of determining the facts from the evidence.

Defendants do not have to take the witness stand in their
3395 own behalf. They may, if they choose, submit their cases on the evidence of the Government and of other witnesses, and you are not to draw any inference of guilt from the fact that neither of the defendants has testified in his own behalf.

Certain witnesses have testified that the defendants Bayer bore a good reputation in business and in their home communities. Also, you have heard read certain citations awarded to the defendant Radovich which you may, if you wish, consider as evidence of good character.

In your consideration of the cases of each defendant you may consider this testimony and attach to it such weight as you think proper. You should consider such evidence along with all the other evidence in the case, and if considered along with all the other facts and circumstances
3396 of the case such evidence should raise in your minds a reasonable doubt of the guilt of any defendant, you should find such defendant not guilty. However, the fact that a person bears a good reputation is no justification for the commission of crime, and if you are satisfied beyond a reasonable doubt that any defendant is guilty, then the fact that such defendant bears a good reputation or has been awarded citations would be no reason or excuse whatever for a finding of not guilty as to such defendant.

Now, as to the particular offense charged in this case: the gist of the charge made in the indictment in this case is that the defendants unlawfully, wilfully and knowingly did combine, confederate and agree together and with each other to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, the particular object being to procure the defendant Radovich, other than in the honest discharge of his duty, to prevent the sending of privates Martin Bayer and Melvin Usdan out of the continental United States for combat duty. 3398

This is what is known as an indictment for conspiracy. A statute of the United States provides that if two or more persons conspire to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, it shall be a criminal offense.

As an officer of the United States Army it was the duty of the defendant Radovich to render to his country honest and faithful service, free from corruption, dishonesty or partiality, and it would be a fraud upon the United States for the defendant Radovich as such an officer to deviate from such duty.

In order to constitute a fraud on the Government it is not necessary that the Government suffer any monetary or financial loss. To deprive the Government of the United States of the honest and faithful services of any of its officers constitutes a fraud irrespective of whether or not the Government suffers financial loss. 3399

So, if the defendant Radovich and the defendants Samuel and Elias Bayer, or any two of them, entered into an agreement that the defendant Radovich would act corruptly, dishonestly, or by reason of bias or partiality, and not render faithful, honest and disinterested service to

the United States, or to induce said defendant Radovich so to do, then there would be an agreement to defraud the United States. And if such an agreement was followed by the doing of any overt act by any one of the three for the purpose of carrying out the object of the agreement, then the agreement would be a conspiracy as set out in the statute.

Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Com-
3401 mando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer.

The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.

If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not
3402 have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

In your consideration of this question, you should consider not only the statement of the defendant Bayer, and the testimony of the witness Anne Solomon, but all the other evidence in the case except the statement in writing 3404
of the defendant Radovich.

There are many acts which by law are made crimes against the United States Government, but in addition to such substantive offenses it is made a separate and independent offense under the laws of the United States for two or more persons to conspire or join together in an agreement to defraud the United States, and do some act pursuant thereto; and persons may be, in a proper case, convicted of conspiracy, as well as for the substantive offense or offenses, or without being tried for the substantive offense. The indictment here, with which you are solely concerned, does not charge any substantive offense. It charges the defendants in one count with a separate and independent offense of having conspired to 3405
defraud the United States, and even though you should be satisfied beyond a reasonable doubt that one or more of these defendants are guilty of some substantive offense, such as bribery, before you should convict them upon the charge set out in the indictment, you must further be satisfied beyond a reasonable doubt that there was a previous agreement or understanding among them to defraud the United States, and that some act or acts charged in the

indictment were done by one or more of the defendants to carry out this understanding or agreement.

The reason why conspiracy is made a separate offense is because it is believed that, with two or more persons combined to defraud the United States, the danger to the Government from such concerted action is greater than that from a fraudulent act indulged in by one person alone, and justifies the making of the combination or agreement itself a separate crime.

I shall undertake to make clear to you, if I can, the nature of such a conspiracy as is here charged, and what constitutes it. A conspiracy is an agreement or understanding between two or more persons to defraud the 3407 United States, and it exists whenever there is a conspiracy, agreement or understanding between two or more persons for that purpose, followed by the doing of some act furthering the scheme. It is not necessary that they should meet together and enter into any formal or definite agreement as to the things which they intend to do, or that they should agree formally on the details or plans by which the unlawful combination could be made effective. The offense is sufficiently proven if you are satisfied beyond a reasonable doubt that these three defendants or any two of them acted together for the accomplishment of a fraud upon the United States, and that in this unlawful purpose they acted with the mutual or common understanding as to the purpose to be accomplished, or co-
3408 operated together in the accomplishment of this purpose, followed by some act done by one of the parties for the purpose of carrying out the object of the agreement or understanding.

It will be plain to you that a conspiracy may be, and of necessity often must be, shown by circumstances rather than by definite proof of any actual agreements entered into. Persons who contemplate defrauding the United States are not accustomed to make their plans known to

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the outside world, and it is usually necessary in considering whether or not a conspiracy exists to consider all the facts and circumstances proven in the case. The existence of a conspiracy may be proved by facts and circumstances as the natural and logical inference from these facts and circumstances. The acts charged to have been done in pursuance of the conspiracy may themselves be of such nature as to prove the existence of a conspiracy without the aid of separate and independent proof of any agreement. However, in order to justify a conviction, the facts and circumstances relied upon must not only be consistent with guilt, but inconsistent with any reasonable hypothesis of innocence.

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If an agreement or understanding was entered into or reached by any two or more of the defendants named in this indictment to defraud the United States, as charged in the indictment, then any other person or persons who participated in this common purpose with knowledge of it would be guilty of conspiracy, even if their participation first took place after the orginal agreement was formed, and even though they had no part in the formation of the original agreement and no knowledge of it at the time it was formed, and even if they were unacquainted with and had no knowledge of the activities of all the remaining persons who also might be acting to aid the purposes of the conspiracy. The indictment refers to persons unknown to the grand jurors, and the evidence refers to the activities of various persons other than the defendants. Whether these persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence.

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It is necessary, however, that each person who is to be held to be a member of a conspiracy should have knowledge of the unlawful purpose sought to be accomplished and should intend to be acting with other persons in the accomplishment of this unlawful purpose. However, it is not necessary that all of the persons taking part in a conspiracy should play parts of equal importance or activity. Anyone who acts with others in the accomplishment of an unlawful purpose, knowing it to be unlawful, or fraudulent purpose, knowing it to be fraudulent, is guilty of conspiracy, whether his activities in the fraudulent purpose were great or small. It is sufficient to convict a de-
3413 fendant of the offense of conspiracy if he knows in a general way of the purpose of two other persons to defraud the United States and then assist in any way to accomplish the purpose, no matter how great or how small the assistance which he gives to accomplish the purpose.

The indictment sets forth that this conspiracy came into existence on September 1, 1942, and I wish to state that the date of the origin of the conspiracy is not of importance, and if a conspiracy existed it is not necessary for the Government to prove that it came into being on the date named in the indictment, nor on any specific date. A conspiracy may be of gradual development, and in this case it is sufficiently proved if you believe beyond a reasonable doubt that at any time subsequent to September 1, 1942, and prior to the return of this indictment on July
3414 12, 1945, a conspiracy existed as it has been previously defined to you.

Acts done by conspirators in furtherance of a conspiracy are called overt acts. I wish to explain to you the nature of an overt act and the part it plays in the prosecution for conspiracy. Conspiracy is punishable as an offense under the statute I have previously referred to, only if an agreement or understanding has been formed to defraud the United States, followed by some step known as

an overt act taken to carry out the proposed scheme. The law recognizes that persons might have an agreement or understanding to engage in a criminal activity, but they might repent of that decision or for some reason abandon it without taking any step to commit the offense, and in such case they would not be guilty of the crime of conspiracy. If, however, having entered into an agreement or understanding to defraud the United States, they take any step or commit any act toward the completion of the offense, thereby evidencing their intention to go through with the conspiracy, the offense would be complete, irrespective of whether or not the plan was finally carried through to a successful conclusion.

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The overt act need not itself be of a criminal nature. It may be an act perfectly innocent in itself. But if it is an act done for the purpose of carrying out an unlawful agreement, then the crime of conspiracy has been committed and completed. Therefore, it is not necessary that overt acts shown to have been committed or steps taken in furtherance of a conspiracy are in any way criminal or forbidden in themselves, but it is necessary only to show that some act of some sort as charged in the indictment was done for the purpose of carrying out the object of the agreement previously arrived at, and when an overt act has been committed by any one member of a conspiracy, it makes all persons co-conspirators who participate in the unlawful agreement with knowledge of its unlawful nature, whether they were original parties to it or whether they came into it at a later time. It is not necessary that the Government prove the commission of all the overt acts charged in the indictment. If the commission of any one of these overt acts be proved beyond a reasonable doubt, that is sufficient.

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I have admitted for your consideration the evidence of F.B.I. Agent Flynn as to the statements of the defendants Samuel Bayer and Elias Bayer, and also their typewritten statements in question and answer form, and

also their statements read from the shorthand notes of the witness Sergeant Lasko as given to Colonel Snyder when he questioned them at their place of business, and also the statement of the defendant Radovich, in narrative form, written out by the witness Flynn and signed before witnesses by the defendant Radovich in March of this year.

At the time these statements were admitted I charged you specifically that each of these statements might be considered by you in your consideration of the charge against the person making the statement, but that you must not consider such statement as evidence against the
3419 other defendants. I repeat that charge and admonition to you.

These statements of the defendants considered alone would not be sufficient evidence for the conviction of all or any one of the defendants. In your consideration of the guilt or innocence of each defendant you may, and you should, take into consideration his statement, or statements made before his trial, but before you agree upon a conviction of any one or more of the defendants you should be satisfied beyond a reasonable doubt that such statements are corroborated by the substantial independent evidence of witnesses who have testified during the course of this trial. These statements, considered alone, do not constitute sufficient evidence of the existence of a conspiracy, but if you are satisfied beyond a reasonable doubt
3420 from the other evidence in the case that a conspiracy between any two of the defendants did exist, then you may consider the statement of each defendant in your consideration of whether or not that defendant was a party to the conspiracy.

Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants which has been introduced in evidence was admissible because not coerced nor in-

duced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.

I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function 3422
to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

To summarize briefly, ladies and gentlemen, if you are satisfied from the evidence beyond a reasonable doubt that all or any two of the defendants entered into a conspiracy or unlawful agreement to defraud the United States as I have previously defined it to you, and that any one of them did any one of the overt acts charged in the indictment, you should find such defendants guilty. As to any defendant or defendants about whom you are not so satisfied, you should find such defendant or defendants not guilty.

Depending on your conclusions from the law and the 3423
evidence, you may acquit all of the defendants, you may acquit one and find the other two guilty, or you may find all three defendants guilty as charged.

Now you may retire, ladies and gentlemen, but do not undertake to decide the case until I hear counsel and determine whether or not to add anything to what I have said to you. You may retire to your room.

(The jury retired at 11:05 A. M.)

The Court: All right, if you are ready, counsel for defendant Radovich may state objections.

Mr. Robb: We have certain exceptions which we would like respectfuly to take to your Honor's charge.

We except to your Honor's failure to charge as requested in our prayer No. 2, that the presumption of innocence is evidence in our favor, or evidence in favor of the defendant Radovich.

We except, if the Court please, to give our prayer No. 3 as requested.

We except to your Honor's charge on evidence as to good character and in particular to your Honor's failure
3425 to instruct that while the jury must consider evidence of good character, together with all the other evidence, such evidence of good character may itself create a reasonable doubt and require a verdict of not guilty.

And in that connection we also respectfully except to your Honor's failure to mention the testimony of the witness Colonel Boebel, who testified that the reputation of the defendant Radovich was "the best".

In connection with the testimony as to good character, your Honor mentioned only the medals and citations.

We respectfully except to your Honor's summary of the indictment in this case on the ground, with all deference to your Honor, that the indictment does not state the object of the conspiracy as clearly and as succinctly as your Honor stated it, and that the object of the conspiracy in
3426 fact is stated quite differently in the indictment.

In short, with all respect to your Honor, we suggest that your Honor's summary was not entirely accurate.

We except, if the Court please, to your Honor's summary of the evidence concerning the contention of the Government and the contention of the defendants Bayer as to the payments to Major Radovich, upon the ground that your Honor did not mention the contention of the

defendant Radovich, that as to him the Government has failed to prove that any payments were made.

We respectfully except to your Honor's statement to the jury that your Honor held as a matter of law that the statement made by defendant Radovich to Agent Flynn was not coerced. We respectfully submit that that is a question which should now be decided by the jury and they should not be told that your Honor has decided that question.

And, in that connection, we respectfully except to your Honor's failure to give prayer No. 6 and 6-A, requested by the defendant Radovich.

We further except in that connection to your Honor's 3428
statement to the jury that their only function is to determine whether or not the statement, if any made, by the defendant Radovich, was true. We respectfully suggest that they should also determine whether or not it was coerced, and if it was in any degree coerced, whether it was true or not, they should reject it.

We respectfully except, if the Court please, to the Court's failure to give prayer No. 3 requested by the defendant Radovich on the subject of reasonable doubt; and prayer No. 5 on the subject of substantial evidence; your Honor's failure to tell the jury in connection with the requirement of substantial independent proof, independent of the statement of any defendant, that the burden is upon the Government to establish such proof beyond a reasonable doubt.

We respectfully except to your Honor's failure to in- 3429
struct the jury as requested in prayer No. 10, submitted by the defendant Radovich in connection with the testimony of the witness Ann Solomon.

And to your Honor's failure to instruct the jury as requested in prayer No. 11, with reference to the testimony of the witness Ann Solomon.

We also suggest to your Honor respectfully and except to your Honor's failure to tell the jury that under the

theory of the indictment which alleges "to the grand jury unknown" it would be possible for the jury in this case upon the evidence to convict any one of these three defendants and acquit the other two.

If your Honor please, it has just been pointed out to me by General Ansell that your Honor, in your Honor's summary of the indictment, stated that the object of the conspiracy was to defraud the United States of the honest and faithful service of the defendant Radovich alone, whereas the indictment alleges that the purpose of the conspiracy was to defraud the United States of its right to the conscientious, faithful and unbiased services of officers of the United States Army, the allegation not being limited to the defendant Radovich alone.

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We further except to your Honor's failure to tell the jury as I have indicated. Thank you.

The Court: The Court declines to amend or add to its charge as suggested or requested by counsel for the defendant Radovich, and exceptions may be noted as stated.

All right, Mr. Keenan.

Mr. Keenan: The defendants Samuel and Elias Bayer respectfully except to the failure of the Court to charge in accordance with the 16th request, namely, that as a matter of law fraud is never presumed, and that, on the contrary, the presumption in law is parties in their business and other relations are prompted by honest motives.

The defendants Bayer likewise except to the failure of
3432 the Court to charge paragraph (I) in the 28th request, that is, the important matter of informing the jurors that the verdict which they render must represent the real judgment and honest conclusion of each juror, and to further charge them upon their oaths that in arriving at that conclusion no one was required to surrender his earnest belief concerning guilt or innocence of the defendants for any purpose, in accordance with the case of Allen v. United States, 164 U. S. 492.

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Defendants Bayer respectfully except to the failure of the Court to charge in accordance with the 29th prayer, that in the opening statement setting forth the Government's theory of prosecution, the United States Attorney stated that evidence would be presented that arrangements were made through the intercession of the Bayers with Major Radovich and others of the officers to have the two boys, Martin Bayer and Melvin Usdan, transferred from headquarters of the Base to headquarters of the First Fighter Command, there being no evidence in the case presented to prove this vital part of the Government's case, and, to the contrary, the evidence showing clearly no such fact.

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The defendants Bayer respectfully except to the failure of the Court utterly to charge on the vital matter of the requirement for basic training to be given to enlisted men, the said two enlisted men, the evidence showing in the case clearly that they are required to have three months' basic training, and the evidence showing clearly that under no hypothesis of findings of any fact in the evidence could they have received more than two weeks' training; and that such requirements were in accordance with the regulations, as proven by the testimony offered by the Government, particularly the witness Captain Pepper.

The defendants Bayer respectfully except to the Court's failure to charge the jury that the undisputed evidence in the case shows that the Commando unit at Goldsboro was a volunteer organization to which the enlisted men could not be assigned without their consent. And that, further, the Court, with great respect, we believe was in error in failing to charge that the testimony in the case likewise shows that the Airborne Engineers was a volunteer outfit and therefore required consent before there could be a lawful transfer thereto.

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We respectfully request the Court now to charge the jury that in the event the proposed transfers of these two

enlisted men were not in accordance with the regulations of the Army, as shown in the evidence, that any effort upon the part of either of the defendants Bayer to prevent such transfer would not be a conspiracy to defraud the United States.

The defendants Bayer except generally to the failure upon the part of the Court to adequately charge on the theory of defense of either and both defendants Bayer.

The defendants Bayer respectfully except to the Court's failure to charge that the mere solicitation of transfers or refraining from transferring men, made to any officers, in and of themselves would constitute no unlawful act
3437 or no fraud against the Government.

The defendants Bayer further except to the failure on the part of the Court to charge the jury that, regardless of the fact that conspiracies or agreements need not be in writing, need not be made at any precise time or in any formal manner, nevertheless the agreement or plan or design of the conspiracy must be clearly shown beyond a reasonable doubt as one of the essential elements of the prosecution's burden, and a failure to so do beyond a reasonable doubt would require, in and of itself, with nothing more, a verdict of not guilty on behalf of the two Bayers.

The defendants Bayer further except to the Court's failure to charge on the irrelevant and immaterial mat-
3438 ter contained in the statements introduced in evidence by the Government of Samuel and Elias Bayer, and specifically except to that action of the Court failing to point out to the jury at this time that in looking over such statements in their jury room they should examine each and every statement with reference to its relevancy to any matter upon which the Court has charged; and a failure to associate it or relate it to any such matter thus made relevant to this prosecution should require the jury to

utterly disregard any such statement and not speculate with reference thereto.

Defendants Bayer respectfully except to the Court's failure to state that, particularly where fraud is charged, the matter of the good reputation or character of the defendants is of especial importance; and further except to the linking together in its charge on a most important matter of character witnesses and that type of testimony, the charge with reference to the two Bayers and Major Radovich, since Major Radovich offered no character witnesses in his defense and apparently relied upon citations of valor as good conduct in that respect; and that such failure on the part of this Court was confusing and failed 3440
to set forth clearly to the jury that to which the defendants Bayer were clearly entitled.

We respectfully request the Court to charge the jury that the good reputation of the Bayers up until the time of the incidents complained of has not been disputed by the Government and that no proof has been offered in contradiction thereto.

And we specifically ask the Court at this time to charge the jury on the subject matter of alias, the meaning of the word "alias" and that the jury should in no manner or fashion be misled or prejudiced by any such allegation contained in the indictment; that no proof of any use of alias has been offered by the Government and that matter must be entirely disregarded by them and no improper in- 3441
fluence registered therefrom in their minds by reason of such unproven allegation.

The Court: Is there such a prayer in your rather comprehensive list of prayers?

Mr. Keenan: I think there is, your Honor. If there isn't, I am asking for it now.

The Court: If it is, then I would like to have my attention pointed out to it.

Mr. Keenan: May I come back to that in a moment, your Honor?

The Court: Yes.

Mr. Keenan: The defendants Bayer further except to the failure upon the part of the Court to charge this jury that with reference to the payments of any sums of money to Radovich, there is no proof of any kind before them, other than the statements of Samuel Bayer and Elias Bayer, and, therefore, with reference to any such payments or the manner in which they were made, there being no other evidence before the jury, that they will be confined to consideration of the same in arriving at any determination in reference thereto.

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The defendants Bayer except to the failure of the Court to charge that in the event the charge is confused in attempting to separate the information considered by them in the various statements, alleged admissions or confessions of the several defendants, and a confusion thereby comes about in their minds which they cannot set aside, that that could generate a reasonable doubt in their minds and would be sufficient justification for a verdict of not guilty towards the defendants so affected.

Then the defendants Bayer except to the Court's failure to give that part of prayer 65, that if the jury finds that the defendants made various gifts to Radovich for the purpose of having the defendant Radovich perform his lawful duty, then in such event such gifts would not constitute any evidence of an attempt to defraud the Government.

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The defendants Bayer except to the Court's failure to charge the jury that the defendants Bayer cannot call or compel the defendant Radovich to testify and that that is a circumstance that the jury may take into consideration in weighing the evidence offered on behalf of the said defendants Bayer in their defense.

Your Honor, I do not find for the moment in these prayers the reference to the alias matter, but nevertheless I am asking the Court to make that amendment to his charge on the ground that it is obviously correct, and the point raised by the defendants is quite important in this case where fraud is the essence of the complaint.

Your Honor, my colleague calls my attention to the fact that, as he understood the Court, the Court said, "If you believe a witness has testified falsely in any part of her testimony——"

The Court: "His or her testimony."

Mr. Keenan: I confess that I did not hear that myself, and I don't know what the Court said, I have forgotten; 3446
but my colleague brings it to my attention, and I am asking your Honor to examine that to see if—I feel quite sure that your Honor would not intend to single out any gender or any particular witness.

The Court: It reads, "If you are satisfied that any witness has testified falsely as to any material fact, you may disregard all of his or her testimony, or you may disregard such as you believe to be false and accept that which you believe to be true."

Mr. Keenan: I withdraw that request, your Honor. I didn't hear it, but my colleague had suggested that.

Now, finally, your Honor has charged this jury already in one particular that I think is clearly erroneous, with great respect to the Court, and that is where your Honor 3447
has said that as to these so-called admissions or statements of the defendants introduced in evidence, such statements can be considered against him alone, but all other statements are admissible against the other defendants.

The Court: I don't think I quite understood you. Do you mind repeating what you said?

Mr. Keenan: Yes, I will repeat it as I recall it. Your Honor was charging on the subject matter of these admissions that had been offered of the two Bayers and Major

Radovich. And you said, you charged the jury that each defendant—that such evidence contained in such exhibit was admissible only against the particular defendant making it, and then you added a phrase, as I recall it, that all other statements would be admissible against that said defendant. And I except to it and ask that it be corrected on the ground that it is at least confusing to the jury and I think it improperly states the law. My point is, your Honor, that it would permit other statements made to be considered by the jury against an individual defendant although he did not make them.

Mr. Ansell: If your Honor please, would you bear with
3449 me to make one more exception?

The Court: Certainly.

Mr. Ansell: Your Honor charged the jury that the jury should draw no inference from the failure of the defendant to take the stand. We except to that as being not sufficiently restrictive upon the jury, and again request your Honor to charge in accordance with our prayer No. 9, that the fact that an accused does not take the stand should not enter into the jury's discussions or deliberations in any manner.

The Court: Is that all?

Mr. Ansell: Yes, sir.

Mr. Keenan: Your Honor, one final statement.

The Court: Let me rule on that.

Mr. Keenan: I am sorry.

3450 The Court: Although not in the exact words of the opinion in the case of Bruno v. United States, I think my charge on that subject carries out the spirit of it. And I will overrule that objection. Exception may be noted.

Mr. Ansell: Exception.

The Court: All right, sir.

Mr. Keenan: Your Honor, finally the defendants now, in view of the argument of the United States Attorney, or summation, wherein he referred to various noted flyers

in the country and addressed the remarks to the jury of what would hapen if certain conduct had been adopted by their parents or others in relation to them, which we respectfully contend was an argument addressed to the passions of a jury in times of war, we ask now the Court to charge the jury in accordance with the authority of Wolf v. United States, from the Eighth Circuit Court of Appeals, May 13, 1919, found in 259 Federal Reporter, on page 388, the last page, 394, and the charge that we ask of your Honor is to charge the substance of the following——

The Court: Do I understand that that is not included in the prayer submitted before summation either? 3452

Mr. Keenan: That is true. Because it is particularly suggested——

The Court: All right. I just wanted to be informed. Go ahead.

Mr. Keenan: "The greatest danger to justice from a jury is through the confusion of the real issues in the case. This is peculiarly true when the times or circumstances or character of crime are such as to make jurymen lose sight of the questions of fact actually involved. It is natural in time of war, when patriotic sentiment is high, that it is particularly difficult to secure a fair trial for men accused of crimes connected with the war. At such times the task of the Court becomes especially difficult and requires great care to prevent miscarriage of justice. These are practical considerations which must be 3453 constantly borne in mind or the verdicts of juries in such cases will mistakenly become expressions of their hatred for unpatriotic acts in general instead of their careful judgment on the facts shown by the evidence in a particular case. Patriotism must not become even innocently a cloak for injustice. The right of an accused in the courts of this Nation to a fair trial must not vary with the char-

acter of the crime. The variation permitted is in the punishment but that comes only after a fair trial."

The Court: I heard General Ansell as to his supplemental objection before I had ruled upon your previous objections. The action of the Court as to them is to overrule the objections and motions, and exceptions may be noted.

I will mention the matter of alias to the jury when they come in.

As to the last objection or motion, rather, made by Mr. Keenan, I overrule the objection, and in the absence of the jury take occasion to say that in my opinion the summation of the United States Attorney was notably re-
3455 strained and in good taste.

All right. Now, what has the Government to say?

Mr. McGohey: No further requests, your Honor.

The Court: All right. Bring the jury in.

(The jury came into the court room at 11:40 A. M.)

The Court: Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word "alias" is "other or otherwise", and carries no inference. However, in common acceptation of the word it sometimes is considered to refer
3456 to a person who has more than one name for improper purposes. There is no proof about that, and I charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became American-

ized. So I direct you to disregard the alias reference entirely.

Now, ladies and gentlemen, I am going to ask you to retire to your room and consider your verdict, and I am going to send with you all the exhibits in the case—they are not bulky or cumbersome, and you may want some of them, but I am going to send them all.

If you wish to hear any evidence, that is, the transcript, you may so inform me, and I will have it read. I think in all likelihood you probably, without having in your mind the precise words, remember the evidence which you heard, but if you are doubtful or if there is any conflict between you about what any particular witness said, if you so re- 3458
quest I will bring you back and have such testimony as you wish read.

Mr. Keenan: I take exception, your Honor, to the manner in which you charged on the alias.

The Court: Yes, sir.

Mr. Keenan: As being in itself inflammatory.

The Court: You may note an exception.

All right. If during your deliberations you should desire any further elucidation on the matter of the law and its application to the facts, I will endeavor to give it to you upon request.

In view of the exception just made by counsel, I wish to state that I certainly meant nothing inflammatory or derogatory to any one person whatsoever, and I charge you that I certainly meant none and I don't believe you 3459
received any. All right.

Do you want to except to that?

Mr. Keenan: I didn't hear your Honor.

The Court: I said, did you wish to except to what I said then?

Mr. Keenan: I didn't hear you. I do have a little difficulty in hearing, your Honor, back here, all that you said.

The Court: I am sorry, but——

Mr. Keenan: I would be glad to look at it and see if there is any reason why I should.

The Court: All right.

(Alternate jurors excused and officers sworn.)

The Court: I wish to thank you alternate jurors for your service.

The court will now take a recess.

(Jury retired at 11:45 A. M.)

(The reporter read the statement of the Court previously referred to.

Mr. Keenan: Yes, I do wish to except.

3461 (Recess until 2:15 P. M.)

(The jury returned to the court room at 3:45 P. M.)

The Court: I do not see Mr. Keenan.

Mr. Cohen: Mr. Keenan is unavoidably detained where he went. I will try to do the best I can in his absence.

The Court: You have no objection to proceeding without him?

Mr. Cohen: I have no objection—what?

The Court: To proceeding without him?

Mr. Cohen: No.

The Court: Gentlemen of counsel and ladies and gentlemen of the jury, I have two written communications from the jury. The first one:

"Are we allowed to recommend clemency? Yes or no?"

3462 I can answer that without difficulty. You are allowed to recommend clemency, if you please, although you are not required to make any recommendation one way or the other, and in fairness I should say that your recommendation for or against clemency would not, under the law, be binding upon me. As I explained to you at the outset, the matter of whether punishment should be imposed, and, if so, what, under the Federal law governing this trial is a matter entirely for the Judge. But should you wish to make a recommendation, you may do so.

Now the other communication is:

"Summation of District Attorney and the Judge's charge to the jury."

I should like for you to be more specific as to——

The Foreman: May I come up?

The Court: —as to what you mean by that?

The Foreman: May I speak from here?

The Court: Just speak out so that we can all hear you.

The Foreman: In your summation particularly having to do with conspiracy, and the request was for the whole summation by the District Attorney.

The Court: Well, taking the two questions up in order, 3464
I don't think, ladies and gentlemen, that it would be proper to send in to you the summation of the District Attorney without sending in the summations of all counsel, and besides that, the summation of the District Attorney—I don't know whether it has been transcribed in writing or not, but whether it is or not, I don't think that it would be proper to send in to you the summation of one counsel without sending in them all. Nor do I think it would be proper to read one without reading them all, and I don't gather that you wish that.

Now, if the person who made that suggestion or request will be specific as to what portion or what phase of the District Attorney's summation they would like refreshment on, I will undertake to answer any questions 3465
which you may ask as best I may.

The Foreman: The principal thing, your Honor, is your charge to the jury concerning conspiracy.

The Court: And it is only, if I understand you correctly, the part which pertains to conspiracy which you wish to hear now?

The Foreman: That is right, sir.

Mr. Ansell: May I ask, pertaining to what, your Honor? I couldn't hear.

The Court: Conspiracy. Now in reading this part, ladies and gentlemen, I do not wish to be construed as emphasizing this part. I hope you will bear in mind all of the charge as given this morning. And at your request I am going to read that part which I gather you desire read, and I may read a little bit more.

Now as to the particular offense charged in this case: The gist of the charge made in the indictment in this case is that the defendants unlawfully, wilfully and knowingly did combine, confederate and agree together and with each other to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and
3467 judgment of the defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, the particular object being to procure defendant Radovich, other than in the honest discharge of his duty, to prevent the sending of privates Martin Bayer and Melvin Usdan out of the continental United States for combat duty.

That is what is known as an indictment for conspiracy. A statute of the United States provides that if two or more persons conspire to defraud the United States in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, it shall be a criminal offense.

As an officer of the United States Army it was the duty of the defendant Radovich to render to his country honest
3468 and faithful service, free from corruption, dishonesty or partiality, and it would be a fraud upon the United States for the defendant Radovich as such an officer to deviate from such duty.

In order to constitute a fraud on the Government it is not necessary that the Government suffer any monetary or financial loss. To deprive the Government of the United States of the honest and faithful services of any of its officers constitutes a fraud irrespective of whether or not the Government suffers financial loss.

So, if the defendant Radovich and the defendants Samuel and Elias Bayer or any two of them, entered into an agreement that the defendant Radovich would act corruptly, dishonestly, or by reason of bias or partiality, and not render faithful, honest and disinterested service to the United States, or to induce said defendant Radovich so to do, then there would be an agreement to defraud the United States. And if such an agreement was followed by the doing of any overt act by any one of the three for the purpose of carrying out the object of the agreement, then the agreement would be a conspiracy as set out in the statute.

Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for immediate dangerous overseas mission, which would be a violation of his duty as an officer. 3470

The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.

If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement not any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged 3471

in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

In your consideration of this question, you should con-
3473 sider not only the statement of the defendant Bayer, and the testimony of the witness Anne Solomon, but all the other evidence in the case except the statement in writing of the defendant Radovich.

There are many acts which by law are made crimes against the United States Government, but in addition to such substantive offenses it is made a separate and independent offense under the laws of the United States for two or more persons to conspire or join together in an agreement to defraud the United States, and do some act pursuant hereto; and persons may be, in a proper case, convicted of conspiracy, as well as for the substantive offense or offenses, or without being tried for the substantive offense. The indictment here, with which you are solely concerned, does not charge any substantive offense. It
3474 charges the defendants in one count with a separate and independent offense of having conspired to defraud the United States, and even though you should be satisfied beyond a reasonable doubt that one or more of these defendants are guilty of some substantive offense, such as bribery, before you should convict them upon the charge set out in the indictment, you must further be satisfied beyond a reasonable doubt that there was a previous agreement or understanding among them to defraud the United States, and

that some act or acts charged in the indictment were done by one or more of the defendants to carry out this understanding or agreement.

The reason why conspiracy is made a separate offense is because it is believed that, with two or more persons combined to defraud the United States, the danger to the Government from such concerted action is greater than that from a fraudulent act indulged in by one person alone, and justified the making of the combination or agreement itself a separate crime.

I shall undertake to make clear to you if I can, the nature of such a conspiracy as is here charged, and what constitutes it. A conspiracy is an agreement or understanding 3476
between two or more persons to defraud the United States, and it exists whenever there is a conspiracy, agreement or understanding between two or more persons for that purpose, followed by the doing of some act furthering the scheme. It is not necessary that they should meet together and enter into any formal or definite agreement as to the things which they intend to do, or that they should agree formally on the details or plans by which the unlawful combination could be made effective. The offense is sufficiently proven if you are satisfied beyond a reasonable doubt that these three defendants or any two of them, acted together for the accomplishment of a fraud upon the United States, and that in this unlawful purpose they acted with the mutual or common understanding as to the purpose to be accomplished, or cooperated together in the accomplishment of 3477
this purpose, followed by some act done by one of the parties for the purpose of carrying out the object of the agreement or understanding.

It will be plain to you that a conspiracy may be, and of necessity often must be, shown by circumstances rather than by definite proof of any actual agreement entered into. Persons who contemplate defrauding the United States are not accustomed to make their plans known to the outside

world, and it is usually necessary in considering whether or not a conspiracy exists to consider all the facts and circumstances proven in the case. The existence of a conspiracy may be proved by facts and circumstances as the natural and logical inference from these facts and circumstances. The acts charged to have been done in pursuance of the conspiracy may themselves be of such nature as to prove the existence of a conspiracy without the aid of separate and independent proof of any agreement. However, in order to justify a conviction, the facts and circumstances relied upon must not only be consistent with guilt, but inconsistent with any reasonable hypothesis of innocence.

3479 If an agreement or understanding was entered into or reached by any two or more of the defendants named in this indictment to defraud the United States, as charged in the indictment, then any other person or persons who participated in this common purpose with knowledge of it would be guilty of conspiracy, even if their participation first took place after the original agreement was formed, and even though they had no part in the formation of the original agreement and no knowledge of it at the time it was formed, and even if they were unacquainted with and had no knowledge of the activities of all the remaining persons who also might be acting to aid the purposes of the conspiracy. The indictment refers to persons unknown to the grand jurors, and the evidence refers to the activities of various persons other than the defendants. Whether these

3480 persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence.

It is necessary, however, that such person who is to be held to be a member of a conspiracy should have knowledge

of the unlawful purpose sought to be accomplished and should intend to be acting with other persons in the accomplishment of this unlawful purpose. However, it is not necessary that all of the persons taking part in a conspiracy should play parts of equal importance or activity. Anyone who acts with others in the accomplishment of an unlawful purpose, knowing it to be unlawful, or fraudulent purpose, knowing it to be fraudulent, is guilty of conspiracy, whether his activities in the fraudulent purpose were great or small. It is sufficient to convict a defendant of the offense of conspiracy if he knows in a general way of the purpose of two other persons to defraud the United States and then assist in any way to accomplish the purpose, no 3482
matter how great or how small the assistance which he gives to accomplish the purpose.

The indictment sets forth that this conspiracy came into existence on September 1, 1942, and I wish to state that the date of the origin of the conspiracy is not of importance and if a conspiracy existed it is not necessary for the Government to prove that it came into being on the date named in the indictment, nor on any specific date. A conspiracy may be of gradual development, and in this case it is sufficiently proved if you believe beyond a reasonable doubt that at any time subsequent to September 1, 1942, and prior to the return of this indictment on July 12, 1945, a conspiracy existed as it has been previously defined to you.

Acts done by conspirators in furtherance of a conspiracy are called overt acts. I wish to explain to you the nature 3483
of an overt act and the part it plays in the prosecution for conspiracy. Conspiracy is punishable as an offense under the statute I have previously referred to, only if an agreement or understanding has been formed to defraud the United States, followed by some step known as an overt act taken to carry out the proposed scheme. The law recognizes that persons might have an agreement or understanding to engage in a criminal activity, but they might repeat

of that decision or for some reason abandon it without taking any step to commit the offense, and in such case they would not be guilty of the crime of conspiracy. If, however, having entered into an agreement or understanding to defraud the United States, they take any step or commit any act toward the completion of the offense, thereby evidencing their intention to go through with the conspiracy, the offense would be complete, irrespective of whether or not the plan was finally carried through to a successful conclusion.

The overt act need not itself be of a criminal nature. It may be an act perfectly innocent in itself. But if it
3485 is an act done for the purpose of carrying out an unlawful agreement, then the crime of conspiracy has been committed and completed. Therefore, it is not necessary that overt acts shown to have been committed or steps taken in furtherance of a conspiracy are in any way criminal or forbidden in themselves, but it is necessary only to show that some act of some sort as charged in the indictment was done for the purpose of carrying out the object of the agreement previously arrived at, and when an overt act has been committed by any one member of a conspiracy, it makes all persons co-conspirators who participate in the unlawful agreement with knowledge of its unlawful nature, whether they were original parties to it or whether they came into it at a later time. It is not necessary that the Government prove the commission of
3486 all the overt acts charged in the indictment. If the commission of any one of these overt acts be proved beyond a reasonable doubt that is sufficient.

Now I think that covers everything I said to you this morning on the subject of conspiracy as such.

Is there anything about which I have read to you which is not clear to anybody, or which you would like to have amplified in any way? Or have you any questions on any

phase of the case, any of you, which you would like to ask now?

Juror No. 6: Yes. In reference to Mr. McGohey's summation, several of the jurors would like to hear again that part in which he connects certain telegrams and meetings and messages of the defendants to the dates of November 22nd, and 24th and 25th of 1943.

The Court: I still think, sir—I want to give you all the assistance I can, I want to give you all the assistance I can, but I don't believe it will be proper to read from the summation or argument of any one counsel without reading all of them in full and I do not imagine you want that done. 3488

Now is there anything further, ladies and gentlemen? Did you have some suggestion? There is nothing else you have in mind then? Did something else occur to you, sir?

Juror No. 6: No, that was the only thing. That was just a few paragraphs and it would have contained so much testimony.

The Court: Well, it is not a question of the practicability of it. What I have in mind is that I do not think it would be fair to read a quotation or excerpt from the summation of one person without comment from the other counsel, which I would not know exactly where to find. I think that most of your have pretty well in mind what the summation was, and I would like to comply with your request, but I don't believe I can do so. 3489

All right, ladies and gentlemen. I will ask you to retire to your room and resume your deliberations.

(Jury again retired at 4:12 P. M.)

Mr. Robb: If your Honor please, we had certain exceptions to the portion of the charge which your Honor reread. I assume that your Honor will let us take those again and renew those.

If the Court please, in view of what has happened at this time, I ask the Court to instruct the jury that Mr. McGohey's summation is not evidence, is not to be considered as such. I gathered from the remark of one of the jurors that he seemed to treat that as testimony. He referred to it as testimony. He said it contained so much testimony.

The Court: I did not so understand. I understood the gentleman to say that the particular portion which he referred to—he may have used the word "contained"——

Mr. Robb: Yes, sir.

The Court: What I gathered from him was that it summarized and gathered together certain testimony.

3491 Mr. Robb: I am quite sure he used the expression, "contained so much testimony".

The Court: All right, I will consider that.

Mr. Cohen: May I make the same objections that Mr. Robb has made and renew the objections made by Mr. Keenan to your charge in the main?

The Court: Very well, it may be so noted.

What has the Government to say? Frankly, that request I have never had before and have never heard of.

Mr. McGohey: Neither have I, your Honor.

The Court: What comment have you to make, if any?

Mr. McGohey: I think your Honor means the request to read the summation. If I understand your question, you wanted me to indicate what I had to say about the re-

3492 quest to read the summation?

The Court: Well, I didn't——

Mr. McGohey: I make no question about that. I don't know how you could do it without reading all of them, and I don't know whether the others have been transcribed.

The Court: Well, I don't either, and I would not, unless urgently requested, direct that all summations be read; and, as I said, the request made was entirely a novel one

to me, but I thought that it would not be fair nor proper to permit the reading of an excerpt of one counsel.

Mr. McGohey: I don't quarrel with your Honor's ruling on that at all.

The Court: All right.

Mr. Ansell: If the Court please, and with all proper respect, of course, we feel that the procedure over-emphasizes in this case that part of the charge having to do with the elements of conspiracy, and puts them out of a fair relationship to other parts of the charge which, it would seem to me, they necessarily pertain to. And I would like to have an exception to the procedure itself.

Mr. Cohen: Your Honor will accord me the same exception? 3494

The Court: Very well. Yes. I am inclined, if you seriously urge the matter about the District Attorneys——

Mr. Robb: I do, sir.

The Court: I expect you had better get them back.

Mr. McGohey: That is, the point to instruct them that the summations——

The Court: Are not evidence.

Mr. Rudykoff: Maybe we could have the stenographer read what Juror No. 6 said.

(Record read.)

The Court: I still don't think that your apprehension is well founded, but I would rather make it clear to the jury in case they should be——

Mr. Ansell: We join in that, too, your Honor, for the reason that, rightly or wrongly, it seems to me that the jury does regard the statement made by Mr. McGohey as testimony. 3495

Mr. McGohey: I don't believe there is any basis for that, your Honor, and I call your Honor's attention to the fact that in the summation of each of counsel I am pretty sure it was pointed out that counsel's statements were not testimony and not evidence. I am sure I did that and I am

sure that your Honor said that in his charge. However, I want to be fair, your Honor, and I won't press it.

The Court: I think our apprehensions are groundless, but I would rather correct them than to take any chance.

Bring the jury back in.

Mr. Robb: I had in mind that the jury is not bound by what Mr. McGohey said. It is their recollection of the evidence.

Mr. McGohey: I think that has been well taken care of in the charge.

The Court: I am not going to make a speech.

Mr. Robb: No. That is the thought I had in mind.

3497 Mr. McGohey: My summation has been here (indicating) and I have said that.

(The jury returned to the court room at 4:20 P. M.)

The Court: Ladies and gentlemen, after you retired it was suggested to me that the question asked by Juror No. 6, you, sir, in speaking of the United States Attorney's summation, made some reference to the evidence contained in certain portions of his summation, and it was suggested to me that possibly you or someone was under the misapprehension that summations of counsel were evidence in the case.

I think it has been made clear to you by counsel themselves, and, if not, by me, that summations of counsel are not evidence; summations of counsel undertake to summarize to you the evidence which they think important
3498 and which has a bearing on the case. That is true of all summations, but I am sure that counsel themselves have made clear to you that summations are not evidence.

Did you have any misapprehension about that part, sir?

Juror No. 6: No, sir. I just thought that it was a certain group of facts in a small—encompassed—not the right or the wrong of the facts.

The Court: I was pretty sure that neither you nor anyone else was under any misapprehension about that:

that your reference to evidence in the United States Attorney's summation meant his recital of the evidence as he recalled it and was not evidence itself.

Another Juror: May I make a suggestion that there is in the facts the fact that—this gentleman wants to know—can be found in any of the evidence, can you point it out to us in the evidence? Can you tell us where we can find that fact?

The Court: Well, now, could you be more specific about that?

The Juror: Well, the gentleman asked the question of those dates. Can those dates be found in any of the evidence that has been given to us, and can you direct us 3500
to where we can find those dates in that evidence, or those facts in the evidence that was given to us?

The Court: Those dates were referred to, as I recall it, in the evidence of a good many witnesses. For instance, the young lady from Washington, Miss Goertz, gave some testimony on those dates; Miss Solomon testified something about those dates, and there may have been——

A Juror: Melvin Usdan also testified.

The Court: That is quite true.

Mr. Ansell: What was the statement of Juror No. 4?

(Record read.)

The Court: I do not believe it would be practical for me to undertake to pick out from the evidence of the different witnesses what was said, and I am afraid you will 3501
have to rely on your recollection. As to any specific witness whose testimony you would like to have read I will undertake to have it read to you, but I do not believe it would be practical to go through the entire record to undertake to get the separate questions and answers which have some bearing on the date.

Is there anything else, gentlemen?

Mr. Cohen: May I interrupt your Honor to say that you also called the jury's attention to the fact that those dates might be found in the definite records which you called the jury's attention to?

The Court: Yes, I mentioned that this morning. I haven't undertaken to recite to you or indicate to you what different people said because, offhand, I may have overlooked something. All right, ladies and gentlemen. I beg your pardon?

Another Juror: I don't know whether this is apropos, but in the minds of some of the jurors there appears to be a little confusion regarding the guilt of others in connec-
3503 tion with the three that are now on trial, and it seems to me perhaps it might be clarified by the Judge, perhaps, to clear their minds of the idea that—I mean, we seem to be a little confused.

The Foreman: As to whether one or three.

The Court: I beg your pardon, sir?

The Foreman: As to whether one or three.

The Court: It seems to me you have made——

A Juror: Have I made it not clear?

The Court: I think I understand what is in your mind, Madam.

The Foreman: I was just trying to help her.

The Court: All right. I thought that I had made that clear by something I had already said in my charge, but if I haven't, I will undertake to make it clearer.

3504 The only persons whom you are trying in this case are the three defendants, Elias Bayer, Samuel Bayer and the defendant Radovich, and the only persons as to whom your verdict can in any wise affect, and they are the only persons whose guilt or innocence you should consider. Now there are other persons who have been mentioned in the testimony, persons who have testified here about their own activity in connection with the activities of these defendants. Now as to whether those persons, or any of them,

are guilty or innocent of anything, should not concern you at all, they are not here on trial, with this exception; you may consider that for what bearing their activities have upon the actions of the defendants who are upon trial and for what effect in your judgment the activities of these other persons might have upon the testimony which they have given, that is whether it is true or not, whether it is all true or part true. But as to whether they are guilty, whether any person other than those named in this indictment are guilty of any offense or not, is not a matter which should concern you at all. You are charged with the duty of trying the persons named in the indictment and those only.

3506

All right, you may retire to your room then.

(Jury again retired at 4:27 p. m.)

Mr. Robb: If your Honor please, with all respect, we except to your Honor's discussion with the jury of the evidence——

The Court: Of what?

Mr. Robb: We except to your Honor's statement to the jury concerning what the evidence, or, rather, what the witnesses had testified about a particular point, upon the ground that your Honor in so doing took part in the jury's functions and undertook to tell the jury what the evidence was, which is their function, of course, and not the Court's.

We submit also that your Honor's remarks in that connection constituted argument.

We also, if the Court please, except to your Honor's statement as to the possible bearing upon this case of the guilt or innocence of any others inasmuch as the indictment in this case charges "others to the grand jury unknown." We submit the jury upon the evidence might possibly convict only one of these defendants and acquit two of them.

3507

The Court: I stated that to them this morning.

Mr. Robb: If the Court please, I think that I asked your Honor so to charge and your Honor said no, your Honor

would not charge that way. Your Honor charged they might convict two and acquit one, but did not charge that they might acquit two and convict one.

Mr. Cohen: Now, your Honor——

The Court: All right.

Mr. Cohen: Your Honor will recall that after the jury first was sent out by you, at the request of Mr. Keenan they were recalled and you spoke to them about the telephone calls, and you stated to them that while there was evidence that a telephone call was made to Washington and one came in from Washington, there was no evidence as to who made the call from Washington. Your Honor will recall that.

3509 The Court: I recall saying that there was no evidence on the record.

Mr. Cohen: Yes. Now, since that time, of course we were unable to get the evidence together because we did not know that Mr. McGohey was going to make a point of it on the trial, and he made it only in his summation, we have gotten the record of the telephone company, showing that the call from Washington to New York was made by Captain Radovich. And we ask for leave to put in that evidence in the light of Mr. McGohey's statement to the jury and in view, further, of the statement made by the jury to your Honor for further information concerning those dates. This is highly important and of great importance to the defendants here.

The Court: What is that you have in your hand?

3510 Mr. Cohen: This is the telephone company slip which we only got after the matter was submitted to the jury. I think it is highly important in view of the statements made by the jury to your Honor.

The Court: Have you seen this, Mr. McGohey?

Mr. McGohey: No, I have not, your Honor.

Mr. Robb: We haven't either.

Mr. Ansell: Would your Honor hear us one moment please.

The Court: Yes.

Mr. Ansell: We think the whole idea of putting evidence in the record by the method pursued this morning is irregular and prejudicial to the defendant Radovich, and we think to go further with it by means of stipulation between the United States and Mr. Keenan's clients would be highly prejudicial to Radovich and could not be done by stipulation, and would involve the opening up of that question and permitting us to cross-examine upon everything that is brought out. We don't believe your Honor that there should be an injection of facts into this record in any such way.

Mr. Cohen: Evidently, your Honor——

The Court: I want to hear from the Government first. 3512

Mr. McGohey: Your Honor, may I see that? Have we got those telephone calls that were in here this morning?

The Court: I gave them back to Mr. Flynn or Mr. Wallace this morning.

Mr. McGohey: Because it is my recollection that there was an Arlington call, and that is what this appears to be, as distinguished from Washington.

Mr. Cohen: Arlington is Washington.

Mr. McGohey: We talked this morning about two calls, one from Washington and one to Washington.

The Court: That is right.

Mr. McGohey: Until I see the records, I don't know whether that is so or not.

The Court: I do recall very distinctly that the record which was produced this morning, that is, the telephone bill, 3513 referred to the two calls, New York to Washington and Washington to New York, a collect call from Washington, Col. parenthesis New York.

Mr. McGohey: Your Honor, but this is not Washington. This says on its face, Arlington, Virginia, and that undoubtedly is the way that would be reported on a telephone company bill.

Mr. Cohen: No, it would not.

Mr. McGohey: Well, wait until we see, when the bill comes in. That is the first point. The second point, your Honor, is that I don't understand on this argument that they didn't have any time to get it. They had three weeks since this trial started and they certainly had the time since Miss Goertz testified about the dates to get it. And the evidence that Miss Goertz gave, and the argument that I made from that, your Honor, isn't going to be disproved by this or any part of it at all. All this is going to prove is that a telephone call was made from Washington. It is not going to prove that Radovich didn't make that telephone call from Goldsboro, and it is not going to prove that
3515 Radovich didn't on that day, the 24th, ask to have those orders made. It is not going to disprove that on the 25th the letter was sent from the Army Air Forces in Washington to Seymour Johnson Field to have the boys transferred out. It is entirely collateral, and certainly at this time, when the jury has been considering the case now since eleven o'clock, I certainly don't think there is any justification for opening the case to go into such a collateral matter, and I will oppose it.

Mr. Cohen: Evidently the matter is of great moment to the jurors, as your Honor could see from the question asked by Juror No. 6, and the matter—the whole thing was engendered by Mr. McGohey's argument in his summation before the jury.

Mr. McGohey: Based on the evidence of course, your
3516 Honor.

Mr. Cohen: But you raised the point, on the question of doubt, as to whether or not this thing took place at all. There never was any question up to that time.

Mr. McGohey: That doesn't——

Mr. Cohen: Evidently it created a doubt in the minds of the jury.

Mr. McGohey: This evidence would not disprove it because all this evidence would show that he made a call from Arlington, Virginia, to New York some time that day.

The Court: Gentlemen, I am not going to admit the evidence for a number of reasons. In the first place, there is no witness called to prove anything. In the second place, this memorandum refers to an Arlington call; a call about which I made a statement this morning was a Washington call. I know that Arlington and Washington are near each other. Conceivably it may be the same call, but it is not conclusive.

Mr. Cohen: But——

The Court: Sir, I have ruled, and I am just explaining. 3518
But the most cogent reason in my mind is that the case has long since been closed. As General Ansell very aptly remarked, my procedure at the beginning of this morning was irregular to say the least, and I am not going to make it more irregular by calling in the jury at twenty-five minutes to five, when they have been considering the case since approximately eleven o'clock, and make some statement by way of evidence to them, or permit the statement of counsel, or the handing to them of an unverified memorandum from the telephone company. In my opinion, to inject any evidence or bit of evidence at this time would unduly emphasize it and give other counsel the right to put in other evidence, and call for somebody to cross-examine, and I just am not going to permit that.

Mr. Cohen: May I with all due respect then, besides tak- 3519
ing my exception to your Honor's ruling, now make a motion for the withdrawal of a juror and for the declaration of a mistrial and for a new trial on this evidence which we have found since the close of the trial or submission to the jury, and which we were unable to obtain prior to the opening of this trial.

The Court: Very well. The motion will be overruled.

Mr. Cohen: Exception.

Mr. McGohey: There isn't any evidence that they were unable to obtain it, your Honor.

The Court: All right. The court will take a recess.

Mr. Ansell: Would your Honor hear me one moment?

The Court: Certainly.

Mr. Ansell: I am quite certain that you know I would not make this suggestion, perhaps a motion it should be labeled, to your Honor, unless I were convinced that there is confusion in the minds of the jury as evidenced by certain requests made by one or perhaps more of the jurors upon this subject, as to whether or not the jury might acquit two of the named co-defendants and convict one.
3521 Your Honor's charge this morning, I wish to say with frankness, and it is not surprising, I think was confusing to me and I think it is not surprising because I had difficulty in hearing—your Honor's charge in effect as I remember it, was that testimony with reference to "persons to the grand jury unknown" could be used only to throw light upon the issues that were before this jury. It seems to me that your Honor's charge and the statement made to the jury in honor of their request here, was to tell them in effect that they could not convict one of the named defendants, if they found him conspiring with one or more persons to the jury unknown. That I wish to say, your Honor, was not my view of the law of the matter.

I regret that I have taken up this much time and I hope—

The Court: Oh, have no regret, sir. What I said is this,
3522 the indictment refers to persons unknown to the grand jurors, and the evidence refers to the activities of various persons other than the defendants. Whether these persons, or any of them, or any of the persons who have testified as witnesses were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participa-

tion may bear upon the weight or credibility of their evidence.

Your views still stand after hearing that read?

Mr. Ansell: I regret it is so, your Honor, because it seems to me to preclude their finding one man guilty of having conspired with persons to the grand jury unknown. It seems so to me or I should not make the statement that I think it does, when coupled with your charge upon the possible verdict that could be given. I think your Honor is clear enough about the law. The only question that I am making is whether or not your Honor made himself clear in addressing the jury, and I thought then that it might be a matter of asking, and I just sense that it is one, perhaps, of importance now. 3524

The Court: What is your thought on that matter, Mr. McGohey?

Mr. McGohey: I am afraid, your Honor, I did not follow that last part, I was just talking to Mr. Rudykoff here.

The Court: Suppose you read to him what Mr. Ansell said.

(Record read.)

Mr. McGohey: I am afraid I just don't understand the argument as it has been made. I can't comment intelligently on it.

Mr. Rudykoff: If anything, it would be of an advantage to the defendant Radovich rather than a detriment.

The Court: Treating your suggestion as a motion, gentlemen, I am going to overrule it. 3525

Mr. Robb: May we have an exception, your Honor?

The Court: Yes.

(The Court recess from 6:10 P. M. to 7:30 P. M.)

(The jury returned at 9:02 P. M.)

3526

VERDICT.

The Clerk: Will the jurors kindly answer as your names are called. (Roll called.)

Mr. Foreman, have you agreed upon a verdict?

The Foreman: We have.

The Clerk: How say you?

The Foreman: We find them guilty, with the highest degree of clemency for all three defendants.

The Clerk: Ladies and gentlemen of the jury, listen to your verdict as it stands recorded: You say you find each and all of the defendants guilty with a recommendation for clemency, and so say you all.

3527 Mr. Ansell: If your Honor please, may we have the jury polled?

(Jury polled.)

The Court: Ladies and gentlemen of the jury, I want to thank you for your patient and careful attention which you have given to the trial of this case, which has been long and at times tedious. And I now discharge you from further consideration of this case with the thanks of the Court.

(Jury discharged.)

The Court: What is your desire, gentlemen of counsel, about the matter of sentence, that is, the matter of when to pass on it? What is your desire, counsel—Mr. Keenan?

Mr. Keenan: Your Honor, I am not ready to make any request for any specified time, but if the Court has a
3528 notion in mind to deny bail to the defendants, I would ask to have sentence deferred to another time.

The Court: I did not hear you, sir.

Mr. Keenan: If the Court is of the opinion that no bail should be permitted for these defendants that I represent, I would like to have the sentence deferred until a later time where that situation could be met. Other than that I would ask the Court—would move the Court that sentence be not imposed immediately.

3529

The Court: Do you gentlemen insist that it be taken up tonight? I think it has been a long trying day and I prefer not to take up that matter at this moment.

Mr. Ansell: Pardon me, your Honor.

The Court: Yes, sir.

Mr. Ansell: I don't know what the procedure is here. It is late in the nighttime, the day has been a hard one. My client, without money, your Honor, has been found guilty. He is here. He is still an Army officer. I don't know what the practice is. I don't know that the practice fits this case of my client. The United States Attorney is here. I can only say, I hope and I will believe that it would be very harsh to commit Major Radovich tonight.

3530

The Court: I have no idea of ordering that. I have no idea that the United States Attorney would suggest it. I am inclined to continue the whole matter, adjourn the whole matter until tomorrow morning. Is there any objection to taking up the matter of sentence at 10 o'clock tomorrow morning?

Mr. Ansell: No objection on my part, sir. Indeed, I would like to get it over and find out where we are.

The Court: All right, sir.

Mr. Keenan: Your Honor, if the delay is to be only until the morning, my clients would rather have the matter passed on tonight, and I think perhaps General Ansell, I don't know. He speaks for himself.

Mr. Ansell: I think I could not. I am unable to think on the subject at the present time, your Honor.

3531

The Court: Frankly, I am really tired and I haven't got the patience that I ought to have to take up a matter as important as this is. Bail is continued and the whole matter is adjourned until 10 o'clock tomorrow morning in this room.

Mr. Ansell: Thank you, sir.

(Adjourned until Wednesday, October 24th, 1945, at 10 A. M.)

New York, October 24, 1945, 10 A. M.

(Met pursuant to adjournment.)

The Court: Are you ready to proceed, gentlemen?

Mr. Ansell: I am ready, your Honor.

Mr. McGohey: The Government is ready.

The Court: All right, sir. Let me hear from the Government first.

Mr. McGohey: May it please the Court, I am sure that so soon after the verdict in this case and after this long trial, it is not necessary for me to review to your Honor any of the facts which were proven here on the trial. I think they are pretty well fresh in your Honor's mind.

3533 The jury has rendered its verdict of guilty as to each of these defendants, and the Government is prepared to make recommendations if your Honor cares to hear them on the question of sentence.

The Court: All right, sir.

Mr. McGohey: Now in view of the evidence in the case, your Honor, I would have recommended for the defendant Samuel Bayer the maximum sentence of two years in jail and a fine of $10,000. However, the jury considered the case for a long time yesterday and they came back last night and recommended the highest leniency, the expression I think the foreman used, and taking that into consideration I decided to reduce the recommendation which ordinarily I would have made to a recommendation that Samuel

3534 Bayer be sentenced to a jail term of eighteen months, and that a fine of $10,000 be imposed upon him.

Now, as to Elias Bayer, without——

The Court: Let me correct your phraseology. Not jail, it is an institution provided by the Government. I assume that you mean——

Mr. McGohey: I accept your Honor's correction and that is what I should have said.

Now as to Elias Bayer I would have recommended if the jury had not recommended clemency, commitment to an institution of the Government for a term of eighteen months and the imposition of a fine of $10,000. However, in view of the jury's recommendation, I now recommend to your Honor confinement for Elias Bayer in such institution for a period of a year and a day, and the imposition of a fine of $10,000.

As to the defendant Radovich, I recommend as to him, taking into consideration the jury's recommendation for clemency, confinement in an institution provided by the Government for a term of one year and a day, and no fine.

The Court: Let me make an inquiry of you. I gathered 3536
from some document or some statement that the defendant Radovich had paid into the Treasury of the United States already, $7,000; is that correct or not?

Mr. McGohey: I think it was not to the Treasury of the United States, your Honor. My information from the Army officials is that he paid back $7,000 to the Army, and I think it went into the Army Relief Fund.

The Court: Anyhow, it has been paid by him to some agency of the Government?

Mr. McGohey: Yes, sir.

The Court: What is your recommendation again as to the defendant Radovich?

Mr. McGohey: Confinement in an institution for a year and a day.

The Court: And no fine? 3537

Mr. McGohey: And no fine.

The Court: Is that all you wish to say?

Mr. McGohey: That is all I have to say at this time.

The Court: Gentlemen, I will hear from counsel for the defendant Radovich.

Mr. Ansell: If your Honor please, I have slept none, I am in poor shape, so if I wander afield your Honor will, of course, restrict me.

The Court: No, sir, I shall not restrict you. You can wander anywhere you want to, sir. I will be glad to hear what you have to say.

Mr. Ansell: The jury has convicted these three defendants. I am not used to criminal practice. It is evident to me that the jury fought among themselves to the conclusion that they finally reached. There is no verdict that will ever cause me to quarrel with a jury. That verdict was accompanied by what is to me a most remarkable recommendation for clemency. Your Honor remembers it.

I said to that jury and I said to your Honor and everybody else connected with this trial, I have the utmost appre-
3539 ciation of the kindness, the courtesy, the fair dealing under the law, and nothing will ever cause me to say otherwise.

It has been said to me by my best friends, in church, in professional circles, in social circles, "Why are you defending such a man?" They prejudged his guilt, I didn't, and I won't until the highest court in this land says so. Of course, he is guilty here now.

Your Honor, we have had mention made of Jews here and Catholics and Yugoslays, and the Lord only knows what all. We are Americans first, last, all the time, and this is an American court in accordance with its highest traditions. I am a part of it and I shall endeavor to demean myself with all the courtesy and decorum that any officer of the court ought to demean himself with. But I said to this jury, and I repeat it to your Honor, there were voices in
3540 me that I thought had long ago fled when this boy was sent to me by New York attorneys, friends of mine, with the request that I serve him to the limit of whatever ability that I have, and those voices arose, they called to me, and I came. And I did my best. I lost.

I don't want to enter into much personality as to myself. I feel it my duty to do so. In Eastern North Carolina I was born, in an humble home, with people who had

been there then for nigh onto 300 years. They fought, even in the Civil War, for what they believed to be right. I worship their very memory to this day.

I had a father, a poor man, not well educated except as he did it himself. One of the greatest characters ever known to me, and I pray God that I inherited something from him, was an intense sense of justice coupled with an insurmountable courage. For fifty-six years the people first of that district and then of the county, honored him by making him Clerk of the Superior Court, fifty-six years. I am certain he never asked a man to vote for him in all his life.

In my little bedroom there was a placard, written in the beautiful hand that he could write, and on that was written "Be true and fear not." That was his commandment to me. And that commandment I shall obey just as long as I draw the breath of life, regardless of who is on the other side. 3542

I had read it before, but last night I went back and read this from the Bible: "My Son, keep Thy Father's Commandments. Let it ever be about thy neck and bind it ever around thy heart." And later on it says: "Where thou goest, thy Father's commandment shall lead thee. When thou sleepest it shall keep thee. When thou wakest it shall talk with thee."

I am no different now from what I ever was. There is no power on this earth, and I am not a formally religious man, that will keep me from taking to my God my troubles, in my own Episcopal Church, in that Catholic Church over there, if there were a Jewish Synagogue I would go there. And last Friday night I went back to West Point. I knew that we were up against it. I went to the old chapel where I worshiped as a cadet, and I love it, and I asked that whatever happened here, let me play my part courteously, amiably, but courageously and truthfully. 3543

I went to the old house that I was married in, my children were born in, that looks down on the cemetery, and the

cemetery looks down on that most glorious of this world's rivers, and the river runs up to Vassar College, where my womenfolk were educated and lived, and I came back here quarreling with nobody, abusing nobody, but attempting to do what was true and right.

Of course the money has been paid back. Of course we must assume, because it is fixed in the law, that Radovich got it. I don't believe at the end it will ever be found that Radovich was guilty of moral wrong, and that statement I make to your Honor; it is all not here.

Your Honor knows that I served in the Army many years and your Honor knows that I loved, and I do yet
3545 love, the Army of the United States, and I shall ever love it. I know that my views of the methods of arriving at punishment in the Army were not the views of my own West Point classmates—they were not then, they are not now; and yet as the years have gone by and judgment has been softened, I have been proud to receive the decorations of respect and esteem and love from every officer of the Army who served in the Army, either at West Point or thereafter, with me. It is a great pride and pleasure, your Honor, thus to end out my days. I love any man who serves, and serves courageously, in the Army of the United States, and they can put prison stripes on him, as the law of the land requires, but my arms will be around that man just as long as I live and he lives.

Of course attorneys can't agree with the judges; of
3546 course not. So with opposing counsel. Of course not. But fairness, honesty of judgment, rectitude of official performance, I have known that it was here. I know it.

Now I think there are questions here that ought to go, and that will go, to the upper court. I have not believed that Radovich's confessions were free. I have believed, indeed I know, that this part of the Army of the United States coerced and maltreated Radovich and they ought not to have done it, and they violated the new Articles of War that I

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for one labored so hard to change, to prevent that very thing. It seems to me that the Army—I assume for reasons that I shall never be able to understand, except I know that if you give a certain kind of man enough rank and enough power you had better keep the check rein on him. Not all, far from it. I have never known, your Honor, why they imprisoned Radovich as they did, and I feel intensely about it. I have never known why the military authorities, after he had done all that he did, at General Hunter's request had been brought from the Pacific Coast and thrust into that ward for the insane.

I have never known, I can't comprehend, any set of men with the slightest sense of responsibility for their duties as 3548
high ranking officers of the Army, could have convened a court-martial and tried him for what is in every practical respect—your Honor says not—legal, and for the time being, of course, I defer to that, convened a court-martial upon this man.

And I wrote to the President of the United States as good a letter as I could compose, because he is the Commander-in-Chief, and I said to him: The court-martial was a kangaroo court. It can never stand up. There is law in this land. I know you can't attend to these things, I know that the Secretary of War can't. I don't know what the Judge Advocate General will do; I think I know. But, Mr. President, can't you take some simple soul without servility to the department, any of them, and ask him to find the truth of all that happened to Radovich out there. 3549

That was July 28th or 29th. August, September, almost three months have passed away, and yesterday when I get to my hotel I get a letter, a nice formal letter that gets us nowhere. And they send an inspector-general of General Hunter's department to investigate why General Hunter violated the law in bringing this man to trial. And he reported, your Honor—reported—Ansell. Ansell, why he was a queer duck even in the last war. Queer duck. Be-

cause more than a hundred thousand men were released from penitentiaries, prisons and military prisons, by Secretary of War Baker upon my insistent recommendation. Queer duck.

Secretary Baker—and your Honor was in the Army and Mr. McGohey and Mr. Keenan, we all were in doing our best—stood by me, except when men whose sentences they had approved were not being executed, and they mustered their forces upon me, and it went to Congress. It turned out that Congress was on my side—the committees I mean—and they were about to criticize the Secretary of War. I would not have had it so. But the Secretary paid to me
3551 a bit lefthanded but nevertheless a glowing compliment, "You have to remember that General Ansell is a man who has a passion for military justice."

This was the first time that I had ever encountered a ruthless violation of the Articles of War that the Congress of that day made to prevent some of the injustices of the land.

Punishment. I think those of us who served with the regular Army esteem it as highly as I, but I think also we must know that when we encounter a man like that, a man like General Hunter, things like that can happen, and that attitude goes down to his military minions, and a man who has not been tried, a man who has not even been charged, but thrown into the insane ward, that man is a pariah, he can't be spoken to, he can't be regarded as an officer of
3552 the Army; he is degraded and humiliated in accordance with some of the military law that has governed the Continent of Europe but not of England and our land.

That man has been punished since the 9th of 10th day of August, 1944, punished by humiliating, harsh, cutting treatment.

Now I wanted to confer with him but they said, well, you come up here. He was in the jug then. They would not let him come to me. I can understand that. But nothing

was done ever to permit him to get in touch with me, an old man. Applications for request for a few days' leave were denied. I had to come to Mitchel Field even to confer with him, and go through all the folderol that one has to go through to get on a military post of the United States.

Born as I was, I never saw, your Honor, a man with a foreign name, what I call a foreign name, in my county. I never saw an Irishman in my county; I never saw a Catholic in my county; I never saw a Jew in my county unless he were a peddler. There was never but one foreign-born man in my county, and he was an Englishman. This boy here (indicating Major Radovich) came from foreign parentage, Yugoslavian parentage. He was born in this land. 3554
He is an American. He loved this land, he fought for it. I see no difference myself; my regard for this Government, for the Constitution, for our place in this world, won't permit me to distinguish between those of foreign racial extraction and myself.

I had a good military record, but with all this boy's faults, so help me Heaven, I would be proud to change places with him and go down if need be. That boy's name, in my opinion, is placed like a great star in the crown that marks the place of this nation in God's Heaven.

I think the military authorities were not only unjust but they were stupid. He is here to be punished by your Honor, and I know, I know what a distasteful job that is to your Honor. I know that. Your Honor's duty of course will be done, and I could not and would not deflect you from it. 3555
Government, right, justice, truth, do not lie in any such direction as that. I am here, your Honor—after all the motion shall be made, new trial, and all this and that, I am here pleading as earnestly as I can for the probation of this man, whatever sentence you may pass upon him.

It was Chief Justice Taft, in passing upon our probation law, a glorious law, your Honor—like all other law with some abuses—that the object of that statute was to

take a man of hitherto good character, a convict, I mean, who had done well up to this moment, who had served his country well, who had the elements of the making of manhood in him, to take him and pluck him, like a brand from the burning, and that I think is the Chief Justice's words. And this man has all of that. When we are through with this, then we are going to face a court-martial. In God's name when will this Government that we love so much stop? When I say "government" I don't mean the great United States and its institutions; I mean the personnel of the Government. When will they stop?

I say that whatever your Honor may do, this boy should
3557 be turned back to the Army of the United States, whence he came to Mr. McGohey here under orders, and turn him back with the proper restrictions upon parole and probation and all of this, with which I am not familiar, and let the Army of the United States do whatever it thinks it ought to do. And I will be there again with this boy, and I am going to stay with him wherever he is before every tribunal until the very end.

Now I have said, your Honor, all that I can say. I am deeply moved by it all. I don't want to see him with stripes on him as yet at least. I think it would be a disgrace to the Government rather than to him, to put him there. I would like to see Mr. McGohey, for whom I have a high regard, and I think your Honor has noticed it—and I did not have it when I came here; I have it now—I hope he will join
3558 with me in attempting to enlighten your Honor to the point where the Government's interest will not be served and justice will not be served, by treating this man as we have to treat some, as a common, ordinary criminal, a safe blower, a bank robber, a gangster. We know we have that criminal type and we know that they have to be handled.

May God spare me, your Honor, to plead with you in this last sentence to do your best. I know your Honor and the land, the part of it from which you came: a good

lawyer, a feeling heart, a just judge; see, see that this boy is given a good break, and turn him over to the military authorities, where in Washington I can still fight for him, and if at the end they say he must be put in prison stripes, I shall have to defer to that, but I shall put my arms around him even then.

Mr. Keenan: Your Honor, I would make it very clear at the outset that whatever I have to say with reference to Samuel Bayer or Elias Bayer, that I don't come before your Honor with any bowed head or with my head even tilted a little bit, or to beg for mercy or pity. Whatever I shall say will be addressed with whatever humble powers I have, to the honest and fair discretion of this Court, what I be- 3560
lieve is the complete and entire fulfillment of the law.

Now the distinguished former Judge Advocate General for whom many times I have stated I have respect and affection, has told you of the deep personal and other interests he has of his old association in the Army, which one can well understand; and I want to state to your Honor that I am more keenly interested in this matter because of my own desire to continue my own devotion to justice in this country.

Now a case of this nature, where widespread publicity, for some reason or other, has been generated and has become somewhat of a cause celebre, it is somewhat more difficult to urge that the case be given the treatment that it should receive, stripped from all of its trappings, and it is very difficult when you are dealing with the future of a 3561
human being, his liberty, that is the next dearest thing to the things of life, and perhaps equally dear, to still feel the obligation to sustain your own notions about the administration of justice. But, nevertheless, I have respect enough for Mr. Bayer, whom I have come to know very intimately in the many, many months that I spent in the preparation for the trial of this case, and in the three weeks that we have been in this court room, to know that

he won't mind if I do not address myself entirely to his own personal selfish interest and still adhere to my own practice which I intend to follow as long as God gives me the breath of life, and that is to speak the truth and to call a spade a spade.

Now I know, your Honor, of nothing more ugly that I can conceive of than that foul and despicable tendency of visiting punishment or discriminations upon an individual because of the fact that by accident of birth he happens to be of a certain nationality or race or religious persuasion. Whatever happened to your Honor and myself in that regard, we had very little or nothing to do with it, in most
3563 instances, excepting our religion, we had nothing to do with it. So when one considers the matter way down at the base, it is about the most important thing there is in this whole life that we live. Now your Honor will notice that in the trial of this cause the matter which I am going to speak about I adverted to only for a moment and said with a great deal of reluctance, because I can remember back in 1937, when I flew out to the Orient, we stopped over at the Island of Midway and had a good swim, and the next place we went was Wake Island; it was very warm, it was tropical country, and I jumped in the water, and the first thing you know I got close to some of those mammals, and the feeling, the creepy feeling I had of slime around my body is the same feeling that I have when I see the manifestation of this ugly, wretched, wicked thing that every-
3564 body in this court room knows what I am talking about.

The Court: Well, I don't.

Mr. Keenan: Well, I do. Then I will make it very plain.

The Court: I would like you to be specific.

Mr. Keenan: This whole unfortunate Greek tragedy started off with racial prejudice. It started off, as we get the statement from Captain Radovich, with a conversation that he had with Captain Pepper. Captain Pepper told

him that these boys would have to be transferred, he thought, that there was a good deal of talk going around the camp. I have no desire at this time to review the evidence of something that took three weeks, almost, for the Government to present, step by step, but I think your Honor will agree with me that there was nothing of any consequence occurred that ever would have brought about any particular notice had it not been for the transfer of these boys to the hospital unit at Mitchel Field, the first transfer that anything could be said to have an aroma of any influence that was wrongful. 3565

Now, Captain Pepper, your Honor, an officer who wore the uniform of our country, on the witness stand, was asked the question not by me but he was asked a question by counsel for Captain Radovich: "Isn't it true that you said to Captain Radovich that you wanted to get rid of these boys because they irritated you because they were Jews?" I didn't bring that in, your Honor, neither obliquely nor directly. And instead of the captain, in a court room, openly stating "Why certainly not, such a thought would never come to my mind," his answer was, he didn't remember saying it, but he would not deny it; and he made the amazing admission afterwards that he did not carry his prejudices around with him openly. That is the testimony in this case. 3566

The Court: I recall that. But how do you attribute the investigation and the prosecution to Captain Pepper, who himself plead guilty to a participation in it in a way? 3567

Mr. Keenan: I believe he did not, your Honor. In the first place, we have nothing in the record except what Captain Pepper said on that subject, and Captain Pepper, in the presence of this Court, committed open and unadulterated perjury when he denied that court-martial proceedings had been leveled against him in the Army, and a very few moments later when a document was brought to his attention in which that appeared, he said, "Oh, yes, I

was court-martialed, or charges were preferred against me for the 95th and 96th Articles of War"—the most heinous—"Oh, I forgot about it and I don't know, I didn't know that you had—I didn't know about this statement." Well, so much for that, your Honor.

No, the investigation did not start from that. I said that, your Honor. I said that the Greek tragedy started there. Because the investigation is not of the import that the facts themselves are, and the fact is that there never would have been a case here at all if it had not been for Captain Radovich deciding to take these two boys and move them from a position where they were doing an
3569 honorable, lawful duty in the United States Army. But, however, if the matter stopped then I would not be so much concerned, and I think I never would have adverted to it.

And the second thing is a matter, with great respect to your Honor, that your Honor has not seen eye to eye with me, and I am afraid I became quite unintentionally a little bit offensive to your Honor, for which I want to apologize and take this opportunity to do so, but I do think that nothing could be more prejudicial than to set forth in an indictment a charge that Samuel Bayer was a criminal type, a furtive criminal who used one name at one time and one at another. Your Honor knows full well why the term "alias" is put in an indictment. It is to cause a jury to believe that it has to deal with a confidence man, a slick man
3570 who uses one name at one time and one at another, so that he can indulge in his frauds without detection.

Now, your Honor, I think with some misfortune to the defendants adverted to the fact that Bayarsky was put in there, as I understood your Honor, and I did not hear you very well, and stated it, to designate his Russian nationality or pre-nationality, at least the word Russian was used, and it had—I am not now saying about your Honor's remark—but if that was the purpose it certainly had no busi-

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ness whatsoever in an indictment filed by an American prosecutor in an American court.

Now that was not all, your Honor. Let us come to the meat of the cocoanut again—you have asked the question of me—and the next thing is a question asked by Mr. Robb, counsel for Captain Radovich, standing where I am standing now, a very few days ago, with the witness on the stand who prepared the Government's case, who took the statements from Radovich, a representative of an honored institution for which I hold the highest respect and which I am sure holds no such views or identities or indulges in in any such practices—he was asked the question, this man on the witness stand, by Mr. Robb, with Major Radovich 3572
standing a few feet away from him when he asked the question, "Isn't it a fact that you said to Major Radovich that you were not trying to get him, you were trying to get these two Jews?"

I didn't ask that question, your Honor, I am certain that there is no jury here—your Honor has seen enough of Roger Robb in this court room to know that he never would have asked that question before a jury of a man representative of the Government investigating agency if he hadn't been so told that that remark was made to him by Major Radovich himself. I am not indulging, your Honor, in wild speculation.

Now, if that was all, your Honor, I think I would have kept silent on the subject. But last night in this court room was the culmination or the semi-culmination of a 3573
Greek tragedy, where disgraceful transactions appeared in the jury room and where references to races and religion were the paramount subjects of conversation, and that wasn't all, your Honor. But one of the jurors, I am dependably informed, was excused, one of the spare jurors, without knowledge of your Honor, because he didn't want to come back after an altercation, where another member of the jury had been insulted on the subject matter of

race or religion, where she wanted to appeal to your Honor in the latter days of this trial and was dissuaded by the remarks of one of the attendants from coming up to see you and give you the real reason why the juror did not return and ask to be excused.

The Court: Do you mean the alternate juror?

Mr. Keenan: I do, the one that you excused, your Honor, first.

The Court: The alternate was excused by reason of a telephone call to me from her husband, saying that she was too ill to come to court that day, and it is my recollection that you and other counsel were in chambers when I got
3575 that telephone call.

Mr. Keenan: I was in the room when that call came through. Of course I don't know what was said, nor did I ask any questions, naturally. I am stating, on my honor, as a lawyer, the information that has come to me from one of the jurors unsolicited, it did last night, about what happened.

The Court: I am only stating my own information about the reason I excused the juror. What you say is entirely new and novel to me.

Mr. Keenan: Your Honor, I would understand that.

The Court: I would like you and other counsel interested to know that the reason, the actual reason, the lady was excused, was by reason of the telephone call to me from her husband saying that she was too ill to attend
3576 to court. Whether that was not the real reason, I am not prepared to say.

Mr. Keenan: I am stating to your Honor that that information came to me. And, further, that there were persistent efforts to obtain a guilty verdict on the part of juror No. 2, who brought up also the same question, accusing one of the jurors of voting for this because of the race and religion; and that juror today is interested enough

to come into this court room, to be present at the kill right now.

Now, your Honor, I can't help stating those things. I don't believe it makes a softer road in life for my client, because these statements are not matters of other than the greatest importance, but I am starting that in an American court room we should have trials free from any such influence, and the case should be tried and heard upon the facts and the facts alone.

Now, your Honor, with reference to Samuel Bayer. The evidence is very clear that, regardless of any misconception, and I hope that I can indulge in that presumption with some soundness on the part of the Government, because I hope they would not try to prejudice a jury by calling a defendant a name in an indictment or using the term "alias" when they knew very well that he was a respected member of the community—I will say that this must have been one of the instances when the ordinary functions of investigative bodies were cast aside in that particular. But, in any event, Samuel Bayer has been an honored and decent member of this community all his life. We don't find the slightest trace of any complaint of the man's character whatsoever. He has been a reasonably successful business man who has complied in every particular with the law, as has his brother; his business had been conducted on honorable principles. We brought to this court room to testify as to his character, men of different walks of life who knew him well, men who were 3579
not sufficiently intimate with him that one could expect that they would shade a matter for his particular benefit.

We had Mr. Armstrong, one of the well known men of North Carolina. We had a local banker, and the agent of one of the large factor associations, private bankers in the metropolitan area. We had, entirely proper, I think, to certify to his character and attendance to his church, his rabbi. And, your Honor, I think, as I contended to the

jury, that a man's character may be something that in a superficial way attempts to inject between himself and just punishment for a wrong he has done; in many instances where the crime he has committed haven't to do with the solid basis of character—that is, the likelihood of whether it was a real heinous offense—but in this case he is charged with fraud, fraud against the Government, and when a man is called a fraud his best defense is, well, I may have done something that is not permitted by the law, but I am not a fraud; I am an honest man, have been all my life; I am no child and I have earned a position, I have earned this—as I was about to say, as Lowell said to
3581 Daly, "With souls we cringe and plot," but as poetry isn't agreeable to all our friends I will not infringe upon their sensibilities any further in that respect.

In any event, character is something your Honor that is awfully hard to build up, and very easy to tear down. And I say, when we come to the subject matter of imposing punishment, that it is certain we have all left that stage of where punishment is considered from the standpoint of vindictiveness or the kill; there is something more wholesome about it than that. I perhaps will be pardoned for saying that in my position with the Department of Justice, one of the divisions that came under my supervision was the prisons of the United States, and I had something to do with observing them and their operation; and I know that no matter how you attempt to be human to make them
3582 institutions, they can be nothing but prisons, you can't make them anything else. And unless it is necessary to take a person who is safe to keep in a community and confine him for the protection of society afterwards, it seems to me that strong thought ought to be given to exacting that penalty.

On the other hand, there is another feature, of course, in the imposition of sentences and the suppression of crime, and that is setting an example in the community.

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Now I said at the outset that I was not going to ask for any sympathy or pity. It doesn't happen to be my nature anyway, and I do not think this is a case where I would want to resort to such appeals in any event. But I do say that from the standpoint of a man being punished for any wrongdoing as an example to the community for other people not to go and do likewise, I think we should pay some attention, your Honor, and I say this with the deepest seriousness, and I hope to make some impression upon your Honor, particularly in reviewing this fact, that this case has already received widespread publicity. It has been in the magazines that are published all over the world; it has been bruited about in the metropolitan press in the earlier days, and it is well known in the defendants Bayer home community. He has three sons, your Honor. I think I might tell you and give you my professional word that he was more concerned with whether or not this case could be tried in their absence or any punishment he had to undergo during a time when they would not know about it.

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I think the greatest punishment that can be leveled upon a human being is a father who loves his children and who knows that his children love, admire and respect him, to have them know that he has been branded as a man guilty of a felony. When the jury brought in its verdict last night, an act that had been done that never could be undone, a brand had been seared, to use the language adverted to by General Ansell, upon Mr. Bayer that will remain upon him as long as he lives. Any punishment your Honor would give him by way of committing him to an institution, to make a number out of him, because of what he has done in this case, would be to heap the minor coals upon the fire that he is already suffering and has suffered for a long, long time.

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Now, your Honor, I am not unacquainted, although as I have stated, like General Ansell, I have no experience in defending criminals—this is the second time in my life that

I have been in a court room in that capacity—but I do know that it is not unusual and I think it is a matter that deserves the most careful consideration of this Court, that Samuel Bayer has been an ill man, your Honor. We offered no testimony on that point because we do not claim that he is too ill to be brought into court and tried, and we never have claimed that; though the record will show, and I know your Honor will know it was no sham, that there was on one of the sessions an occasion when he was not able to be present because he was stricken in my room on the way down in the morning with a heart attack, and for which we called the doctor, but the doctor very honestly
3587 said it was due to excitement and the like, and after he rested a day he could come back.

And the evidence shows in the case before your Honor, that came from the Government witnesses, that he is described by every witness that testified in the case, your Honor, as a man that was highly agitated; even the Government witness, Major Saffron, he being a medical man, observed his condition of agitation, that he described him almost on the verge of nervous prostration; and then the Government witness Jacobson described him as fainting or collapsing when talking over the telephone.

And at this time, your Honor, I would like to advert to one part of this case that I think has been glossed over, for which I take the blame, and that is this: the Government's theory was that defendant Samuel Bayer—I am going
3588 to speak about Elias in a moment—the defendant Samuel Bayer called Vidal and called Kogan and called Jacobson about getting this boy out of the Airborne Engineers.

Now, your Honor, I think it is important to bear in mind the uncontradicted statement that those calls all came within a brief period of time from the time he was shifted suddenly to the Airborne Engineers and that he did express—it came from Colonel Vidal: that he was quite excited, he did not understand what the Airborne

Engineers was, he thought they were going to fly up in planes and the boy had never been off the ground. And, by the way, young Usdan did state that these boys had never been off the ground when they found themselves down with the Commando Unit at Goldsboro.

Now all those calls took place within a matter of a few days. Major Saffron fixes the time as late in August and Vidal left the 26th of August to go to Colorado and never came back. And Jacobson fixed the time, and we have the telephone slip, it is of interest, to show also it was in the latter part of August. And the boys were shipped there on the 22nd day of August, if I recall correctly.

So that all those efforts upon his part which, if considered, your Honor, as being running events over a period of time to carry out a plan, would have a certain significance if you put them in the position where they are as to time, and find they were during the emotional period when these boys were first shipped—his boy who had never been off the ground and who had been ill, as I shall speak about in a moment, and it just overwhelmed the man's sensibilities. It just shocked him into an action which was not at all in keeping with his conduct during other parts of his life.

Now, in addition to that, your Honor, we have some other facts in the case. We have the fact that the Airborne Engineers was a voluntary unit, your Honor. We have a grave question whether it was alerted for overseas service or not, and it could have been so easily proved by the Government, that had access to all these records, which we did not have access to. If your Honor will consider the difficulties we had in this case, dealing mostly in war time with the War Department, which the evidence shows was none too willing to open up its files even upon an order from this honorable Court.

Now, we don't have the case before your Honor of a man who didn't want his boy to go in the service. We have no Bergdoll case in here at all. We have a case of a man who

was willing that his son should go into the service, and he had three sons; and we have one of them in Okinawa, one of them on the high seas, and the boy in question is now in Burma or in the Burma area. We have a man who had a peculiar weakness for one boy out of three.

And the undisputed evidence shows the boy had rickets, had a bent-in chest. He was not here to be observed. We don't claim that he was a cripple, we don't claim that he was an invalid, but we do say that his condition was such as to solicit the honest zealousness on the part of the parent. And, your Honor, then we come to perhaps one of the most important things to be considered in this whole
3593 case, and that is that the weakness that Samuel Bayer displayed in this case was not a selfish one, it was not a weakness or a wrong, if it were a wrong done, for greed or for pride or for lust, or all those ordinary unfortunate frailties of human nature that bring about the great mass of crimes and suffering and misconduct in this world. His fault was the sweetest and loveliest fault that a human being could have. He may have done wrong, your Honor, and it may not be a thing that would be emblazoned in the poetry of one of the great poets, but it was a love that nature put in that man's heart. It was the love for his own son; and if it was energy and zeal misdirected it was misdirected partially by nature, and if it did a wrong, your Honor, it cannot be left unpunished.

But that is why, undoubtedly, this jury came back with
3594 the I think quite extraordinary procedure of using not the word clemency, but as the District Attorney has repeated, the highest degree of clemency.

Now I hope someone will extricate the learned District Attorney for his position of showing the magnanimity of taking the most severe sentence that could be imposed in law of twenty-four months, and taking off eight months from that and saying that is complying with this jury's request.

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We can't quite call it a mandate, but, after all, it is an important function, too; but I think, your Honor, that when one considers that Samuel Bayer himself has earned something by a life of probity, that ought not to be smashed, and that any imposition of a day in jail for this man would be like Humpty Dumpty—it never can be repaired. It is the grossest type of punishment, outside of taking the man's life, that could be imposed. I do not see any other purpose, your Honor, than to register my honest views in the premises, and if that were all that could be done, we would be faced with the dilemma, perhaps, of saying, "Well, we cannot let offenses of this kind to go entirely unnoticed." But, your Honor, I have one further suggestion: you will remember that this is not an indictment for bribery and, therefore, I say with great respect to this Court, I think that for a crime of bribery, if it is in this picture, he ought to have his day in court to defend on that charge, or if it is conspiracy to bribe he ought to have his day in court and be convicted of that if that is what he has done, before your Honor uses that in the imposition of sentence. He is not guilty in the eyes of the law of which he has been so found, and I, with great respect to this Court, for whom I have the highest respect and regard, say that most earnestly.

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Now, with that reservation, let me approach very briefly to the thought that this a novel type of prosecution, that is, Section 88 of Title 18, your Honor. Your Honor had to give his charge in full compliance with his duty as a Judge, that any type of fraud for any purpose or in any manner, when two people conspire to bring that about, is a violation of this statute. Now I think, your Honor, that some day Section 88 will come before the Supreme Court of the United States and they will reconcile it with the Cohen case in some way, because today really we are letting a jury determine part of the law, to determine whether certain conduct is or is not criminal. I have strong feelings on that,

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but this is no time to voice them. But I have a right to point out to your Honor that this jury could have brought in its verdict in this case on any one of the fifteen or twenty incidents that they found existed. They could have brought it in on merely talk with Colonel Vidal and nothing else, and they could have absolutely believed the statement of Samuel Bayer, Elias Bayer and Miss Solomon as to what happened with the payment of the substantial sum of money of $5,000, as your Honor would [redacted] no way of knowing that, except in special verdicts that we do not have in these criminal causes. And we all well know the presumption of the law that every fact is broad, every fact
3599 is concluded adversely to the defendant after the jury brings back a verdict of guilty. But in this peculiar case, your Honor, where the jury itself has to pick out something that it finds criminal, any one of these things, and the jury in such instances comes back to your Honor, with this juror No. 1 stopping last night at a late hour and saying, "The highest degree of elemency for all defendants," I think that was the statement to your Honor, that "We find there is, under your Honor's charge, technically a defense committed, but we think that it is not of sufficient importance to justify any severe sentence"—and if ever I knew a jury to be plentifully pleading with the judge to put the defendants on probation, that was the message that came from this jury box to your Honor, I say with great respect.

3600 And, of course, your Honor has no obligation in the law to follow that request of the jury; your Honor naturally has that function of the law to perform that the law wisely leaves, of course, to the learned judge, and leaves no part of it legally with the jury. But, your Honor, I cannot help reminding you, with great respect to you—and I know that while your Honor has graced this trial may I say fairly, I do not agree with your Honor's rulings, but I have never seen a judge who I felt was more intent upon

doing a square shooting job than your Honor has performed in this case—nevertheless, your Honor, there are considerations that I think, as human beings, we all have to observe, and that is, these boys are coming home; they have done something for their country. After all, if $1950 was paid by Samuel Bayer, it was paid by him and he no longer has it. That is gone, for whatever it amounts to. And that amounted to five days in the medical corps as a clerk. And, after all, the boy did go over to Burma, and many of us sitting around this trial table would have liked to have the same privilege, of doing what he did; we would stop, for one reason or another, from continuing further. And we don't know what he has been through. And perhaps, your Honor, you wouldn't mind listening to him, not on a matter of guilt, but if he were here perhaps your Honor would not mind listening to him, saying, "Well, Judge, I am a member of the armed forces and I have done something, and my dad had to weakness for me that I couldn't help, but I will try to expiate some of that in these rotten jungles, with reptiles, out here in Burma. Won't you charge that up against my father now? And won't you let him stay at my home and continue to support myself and my mother and his own widowed sister's family?" Because he has been shown anything, Samuel Bayer, your Honor, but a menace to anybody.

We have never seen a tendency, and we know his character will be pretty thoroughly looked over, but the weakness he has had has been, of course, that oh, so many parents could receive punishment for if the straight edge of the law were always applied without being bent here and there.

Your Honor, it is so an offense of love, and I hope that it won't be necessary for me to advert to the unfortunate suggestions that were made upon his character, with that unfortunate incident of that girl, working for a living, who came up and who was in the presence of the F.B.I. and

the lawyers from 10 o'clock in the morning until 4 o'clock in the afternoon, and they never broke down her story in one single regard, so that the learned and able District Attorney never asked her a question on cross-examination.

Now, your Honor, to take this man, under such circumstances, and remove him from the civil walks of life and take him and impose a prison sentence upon him, of course that is what it is, it is an institution, but we all know——

The Court: That distinction was only between jail and prison.

Mr. Keenan: Yes, your Honor. And I think that, if your Honor please, is more of a distinction of terms than it is
3605 of suffering; but whatever it is, it is present, and we all know what happens in such institutions. It can't be helped. And I would not say that I am seeking pity in this case, but I am pointing out facts which I believe are conducive to the administration of justice.

Now, as to Elias Bayer, I really feel that in the case of Elias Bayer I have been derelict in my duty, that he ought to have been represented by other counsel, that he had a matter where the evidence should have been carefully reviewed, and I think if he had there would have been no verdict rendered against him at all, because I am not going to try to advert to the evidence, but I am going to say that it is very trivial as to any actions of his. He never asked anyone to do any wrong that I know of. He listened to the conversations of Radovich, but he had no part in
3606 them, and he went down to see that money was—that Radovich was pointed out, and in a technical sense, your Honor, if he be found guilty that his contact with the offense was of the slightest, and I think there should not be very much effort pursued in asking that he be granted probation if any sentence is imposed, or that anything more than a fine, and a $10,000 fine, for a man like Elias Bayer, it seems to me would be very adequate punishment for any crime that was committed in this case with which he is shown to have the slightest connection.

3607

Now, your Honor, we have other matters in the case that will be presented at the time when a new trial is suggested, because unfortunately we did not have before your Honor yesterday the important information in substantiation of our claim with reference to the point made vital by the District Attorney in his argument to the jury. The jury came in to ask for information upon that precise point, and it is the only point in the whole lawsuit that they asked information about specifically.

Now we have evidence of the fact that this was a call put in by Major Radovich from the telephone company, and we did not have it before. I might state that I was 3608
caught entirely by surprise with the District Attorney's claim that no such conversation ever took place. We did not know what he would claim about it, but we did not think it would be that. We know, of course, that it is well known what Major Radovich's movements were in the month of November; they are easily ascertainable, and no one will ever convince me that they were not very well known.

Now, your Honor, I say as a——

The Court: Let me interpolate a question, lest I forget it later. You said something about a motion for a new trial being presented later. When do you propose to present such a motion?

Mr. Keenan: In accordance with the rules of the Court, your Honor, as soon as it can be filed.

The Court: Well, the only thought I had in mind, I 3609
expect to go home. Does it have to be presented to me? I suppose it does.

Mr. Keenan: I would not think so, your Honor.

The Court: You don't think so?

Mr. Keenan: I don't think so.

Mr. Robb: Might I ask at this time whether that should not be done before sentence? I don't know what the prac-

3610 tice in this jurisdiction is. I am just asking for information.

The Court: It has always been the practice, I do not recall the rule precisely now, but it has always been the practice before me to make the motion before sentence was imposed.

Mr. Robb: Yes, sir. That is our practice in Washington, too.

The Court: I don't know whether——

Mr. Keenan: Your Honor, this verdict did not come in until after 9 o'clock last night and the Court was convened at 10 o'clock this morning, so it was physically impossible,
3611 especially for those from out of town, to prepare a motion for a new trial in that interval.

Mr. Robb: We had intended, if the Court please, to make at least a formal motion for a new trial before your Hônor imposed sentence, in order to save our point. Of course we would prefer to have time in which to get one up and prepare it properly for your Hônor.

The Court: Well, it would seem to me to be proper prior to the time I do impose sentence that you may, any of you who wish to make motions for a new trial, make them and ask leave to amplify your grounds at a later time.

Mr. Robb: Yes.

Mr. Ansell: Is it true, may I ask your Honor—you will help out my ignorance——

The Court: There is not much assistance required for
3612 that, sir.

Mr. Ansell: Is it true, sir, that a motion for a new trial must, under our modern practice, be made in writing? Is that true?

The Court: That is not my impression.

Mr. Ansell: That is your impression?

The Court: That is not.

Mr. Ansell: That is not my impression.

The Court: I know many have been made to me not in writing, and it has never been——

Mr. Ansell: I was wondering, in order that we might get through with this thing—I don't know Mr. Keenan's feelings—as to whether we might not make a motion orally here with leave from your Honor to assign new grounds when we come to perfecting the record for the purpose of appeal. I don't want to disturb any practice that is here. Of course I couldn't but I do not want to.

Mr. Keenan: Your Honor, I am quite certain that the motion for a new trial on the grounds of newly discovered evidence certainly is not required to be filed before imposition of sentence.

The Court: That is right, but ordinarily motions for a new trial have always been, in our practice, prior to the imposition of sentence. A motion for new trial on the ground of after-discovered evidence is a different thing.

Mr. Keenan: I don't know if misconduct on the part of the jury would come within that category, I guess it would, but I intend to bring that formally before the Court, and I want adequate time to do it because that requires affidavits and other formal matters to present it in the form in which it deserves.

The Court: Understand, gentlemen, I am not undertaking to suggest to any of you how to conduct your case. I haven't found that any of you needed assistance along that line. But I did want to apprise you of the fact that I did not expect to be here probably after today.

Mr. Keenan: Well, I think, your Honor, that I have said substantially all that I want to, excepting I would remind your Honor of this one thing that I think is entirely proper to bring up before any sentence is imposed, that there ought to be a reference to the probation officer in a case of this nature. It doesn't deal with dangerous criminals, it doesn't deal with the type of crime—or greed; it is an extraordinary affair. And I would think that the Court

would want all the law and information it could have, and it might permit us, your Honor, to bring upon the record the more definite proof of the condition of Martin Bayer, who suffered double pneumonia and was a very sick man, and whom I can say to your Honor has been ill with jungle fever over in Burma for some time past. And I would like to have that information before you, your Honor, in acceptable form before you did pass upon the subject matter of probation.

The Court: I do not think a probation report is necessary, and I am not going to defer the matter pending probation.

3617 Mr. Keenan: I, of course, can do nothing more than ask your Honor to follow the practice of the courts in that regard.

Then I will say, since your Honor stated that he is leaving, that I would like the record to show that a motion for a new trial has been filed or is being filed on behalf of Samuel and Elias Bayer and will be amplified later, when we have an opportunity to bring the matters on the record that deserve to be brought to the Court's attention.

The Court: Do you wish to be heard on the matter?

Mr. Robb: Yes. I wonder if I may say one word to your Honor on the subject that was opened up by Mr. Keenan. Mr. Keenan spoke of the conduct of some of the jurors. About that I know nothing whatsoever. Mr. Keenan spoke specifically of one lady juror, juror No. 2, I believe, and
3618 stated that that lady was here for the kill. I wish to be perfectly fair with the Court and perfectly fair to that lady juror and I, therefore, tell your Honor these circumstances.

Last night when I left the court house I was waiting under the archway for the rain to lift or the car to come. I met that lady juror, No. 2. She was weeping. She came to me and she told me that she was weeping because of the conviction of my client, Major Radovich. She said she

did not think that she would be able to sleep that night because that boy had been convicted. She said that she hopes that your Honor would heed the jurors' recommendation that your Honor extend the highest degree of clemency to the defendants, and particularly to Major Radovich. She said, in substance, that she hoped that your Honor would not ruin Major Radovich, that the uniform would not be stripped from him, because she thought that he was a boy who had great possibilities, and it grieved her to see his life thus early ruined. And she told me that she thought she would come down here today because her interest in the matter was so great that she wanted to come down and be sure that your Honor did in his compassion 3620
heed the jury's recommendation. And that, if the Court please, is what she told me, as to why she came to be here.

May I say one thing further, if your Honor please. I cannot say with my colleagues that I have had no experience in criminal cases because for seven years I was a prosecutor in an office where we had about 2,000 indictments a year, and there were perhaps five or six of us trying or handling those cases, and I was one of those five or six. I have seen a great many men sentenced; I have sent a great many men to the penitentiary myself and some to the electric chair. My judgment is, if the Court please, that a court sentence ought to respect the judgment of society and the judgment of the community in the matter, and I think that your Honor will agree from the attitude of that jury, from the fact that they were crying when they brought in 3621
the verdict, that their judgment and the judgment of this community is not that this boy, Major Radovich, or any other defendant ought to be dealt with harshly or severely in this case.

Mr. Ansell: I feel that I ought to say, your Honor, that as I was leaving this building last night I ran into what appeared to be a great number of the jurors. They told me they were the jurors. They were much affected. Some of

them placed their arms around me, on my shoulders, and I heard some of them say, "We are going down to the court tomorrow, hoping that the Judge may deal leniently"—some said—"with Major Radovich." Some said "with all."

I saw that they had been terribly moved during their nine hours out there in the jury room. I heard myself no suggestions of misconduct, but I am not, of course, in a position to deny anything that was said. I only know what has happened out there. A strange episode in my life. I got out just as soon as I could because I did not want to talk.

Mr. Robb: If your Honor please, may we file at the
3623 time verbally a formal motion for a new trial?

The Court: Yes. On the subject of the jury, I know nothing about the conduct of the jurors except what took place in the court room; but I will take occasion to say that any criticism of any juror who has been discharged for coming back to the court room to hear the termination of the case is, in my opinion, ill founded. A juror who is not serving any business somewhere else is perfectly free to come into this court room just as well as anyone else.

Mr. Keenan: Since I made that statement, I would like to make it clear that that is my view, and if that were not hooked up with conduct that I will present affidavits concerning that particular juror and what I have said took place——

The Court: You have the option of bringing it——

3624 Mr. Keenan: I want that to go on the record, that that happened. I am not saying that any juror does not have the right to go any place he likes. But I am saying I have reason to believe and will substantiate it with statements under oath that that juror exercised an interest in the case on points that should not be considered by any juror, and I want to bring that to the attention of the Court.

The Court: Very well. You can bring any documents you please any time and the Court will consider them. Do you wish to be further heard?

Mr. McGohey: I have nothing further to say, your Honor.

The Court: I am going to take a five-minute recess.

(Short recess.)

The Court: Gentlemen of counsel, I have listened very attentively to your able presentations of your causes this morning, and it now becomes my duty to pronounce judgment, and I have not a great deal to say in so doing.

I will advert, however, briefly to the suggestion of racial prejudice having a part in the trial of this case. I find no evidence whatever that racial prejudice had anything to do with the prosecution or presentation of this case whatsoever. I do think that the witness, Captain Jack Pepper, made some statements from which some prejudice on his part might be inferred. However, the fact is that Captain Pepper did not instigate this prosecution or investigation, but, on the other hand, that he had plead guilty to what in effect was impeding the investigation, and it further appeared to me that he testified quite reluctantly. So, whatever prejudice he may have had, or felt, was not a matter which instigated or had any part in the investigation or prosecution of this case. And I have noticed no evidence or indication whatever that the matter of racial prejudice had had anything to do with the investigation or prosecution of this trial.

Now the matter of consideration in the imposition of sentence, as General Ansell has suggested, is a distasteful one. It is, I find, the most trying and disagreeable duty which I am called upon to perform, but it is my duty and it is my duty to consider the matter of sentence and arrive at my independent conclusion according to my best judgment.

I have considered the recommendations of the United States Attorney and I have considered the recommendation of the jury last night for clemency. Just exactly what the jury meant I don't know. The jury did not know, and had

no means of knowing, what the penalties provided by the law were. However, irrespective of what they may have meant, it is my duty to pass on the question according to my best judgment, and certainly the jury was not misled because when they asked the Court the question whether they might recommend clemency, I replied to them that they might, but that it would not be binding upon the Court. I made no representation that I would consider such a recommendation if they made it. And I have considered it, however, though in some respects I am not going to be guided by it.

Now, first, in regard to the Bayers, I am satisfied that
3629 both Bayers are guilty as charged and that it has been abundantly proven, and that they have been convicted after a fair trial. It is true that they have good reputations in the community and no previous offense as far as I know; and it is also true that the commission of this offense is attributable primarily, I suppose one should say, to filial affection, the affection of a father for his son, and the affection of the two uncles for their nephew, and that is a praiseworthy trait. However, that affection, that feeling of affection during the past few years is not one which was peculiar to the defendants Bayer; I suppose every father in the Nation, there are millions of them, who had their sons called into the service of their country, felt the same affection. As a matter of fact, I think it might be safely said that every father whose son was called into
3630 service would have been glad to bare his breast to the enemy rather than expose his son to the same danger.

But these defendants proceeded to the commission of very reprehensible acts. I am satisfied that, besides this particular officer, Major Radovich, they undertook to corrupt other officers to secure discriminatory treatment for these two young men, and as to the young men I wish to interpolate that there is no suggestion anywhere of any misconduct on their part or that they did anything but what

seemed to be their duty. But I cannot say the same for Samuel and Elias Bayer. They didn't stop to think that in securing by improper means the transfer of their loved ones from an organization which was apparently destined for overseas combat duty, that someone else, some other fathers' sons would have to take their place. If all the fathers in the United States had been guilty of conduct such as theirs we would never have had the Army which we had. And I consider their conduct even more culpable in that when the Government's net began to tighten around them, they then undertook to place all the blame, or certainly the greater portion of it, upon the shoulders of the defendant Radovich, a young man who in my opinion was certainly no more culpable, if as much, as they were.

Samuel Bayer, stand up.

(Defendant Samuel Bayer arose.)

The judgment of the Court is that you be sentenced to serve a term of two years in such institution as the Attorney General may direct, and pay a fine of $10,000.

Elias Bayer.

(Defendant Elias Bayer arose.)

I think you are guilty, but not in as much degree as your brother, and I sentence you to serve the term of eighteen months in such institution as the Attorney General may direct, and pay a fine of $5,000.

The defendant Radovich has many appealing features to his case. He is a young man who was exposed to temptation. He has a family, for whom I feel the greatest sorrow. And after the commission of this offense he voluntarily embarked upon an extremely dangerous mission, behaved himself gallantly, with outstanding gallantry, and achieved a record which any soldier might be proud of. However, I am satisfied beyond any doubt whatsoever that he betrayed the honor of the United States Army for a monetary consideration. I can't conceive of anyone being

convicted of that offense and not receiving a term of imprisonment.

I am going to impose punishment. The judgment of the Court is that you serve a term of a year and a day in such institution as the Attorney General may direct, with no fine.

Is there anything further, gentlemen?

Mr. Robb: If your Honor please, as to the custody of the defendant Radovich, would your Honor permit him to stay in the custody of the Army, as he has been up until now, pending appeal?

The Court: I will hear from the United States Attorney.

3635 Mr. McGohey: If your Honor please, the Government will oppose that motion, will oppose a motion of that kind on behalf of any of the defendants here. I think——

The Court: Is there any motion to that effect?

Mr. Keenan: Certainly. We ask for a stay of execution, that execution be stayed, and that the bail be continued on the ground that there are substantial matters of fact and law already in the record before the end of this case justifying that action, and, furthermore, there are substantial questions that will arise and are arising, of the misconduct on the part of the jury and various aspects of this investigation.

Mr. McGohey: The Government is of the opinion that there is no substantial question of law involved in this case on behalf of any of the defendants, and, therefore,

3636 under the rules, the Government believes that none of the defendants should be admitted to bail, but that they should be committed. And the Government opposes the application for bail or the discharge and custody of any of the defendants.

Mr. Robb: If your Honor please, we intend promptly to file our notice of appeal and we are sincerely convinced we have substantial questions of law upon which to base

that appeal. We think that, under those circumstances, the Court ought to let Major Radovich stay in the custody of the military authorities as he has been. There could be no question whatever that Major Radovich will be here at any time this Court desires.

Mr. Keenan: And there is no more question about the appearance of either of the two Bayers. They live in this community and have lived here all of their lives, and there is no danger of either of them escaping the jurisdiction. Their case is identical with Major Radovich in that regard. And we ask that the execution be stayed pending our filing a motion for appeal.

Mr. McGohey: As your Honor knows, the determinative 3638
question in this matter of bail is not the likelihood of their running away, but the question of whether or not there is a substantial question——

The Court: I am familiar with the Supreme Court rule which is applicable to this Court, and it is quite different from the rule prevalent in many state courts. The rule, I do not recall it precisely, but in general effect it contemplates that prior to conviction bail should be freely granted because up until then the presumption of innocence stands. After conviction the presumption of innocence disappears, and the presumption is the other way.

As I recall the rule, in effect it provides that after conviction bail should be denied unless the Court thinks there is reasonable doubt of the correctness of the conviction
or that there is a substantial question or questions which 3639
should be reviewed. I am not of the opinion that either one of those conditions exists.

Therefore, motion for bail as to all defendants, or that Major Radovich be returned to the custody of the Army, will be denied.

Mr. Keenan: Your Honor would not stay that until we can prepare papers in the Court of Appeals within the next few days?

The Court: Yes, I will do that.

Mr. Keenan: Would your Honor give us a week within which to do that?

The Court: I think that is reasonable.

Mr. McGohey: I don't believe it is reasonable, your Honor. I don't think there is any—as your Honor stated—substantial question raised here at all. I strongly oppose the stay of surrender for a week.

The Court: My consideration of that is not on the basis as contemplated by the rule. That is to say, in granting that request I am not doing it on the basis that there is a substantial question or that I consider that there is
3641 reasonable doubt. It is purely on a humanitarian basis. I do not think there is likelihood that any defendant will fail to appear on the date upon which they are directed to surrender unless it should be otherwise overruled by higher authority. I think it would be unduly harsh to all these defendants to immediately, at this very minute, commit them to jail. I am going to allow them until Wednesday morning, one week from today, to surrender.

Mr. Ansell: Your Honor, there are consequences under the statute that I think distinguishes Major Radovich's case. Major Radovich, of course, has nothing of this world's goods. He has a wife and child. When he goes to prison, when he has remained there a little length of time, I am sorry I can't recall now, he will be discharged
3642 from the Army, as I remember the statute; there will be that sequence. He has actually nothing. A wife and child. Then if there should be a reversal, and, of course, I understand your Honor's position, with which I most respectfully differ—we have all been mistaken about that, even trial judges; I believe myself there is a matter here, and if I didn't believe it with the utmost sincerity, I should not state it, that will go to the Supreme Court of the United States; I refer your Honor to the matter of confession. No matter what may happen after Radovich goes to this

institution, a penalty of the most drastic kind is visited upon him beyond all correction hereafter. I wish your Honor would please, please let——

The Court: I have thought about that, sir, and I have the utmost confidence in the sincerity with which you express it, but I don't think that those considerations justify granting on my part bail. Application will be denied.

Wednesday morning, at 10:30, to surrender.

Mr. McGohey: And the direction is that the defendants surrender at that time unless bail is granted?

The Court: Yes. Unless bail be granted by the Circuit Court the defendants are directed to report to the marshal at 10:30 Wednesday morning. 3644

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**Government's Exhibit 1.**

OATH OF OFFICE

OFFICERS' RESERVE CORPS

I, WALTER VESELIN RADOVICH, having been appointed a 2nd Lieut. Air Corps in the Officers' Reserve Corps of the Army of the United States, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office upon which I am about to enter: SO HELP ME GOD. 3645

WALTER V. RADOVICH
2nd Lieut., Air-Res.

* * * * * *

Sworn to and subscribed before me, at Brooks Field, Texas this 29th day of May, 1941.

ROY W. OSBORN
1st Lieut., Air Corps
Summary Court

3646

**Government's Exhibit 2.**

Special Order Number 231
Restricted
Extract

HEADQUARTERS I FIGHTER COMMAND
MITCHEL FIELD, NEW YORK
19 August, 1943

* * * * * *

2. The following transfer is directed:

Name, Grade, Serial No.

MELVIN USDAN,
3647 Pvt (501)
12219208

Reld. Fr.

Hq & Hq Sqdn,
I Fighter Command,
Mitchel Field, N. Y.

Transfd. To

Det., Medical Dept.,
Army Air Base,
Mitchel Field, N. Y.

(AUTH: 12th Ind, 201-Usdan, Melvin (Enl), Hq, AF, EDC
3648 & First AF, 17 AUGUST 1943, on ltr, Melvin Usdan, 20 JULY 1943, Subject "Request for Transfer.")

* * * * * * *

4. The following transfer is directed:

Name, Grade, Serial No.

MARTIN BAYER,
Pfc (501)
12219010

*Government's Exhibit 2.* 3649

Reld. Fr.

Hq & Hq Sqdn,
I Fighter Command,
Mitchel Field, N. Y.

Transfd. To

Det., Med. Dept.,
Army Air Base,
Mitchel Field, N. Y.

(AUTH: 12th Ind, 201-Bayer, Martin (Enl), Hq, AF, EDC & First AF, 17 AUGUST 1943, on ltr, Martin Bayer, 20 JULY 1943, Subject "Request for transfer.") 3650

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**Government's Exhibit 3.**

Restricted

HEADQUARTERS ARMY AIR BASE
WESTOVER FIELD, MASS.

Special Orders Number 325 22 Nov 1943

* * * * * * *

32. *T/5th Gr (055) MELVIN USDAN, 12219208, Med Det, 881st AB Engr Avn Bn 3651

Pfc (055) MARTIN B. BAYER, 12219010, Med Det, 882nd AB Engr Avn Bn

are trfd in their present gr to Project #CA-281, and WP at the proper time, by rail fr Westover Fld, Mass, to Goldsboro, NC, reporting not later than 25 Nov 1943 to the CO, Overseas Repl Depot #3 thereat for further overseas asgmt, semi-tropical climate, on per ch of sta. TDN.

1-5250 P 431-02, 03, 08 A 0425-24. Asterisk (*) denotes NCO in charge. It being impracticable for the Govt to furn cooking facilities for rat, meals for two (2) men for six (6) meals a/r $1.00 per meal will be furn on meal tickets under the prov of AR 30-2215. Dependents are not atzd to accompany or join EM. The QMC will furn the necessary T. Auth: AR 615-200, 15 Mar 1943, and TWX AFPMP 3888 fr the CG, AAF, Washington DC, 22 Nov 1943.

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**Government's Exhibit 4.**

3653

HEADQUARTERS TECHNICAL SCHOOL
ARMY AIR FORCES TECHNICAL TRAINING COMMAND
Seymour Johnson Field, N. C., 29 Nov 1943

* * * * * *

38. The following EM are reld fr atchd 715th Tng Gp, this sta, are trfd and WP Second Ferrying Group, Second Ferrying Division, Air Transport Command, New Castle Army Air Base, Wilmington, Del rptg to the CO thereat for asgmt and duty. EM reld fr asgd Project CA-281.
T 5 (055) Melvin (NMI) Usdan 12219208
Pfc (055) Martin B Bayer 12219010

In accordance with AR 30-2215 the QMC will issue two (2) meal tickets to two (2) EM for one third (⅓) days ea.
TC will furn nec T. TDN 1-5250 P 431-02 A 0425-24.
3654 Auth: Ltr WD HQ AAF Wash DC 25 Nov 1943 File AFPMP-2-KRS/mm/nlr Subj: Transfer of Enlisted Men.

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**Government's Exhibit 5.**

Ledger (page 4)—I. Buss Uniform Co.

(Bound in Opposite.)

Sheet No. _____ Account No. _____

Terms

Rating

Credit Limit

NAME Mitchell Field, New York

ADDRESS W.S. Army

| | DATE | ITEMS | FOLIO | ✓ | DEBITS | DATE | ITEMS | FOLIO | ✓ | CREDITS |
|---|---|---|---|---|---|---|---|---|---|---|
| 1943 | May 10 | Capt Radovich | 5513 | a | 8080 | May 10 | | C74 | a | 38790 |
| | 10 | Col Jacobson | 5514 | a | 8080 | May 1 | | a199 | b | 9595 |
| | 10 | Martin Bayer | 5515 | a | 687 | | | | | 48385 |
| | 10 | Col. Sidall | 5516 | a | 8080 | | | | | |
| | 10 | Lt Roeser | 5517 | a | 7777 | | | | | |
| | 10 | Capt Englehart | 5518 | b | 9595 | | | | | |
| | 10 | Capt Radovich | 5519 | a | 1995 | | | | | |
| | 10 | Martin Bayer | 5580 | a | 3333 | | | | | |
| | 10 | Col Jacobson 9595 | 5604 | a | 758 | | | | | |
| | | | | | 48385 | | | | | |

EXHIBIT 5
U.S. Dist Court
S.D. of N.Y.
OCT 4 1946

**Government's Exhibit 6.**

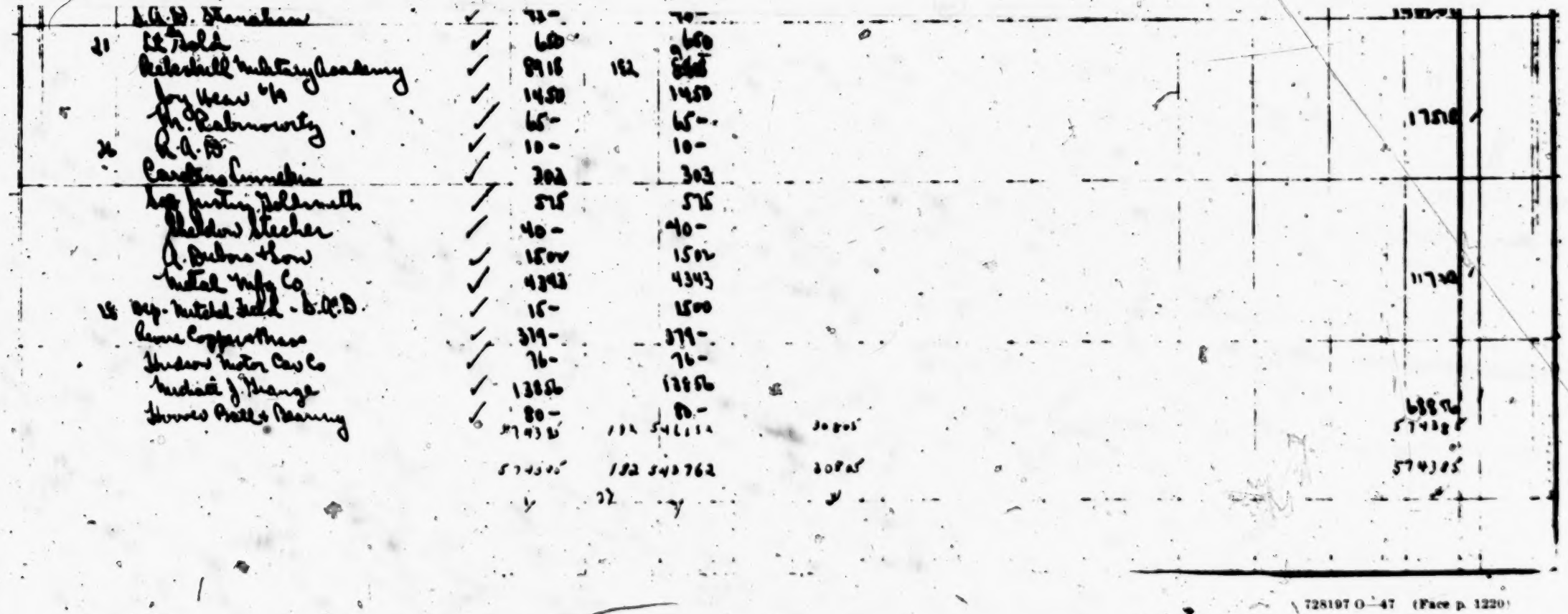
Page 74 of cash book—I. Buss Uniform Co.

(Bound in Opposite.)

EXHIBIT 6
U. S. Dist. Court
S. D. of N. Y.
OCT. 4 1945

June 1943

| June | | Net Cash | Disc on Sales | O/C Rec | Cash Sales | Loans & Exch | General | Interest | [illegible] |
|---|---|---|---|---|---|---|---|---|---|
| 1 | Singer Mfg Co. | 284- | | 284- | | | | | |
| | 201 Sub Depot West Point, N.Y. | 15450 | | 15450 | | | | | 43850 |
| 5 | [illegible] | 1062 | | 1062 | | | | | |
| | " " | 2124 | | 2124 | | | | | |
| | " " | 65610 | | 65610 | | | | | |
| | A. Philipsons | 4750 | | 4750 | | | | | 73546 |
| 7 | Hudson Motor Car Co | 33250 | | 33250 | | | | | |
| | Metal Mfg Co | 7878 | | 7878 | | | | | 41128 |
| 10 | Exchange | 30805 | | | | 30805 | | | 30805 |
| 11 | Plymouth Thread | [illegible] | | [illegible] | | | | | |
| | " " | [illegible] | | [illegible] | | | | | 44668 |
| 15 | [illegible] | 758 | | 758 | | | | | |
| | Fred F. French | 41462 | | 41462 | | | | | |
| | " " " | 39870 | | 39870 | | | | | |
| | Singer Mfg Co | 150- | | 150- | | | | | 97090 |
| 16 | Rome Air Depot | 1364 | | 1364 | | | | | |
| | Goldberg | 3626 | | 3626 | | | | | 5000 |
| 18 | Carstens Dunskin | 960 | | 960 | | | | | |
| | Empire Uniform Corp | 60- | | 60- | | | | | |
| | A. Philipsons | 11350 | | 11350 | | | | | |
| | Auto-Lite Metals Mfg | 1212 | | 1212 | | | | | |
| | Arma Corp | 26179 | | 26179 | | | | | |
| | F. L. Jacobs Co | 900- | | 900- | | | | | |
| | [illegible] | 45- | | 45- | | | | | 140201 |



728197 O—47 (Face p. 1220)

**Government's Exhibit 7.**

Entries of items 5512, 5580 and 5604 in record book.

(Bound in Opposite.)

April 7, 1943
5510

Peekskill Military Academy
Peekskill, New York

27.10 day Com

3 Service Uniforms for Manuel Hubner
Joseph Shorn Jr
James Edward Rogers @ 35.00 105 —

3 Dress Uniforms for Manuel Hubner
Joseph Shorn Jr
James Edward Rogers @ 31.00 108 —

$ 213 T

Amer Express Prepaid
E

April 9, 1943
5511

Memo

Joy Wear Uniforms
90 Fifth Ave
Dup

1 Sample Ladies Uniform @ 28.50 28.50

E

$ 28.50

5512

Plymouth Thread & Yarn Co
30 W 21 20 [illegible]
[illegible]
1 Job lot Thread

341.94

744

728197 O—47 (Face p. 1222) No. 1

Mar 5 57 1943

Cass Radovic
Mitchell Field
Mineola L. I. NY

| | | | |
|---|---|---|---|
| 1 Aviation Wing | @ 3 25 | 3 25 | |
| 1 Pr Capt Bars | @ 1 50 | 1 50 | |
| 2 Sets Captain | @ 1 75 ea | 3 50 | |
| 2 Sets U S | @ 75 ea | 1 50 | |
| 2 Sets Pilot Wings | @ 1 25 ea | 2 50 | |
| 1 Pr [illegible] | @ 3 00 | 3 00 | |
| 1 Pr Aviation Wings on Cont | @ 4 50 | 4 50 | |
| | | 19 75 | |
| | NYC Tax | 20 | 9 23 73 |
| | | | $ 19 95 |

Mar 5 1943
5580

Plymouth Thread & Yarn Co
30 W 21 st St
NYC

mo

| | | |
|---|---|---|
| 1. Pce of Cloth | @ 33 00 | 33 00 |

for Ann Solomon

NYC Tax

$ 33 00
33
$ 33 33

May 5 [illegible]

30639

Tudor City Twelfth Unit Inc
90 Fred F Finch Management Co Inc Agent
551 Fifth Ave NYC

Net 30 days

12 Summer Uniforms @ 27.00 ea 324 -
5 Doormans Caps @ 2.75 ea 13 75
6 Pro Trousers @ 9.50 ea 57.00

394 75
NYC Tax 3 95

Hotel Leider
305 E 41st St
NYC

$398 70
137 5 75

May 22 1943
5603

L4239. 8

F. L. Jacobs Company
Lonyo Plant
6600 Lonyo Rd Dearborn Mich

net 10 days

45 Cadet Grey Tropical Garrison Caps @ 3.00 135 5229 11

$135

May 5604 43

Plymouth Thread + Yarn Co
30 West 21st St
NYC

net

1 Pr Enlisted Men Trousers @ 7.50 7.50
NYC tax 08

$7.58

for Robert Bayer

RECEIVED from I Bus Uniform Co 84-5 Ulam
described pieces of One (1) COD mail.

NOTE. Additional receipted copies of this bill will be furnished as certificates of mailing only, upon payment of 1 cent for each article listed on each additional copy of the bill. Claims for indemnity may not be paid unless articles are properly packed and endorsed, and unless claims are filed within the prescribed time limits. (See postmaster for detailed information.)

| NAME OF ADDRESSEE, STREET, AND POST-OFFICE ADDRESS | Postage (exclusive of other charges or fees) | Insurance or C.O.D. fee | For paid for return receipt | Special delivery fee | Special handling charge | Amount due sender of C.O.D. | Endorsement or article | Delivery restricted For paid Remarks |
|---|---|---|---|---|---|---|---|---|
| Carrier W F Dumphy Man PO Hoboken NJ | 10 | 17 | | | | 922 | | |

NO. 6

DUE SENDER $ _____

(Affix stamps head for fee, if insured, or certificate of mailing)

M.O. FEE _____

TOTAL _____

Postmaster, per _____ (Name of receiving employee)

(Postmark and date of receipt)

MAY 1943 PARCEL POST

538131

728197 O—47 (Face p. 1222) No. 8

3670

**Government's Exhibit 8.**

STATEMENT

OF

SAMUEL BAYER
657 Doughty Blvd.
Lawrence, L.I.

Before:

EDWARD C. WALLACE,
Assistant U. S. Attorney

Present:

3671 JOSEPH B. KEENAN and
WASHINGTON I. LEVY
Attorneys for Mr. Bayer.

Taken: February 7, 1945
Steno: F. Meisner

Q. Mr. Bayer I understand that you want to make a voluntary statement in connection with the matter on which you were arrested on the complaint some months ago.

A. Yes.

Q. And you have consulted your attorneys in that matter and they have advised you to make such a statement?

A. Yes.

Q. You understand that any statement you do make
3672 might or could be used against you later in any criminal proceeding, don't you?

A. Yes, sir.

Q. Suppose you go right ahead and tell us everything you know in connection with Radovich.

A. My boy was stationed in Mitchell Field.

Q. That's Martin Bayer?

A. Martin Bayer, he was there for about 3 or 4 months when I met some officers, their names were Colonel Jacob-

sam, Colonel Vidal and Lt. Roser. I met them through my younger brother.

Q. That's Elias Bayer?

A. Elias Bayer. They used to come up to visit him and naturally I was introduced to them and we used to take a drink on and off, they were very nice. In the time that they used to come up Col. Jacobson saw the pictures of my boys and we were always talking about my kids, I was asking how my kids are. They asked me what my kids were doing and I said they were clerks. He said "I need some clerks in my department and I am going to ask for them." Mr. Wallace I didn't know the difference from this department and that department, but I felt he was a friend, 3674
he used to come up, and I said all right. When the boys were transferred Capt. Radovich came up to the place, he came up the first time he was introduced to me, he came I am positive with Lt. Roser. He said "I'd like to get a uniform," so the other officers already I met them asked to get uniforms at wholesale prices, and I happen to have a brother-in-law who is in the uniform business, I said to them "Go up there and you will be treated right". He went up there and I think he ordered two uniforms, a winter one and a summer one. Since then Mr. Wallace he became a regular, coming in almost every day, sometimes twice a day, he used to come to my office and sit at my desk, where you sit, put his feet on there. He used to come in many times lunch hour and I would take him to lunch, many
times he would come in with a staff car and bring his chauf- 3675
feur up and the chauffeur would be sitting in the office. You can believe me when I tell you I was so disgusted, I was ashamed when customers or salesmen came in, it was a regular hangout. Sometimes he would come in with Col. Jacobson and we would take a drink and then they would go away. This was going on for quite a while until one day he calls me on the telephone and he says "Sam something happened." I said "What happened?" He said "I

3676 *Government's Exhibit 8.*

can't tell you, I am coming over to see you" and he came over. I said "What happened Walter?" "I got to send the kids out." I said "Where to?". He said "To Maine, for overseas."

Q. State of Maine?

A. Yes, I believe he said Westover Field or Bradley Field, and he tells me this company is being broken up and he has to send them out. I asked him whether my boys couldn't remain on the field there, he said no he had to send them out. I felt pretty bad about it, but I couldn't do anything, so he left. The next day he came into the place "Sam I got an angle.". I said "What's the angle?" "I can
3677 have the boys transferred to the Medical Corps." I was very happy and I thanked him. We were just talking, my bookkeeper was in the office and my younger brother was in the office and he turns to me and says "I want to speak to you" so I looked at the girl and my brother they should go out. They stepped out. He said "Sam I need $500, I have to send my wife home to Los Angeles." I didn't like it Mr. Wallace, I didn't know what to think whether it's a loan or a holdup, so I said to him "I haven't got no money on me now, come in tomorrow and I'll give it to you." I could have given him the money the same day if I wanted to but I didn't want to. He showed up the next day and I gave him $400. I told him that's all I could get together. I could have given him the $500, I just wanted to show him
3678 it wasn't so easy to get money. When he was walking out my bookkeeper and my brother walks in and she said "I heard all about it." I said "Ann I don't know whether it's a holdup or a loan, I don't know. My brother shrugged his shoulders. I said "I told him I'll give it to him." She said "Yes, I heard it." A short while after, maybe a week later, he comes in to me "Everything is fine, the transfer is going through" telling us about different flights that he made, etc. and he turns to me again and says "I want to speak to you Sam." I knew then he was going to hold me

up and I turned to my brother and my bookkeeper and they walked out. By that time they were wise to him too. He said "Sam I need $500 more." I said "What do you need it for Walter?" "I need it," with a kind of smile on his face. I said "I haven't got it Walter, you know it's a lot of money." "Well Sam I need it, get it for me." I didn't know what to do, I didn't know what to say to him, but I was scared if I didn't give it to him he will take it out on my kids, so I promised him I'll give it to him. I told him I'll try to get it together and he left. A few days later he walks in "Sam I got bad news for you, the application fell through and the kids will have to go overseas." He took my breath away and I didn't know what to say, 3680
and then he turns to me "Sam I want to talk to you." They knew already, they walked out. He said "I need another $1000 that I have to give up to somebody on the field and if I do that the applications will go through." Mr. Wallace I was just stunned, I knew definitely that I was being held up and then it come again to my mind if I don't give it to him he will take it out on my kids. I told him I would give it to him. He asked me how quick I could get it, I told him I would try my best. By that time I owed him $1500, I didn't give him the other $500 yet. I said "Call me up" and he called me a few days later and he asked me if I have it and I said I have some. He said "Meet me at the Radio City Theatre." It was late in the afternoon, it must have been 5 or a little after. I got there a little
ahead of him. He walked over to me and then he walked 3681
me over to his car which was parked on the corner. He got into the car and I got in with him and I gave him $500. He asked me why I didn't get more together and I told him I just couldn't. I said "I'll try to get it together in a few days I'll give you some more." He called me and told me to meet him at the St. Moritz Hotel and I met him there. He took me up to his room and I gave him $400. The next he came up to the place and I gave him $600.

3682 *Government's Exhibit 8.*

After that Mr. Wallace, I am a little ahead of myself—when he came the third time for the $1000 and when I told him I would give it to him he lifted up the receiver, he was sitting at my desk there, after I told him I would give it to him he lifted up the receiver and called Mitchell Field and he asked for a certain Lt. and he tells the Lt, "Please" he said "do me a favor and fill out two applications for the kids" my son and my nephew, "and have them sent up" and he said "If you will do that for me" he said "I am going to get you a leather flying jacket" and he sat there for a few more minutes and he left. The boys were then transferred a short while after. They were
3683 there just for about a week, it was a very short time at the Medical, they got notice to leave, one for Bradley Field and one for Westover Field. My kid when he got there called me on the phone, as a matter of fact he called me very day because I asked him to specially, and he told me what a nice place it is and what a nice Sgt. from Brooklyn and he was very happy and I was very happy and contented as long as the kid was happy up there. I went along two or three weeks, the kid called me lunch hour or home at night and he talked to his mother too and he kept on telling us how happy he was, and he said he was going home for a weekend with some of his friends. I don't know whether it's two or three weeks that passed and I don't know whether it was a Sunday or holiday, but I was
3684 home, that morning Capt. Radovich called me and said "Sam I found out who done the transferring and" he said "if you will give me $1500 more, I'll have him transferred back to Mitchell Field." I said "Walter please let's forget all about the kids, they are very happy, they met a nice captain, a nice sergeant." He said "All right you are foolish." He said he was at New York at some hotel and I hung up or he hung up on me and said goodbye. Maybe about a month later he calls me once in the place and he says the same thing. "Sam you are foolish, now I'll be

leaving pretty soon, if you will give me the $1500 I'll have the boys transferred to Mitchell Field." I said "Walter I told you once before please let's forget all about the kids, they are happy and I am happy." The conversation was over. I haven't heard from him then for about a month, and one day I walk into the place and my secretary tells me, you will excuse me, she said "the rat called". I said "what for?" She said "He wants to see you and me at the McAlpin." I said "Why did you make an appointment?" and she said "I made it" and we came to the McAlpin Hotel. We were in the lobby and I went to buy some cigars at the cigar stand and by the time I came back I saw Miss Solomon talking to him on the line where they register. I had no love for him, so I didn't go near him, I stood maybe 10 feet away and he was showing her a letter, reading, and afterwards I saw another Lt. came over, or an officer I think it was a Lt., so I walked over and hello, etc. he introduced me and we went downstairs in the McAlpin and we ate. When we got through eating, it didn't take very long, and we left and he remained with this officer. At the table he was telling us of flights he made, etc. which was of very little interest to me. Then I haven't heard from him for maybe six weeks or two months, and one morning he calls up and gets hold of my secretary. I don't know whether I was busy on another line talking to some customer or what, and he tells her he has to meet me and her, very important, he is flying in from Washington. She made the date to meet him at 12 o'clock for lunch in Cavanaugh's Restaurant on 23rd Street. Whether it was an hour later or half an hour later but my kid then called me from Westover Field and he tells me "I and Melly are leaving for Goldsboro."

3685

3686

3687

Q. You mean Melvin Usdan?

A. Yes. I said to myself "there is some trouble" and I just couldn't wait until the 12 o'clock came along. We met him in the restaurant and we had a couple of drinks and

3688 *Government's Exhibit 8.*

sat down to eat, and he started to tell us that he was leaving for Burma, India, on a very dangerous mission and that they were lucky if they would be back in about 8 months and that mission would write history. Then he says to me "I signed out a request for the two boys, I am taking them with me." I said "Walter what did you do? Why don't you take your hands off my kids, why did you do it, please leave them alone, I asked you that before." He looked up at me with a smile and said "Don't worry Sam, if we are lucky we will be back in 8 months." I said, "Walter please leave them alone, I never done you any harm, why do you want to take it out on me and the poor
3689 kids." He said "Sam, I'll tell you what I can do for you, if you will give me $5000 I'll have them transferred elsewhere." I said "$5000, I don't know where I can get it." He said "Sam don't think it's for me, I have to give up $2000 to somebody and $1500 to another fellow and all I'll get will be $1500." I pleaded with him Mr. Wallace and he was just like a stone. We got through eating, I didn't even pay the check, my girl paid the check, we walked outside and he called a cab. I said "Where are you going?" He said "To LaGuardia Airport." Miss Solomon and I followed him into the taxi and I pleaded with him and he kept on telling me the same thing, he wasn't getting the money and that was the best he could do. When we got to the airport he jumped out and he said "Well
3690 Sam the time is short, think it over and I'll see you tomorrow morning." The next morning he came to the place "What did you decide?" I said "Walter I haven't got the money, I haven't got it." He said "Don't tell me that, you are plenty rich." I said "Walter I haven't got the money, please leave the kids alone." He said "Sam I told you once before if it was up to me I wouldn't, but I have to give up most of that money." He started walking down and my brother followed him and met him downstairs in

front of the building. He must have pleaded with him too and he told him unless the money is delivered in Goldsboro by a certain time that it would be late.

Continued by F. R. Ginsburg

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**Government's Exhibit 9.**

Stenographer's notes, pages 155-163—Neisner.

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**Government's Exhibit 10.**

3692

Statement of Samuel Bayer—Feb. 7, 1945—44 pages.

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**Government's Exhibit 11.**

STATEMENT

OF

SAMUEL BAYER

(continuation of statement taken by steno. F. M.)

Steno. F. R. Ginsburg

February 7, 1945

3693

Present:

EDWARD C. WALLACE,
Assistant U. S. Attorney

JOSEPH B. KEENAN
WASHINGTON I. LEVY
Attorneys for witness

GERALD FLYNN
J. I. BROWN
Federal Bureau of Investigation

3694 *Government's Exhibit 11.*

*By Mr. Bayer.*

(answer continued)

The money was delivered. Then we got a letter from him, maybe a month later, telling us that he stopped off and that he was going further and so forth. He didn't address the letters to me. It was addressed to Miss Solomon and maybe about a month later there is another letter came and in it he said "You know, your brother Eli put one over on me. You still owe me more. Don't forget I still know the people in Washington. Everytime I have read the letters to me, I just tore them up. I hated to think of
3695 him.

*By Mr. Wallace.*

Q. That's the last time you have seen or heard of Radovich?

A. Yes.

Q. Mr. Bayer, there is certain preliminary questions I want to ask you. Where and when were you born?

A. In Russia.

Q. When?

A. To the best of my knowledge, February 15, 1891.

Q. How many brothers have you?

A. I have three brothers besides me. Four brothers.

Q. The oldest is Julius Bayer?

3696 A. The oldest is A. L. Bayer.

Q. And then comes Julius Bayer?

A. Yes, and then comes myself and then Elias.

Q. He is the youngest?

A. Yes.

Q. Have you any sisters?

A. Yes.

Q. How many?

A. Three.

*Government's Exhibit 11.*

3697

Q. What are their names?
A. One is Ida Usdan, Bessie Goldsmith, Ethel Cohen.
Q. You are married?
A. Yes.
Q. And how many children have you?
A. I have got three sons.
Q. That's Martin (interrupted by witness).
A. Robert Bayer is the oldest, Martin is the middle one and Sanford is the baby.
Q. How old is Robert Bayer?
A. 24.
Q. Is he in the Army?
A. Yes, sir.

3698

Q. Where is he stationed now?
A. In Texas.
Q. Where was he stationed before he went to Texas?
A. Middletown, Pa.
Q. In the Air Corps?
A. Air Corps Finance.
Q. Where was he before?
A. At Mitchell Field.
Q. The youngest boy, how old is he?
A. He is going to be 18, June 1st.
Q. And you have a nephew named Melvin Usdan, and has Mrs. Goldsmith a son?
A. Yes, sir.
Q. What's his name?

3699

A. Justin Goldsmith. She has two sons.
Q. One is Justin?
A. Yes, and one, Sonny they call him.
Q. Was Justin in the Army?
A. Yes, sir.
Q. Where was he stationed?
A. He was stationed originally at Mitchell Field and then for awhile in Middletown and then he was transferred to another place in Delaware.

3700 *Government's Exhibit 11.*

Q. How old is Justin?
A. I don't know, sir.
Q. He is not in the Army now?
A. No, sir, he was discharged.
Q. Medical discharge?
A. Yes, sir.
Q. Has Mrs. Cohen any children?
A. Two daughters.
Q. Has Julius Bayer children?
A. One son.
Q. How old is he?
A. Honestly, I don't know.
3701 Q. He is in the Army?
A. No, sir.
Q. Has A. L. Bayer any children?
A. Yes, sir, one son.
Q. Is he in the Army?
A. No, sir.
Q. When did you arrive in this country?
A. In 1907, I believe.
Q. And when did you become a citizen?
A. I became a citizen, I think it is about 12 or 14 years.
Q. That would be about 1930, 1932?
A. More than that. I know it is in the 20's.
Q. You were in the last war?
A. Yes, sir, I was discharged.
3702 Q. How long were you in the Army?
A. About three weeks.
Q. About three weeks?
A. Yes, sir.
Q. Now, when did your son Martin Bayer go into the Army?
A. He went in in the month of December.
Q. 1942?
A. 1942.

Q. And Melvin Usdan, when did he go in?

A. The same time.

Q. Did they volunteer?

A. Yes, sir.

Q. And where did they present themselves for induction?

A. At Grand Central Palace.

Q. Where were they sent from Grand Central Palace?

A. Camp Upton.

Q. In New Jersey?

A. No.

Q. Long Island?

A. Yes, sir. 3704

Q. How long did they stay in Camp Upton?

A. I think about a week or ten days.

Q. Did they report on the same day to Grand Central for induction?

A. Did they report?

Q. Yes.

A. No. I drov them out there. They had their privilege that either go from Grand Central or use their own transportation, so I drove them out there.

Q. But they went in on the same day?

A. Yes, sir.

Q. Melvin Usdan lived in Brooklyn?

A. No, he lives in Lawrence.

Q. In Lawrence too? 3705

A. Yes, sir, they are neighbors.

Q. How long did they stay in Camp Upton?

A. About a week or ten days.

Q. And then where were they assigned?

A. Mitchell Field.

Q. How long did they stay in Mitchell Field?

A. Until they were transferred out to Westover Field.

Q. Do you remember when that was?

A. About seven months, I think, I am not sure.

Q. That would mean they were transferred in July, 1943?

A. July or August.

Q. July or August, 1943?

A. Yes, sir.

Q. Your son Martin went to Westover Field?

A. Bradley Field.

Q. That's in Connecticut?

A. Yes.

Q. And Melvin Usdan went to Westover Field?

A. Yes. Westover Field in Massachusetts.

Q. Now, what officers have you met who were stationed
3707 at Mitchell Field?

A. The officers I met through my brother? Col. Jacobson, Col. Vidal, Lt. Roser, Capt. Radovich.

Q. Any others?

A. And I knew of a friend of mine, Capt. Kogan.

Q. Anyone else?

A. That's all.

Q. You never met any other officers?

A. No.

Q. Are you sure you never met any other officers?

A. Positively not, sir. Wait a minute. I think Capt. Radovich brought up to the place once a captain. I think his name was Englehardt or Engelbardt. I only met him once and I never seen him since.

Q. Have you ever met any other officers in Mitchell
3708 Field?

A. No.

Q. You are positive?

A. Yes.

Q. Who was the first of these officers that you met?

A. When I met Captain Kogan, at that time he was a Top-Sergeant or a High-grade Sergeant.

Q. When did you first meet Captain Kogan?

A. I met Captain Kogan when my oldest boy was stationed at Mitchell Field. I met him through my boy.

(At this point Mr. McGohey came into the room and was present during the examination of witness)

*By Mr. Wallace*

Q. Was that sometime in the year 1942?

A. It must have been the very beginning of 1942 because my oldest boy went in about six months or eight months prior to my younger boy.

Q. And where did you first meet Kogan? 3710

A. My oldest son brought him up to the house.

Q. And did you continue to meet him after that?

A. We became very friendly, sir.

Q. Did you see him any place besides in your house?

A. I used to go up to his house with my wife.

Q. Where did he live?

A. He lived in Garden City.

Q. Any place that you met him besides Garden City?

A. I met him no place. He sometimes came to my place when he was down in the city to say hello to me.

Q. Where was your place?

A. 30 West 21st St.

Q. Did he visit you in your home in Lawrence?

A. Yes, occasionally.

Q. Did you have any beach privileges anywhere? 3711

A. Beach privileges? We always—Mr. Wallace, we always take a locker.

Q. Where?

A. When we lived in Far Rockaway we used to be in Far Rockaway. When we moved to Lawrence, we were only there for one year practically, we took it now,—personally, I never go bathing, Ostend. Beach.

Q. Did you ever meet Kogan and his family at the beach?

A. Never.

3712 *Government's Exhibit 11.*

Q. You never met them in Far Rockaway?

A. Yes, sir. In Far Rockaway, he came up my house.

Q. Did Kogan have a locker at the beach? A. No, sir. Not that I know of.

Q. Did he ever use your locker? A. Not that I know. Never. I can positively say never. I don't remember the time when he was at the beach.

Q. Who was the next officer you met?

A. Colonel Jacobson.

Q. Where did he meet you?

A. He used to come up to visit my younger brother and I met him in my place. Colonel Vidal.

3713 Q. Did you meet Col. Jacobson and Col. Vidal at the same time?

A. No. First I met Col. Vidal and Lt. Roser.

Q. And where did you meet Col. Vidal and Lt. Roser for the first time?

A. In my place.

Q. When you say in your place, you mean the Plymouth Yarn and Thread Co.?

A. Yes, sir.

Q. And your brother Elias introduced you to Vidal and Roser?

A. Yes.

Q. And when was that?

A. I know it was in the summertime.

Q. 1942?

3714 A. It must be, sir, or 1943. I honestly don't know. They used to come in with their light suits.

Q. And did you have any conversation with your brother about Vidal and Roser before you met them?

A. Yes. He told me that they couldn't get uniforms wholesale and whether I would have any objection if they would be sent down to I. Buss and see if I could get them wholesale prices so I said "why not".

3715

Q. Did he tell you where they were stationed at the time?

A. Yes, sir.

Q. What did he say?

A. He told me that he met those officers, that they are stationed at Mitchell Field; that they are very nice fellows.

Q. Did he say where he met them?

A. Yes, sir. He met them at a cabaret place called Copacabana.

Q. Did he say how he met them at the Copacabana?

A. I really didn't question him. It didn't mean anything to me, Mr. Wallace. He said how he had met them; that was the end of it.

3716

Q. When you met these two officers, was it in 1942 or '43?

A. Mr. Wallace, so help me, I don't know whether it was '42 or '43.

Q. Was it before your son was inducted into the Army?

A. No. My son was already in the Army.

Q. Your son was inducted in December, '42?

A. Then it must have been '43.

Q. In what month did you meet (interrupted by witness).

A. It was towards the early spring or summer.

(Off the record)

3717

Q. At the time you met Vidal and Roser, your sons were stationed at Mitchell Field?

A. Yes, sir.

Q. And what was your conversation with Vidal and Roser when you first met them?

A. Vidal and Roser? We were taking a drink; they were drinking and I joined them; took a drink with them.

Q. In your office?

A. In my office. Talking. Different things, you know.

Q. About what?

A. Oh, generally. About different things. It was not anything of importance.

Q. Was it about the war?

A. The war, I suppose. I really can't tell you what was said. It was of no importance as far as I was concerned. They were very fine people.

Q. Did they know your son was stationed at Mitchell Field?

A. Yes.

Q. Did you tell them?

A. Maybe I did, sir. Maybe I did.

3719 Q. And what did you say to them and what did they say to you about your son?

A. Colonel Jacobson passed a remark.

Q. You haven't met Colonel Jacobson.

A. Vidal?

Q. Yes.

A. They were asking me about where the boys were on the field. That's was all there was to it.

Q. Did they ask you what outfit they were stationed with?

A. I don't think Vidal did. I don't think so, sir.

Q. Did Roser?

A. I don't think so either, sir. I don't remember.

Q. You didn't volunteer to tell them what outfit your boy was with?

3720 A. No.

Q. How long after you met Vidal and Roser did you meet Jacobson?

A. Maybe a couple of days.

Q. Who introduced you to Jacobson?

A. He walked in with them, the three of them, if I am not mistaken. Jacobson and Roser and Vidal.

Q. Had they gone to I. Bus up to this point?

A. They went to I. Bus even before I met them. My brother sent them up there.

Q. What was the purpose of visiting your office?

A. They used to come up and visit my brother and take a drink and I used to join them, as I said, and they had ordered their uniforms of I. Bus. They had already ordered their uniforms. My brother had already sent them to get their uniforms.

Q. Had the uniforms been delivered yet?

A. No.

Q. A few days after you first met Vidal and Roser, then Jacobson came up to your office with Vidal and Roser? 3722

A. Yes, if I am correct. I am almost sure.

Q. That would be in the late spring or early summer?

A. Yes.

Q. Had you ever met Jacobson before?

A. No.

Q. You never knew him before?

A. No.

Q. What was your conversation with Jacobson, Vidal and Roser on the second visit to your office?

A. Mr. Wallace, nothing of any importance. Nothing of any importance that I could take notice or take stock. I was not interested. I just—they came up and looked very highclass fellows and I was just congenial to them; that's all. Liquor don't mean anything to me. There is plenty of it. Anybody can come up and take a drink with me. 3723

Q. After this second visit, did you meet any of these officers again?

A. Mr. Wallace, the three of them used to come up. I won't say very often. Maybe once a week or maybe once in ten days that I would see them. Not very often, sir.

3724 *Government's Exhibit 11.*

Q. Would they stay in your office or Elias' office?

A. In my office. I happen to have the nicer of the offices there and the liquor is in my office. I happen to have a little, what you put your telephone on, the door is opened and the liquor is there.

Q. Would you say the reason they came to your office was to sit around and drink?

A. As far as I know, sir.

Q. When did you first meet Radovich?

A. I met him after the boys were transferred over to Jacobson's company.

Q. Tell us how—you told us before that Jacobson said
3725 to you that he needed some clerks in his outfit?

A. Jacobson started to talk about the boys. I don't know how the conversation came about. And he said to me, "Say, Sam, what are the boys doing on the field". I told him they were clerks. I think my brother Elias told him the same thing. So he said, "Say, I need some clerks in my department". To me it didn't make any difference whether they were in his department. I don't know what department meant. It was on the same field, and I felt he was a friend, why not be under him. I said "I didn't mind. I don't care. If you want them, go ahead". The next I heard they were transferred.

Q. When was that?

A. During the summer.

Q. Was it June or July?

3726 A. Honestly, Mr. Wallace, I would not be sure to tell you what months they were. I don't know.

Q. You told us before that you thought they had been transferred from Mitchell Field in July or August so it must have been before.

A. I know it was in the summer time. I know it was in the summer.

Q. Tell us when you first met Radovich?

A. Captain Radovich came in, my best recollection, with Lt. Roser. He introduced me to him and Radovich said to me "I understand that you have a brother-in-law in the uniform business" and I said "yes". He said "I will try to get uniforms too." I said, "go ahead, he will sell it to you. I am sure he will sell it to you. I am sure he will get you a wholesale price on that".

Q. How long after you first met Vidal, Jacobson and Roser did you meet Radovich?

A. About a month.

Q. Had the uniforms been delivered to Vidal, Jacobson and Roser? 3728

A. Not to my best recollection.

Q. How long did it take to make those uniforms?

A. He had a hard job of getting the cloth. I think it was delayed. They might have gotten it sooner than I know.

Q. Did you call up Busch before Radovich went up to see them?

A. I might have.

Q. Who would you speak to?

A. To any of the boys; Joe or Phil or Harold. I really don't remember. I presume I did, I told them Capt. Radovich is coming up and they should treat him right.

Q. He went up alone?

A. Maybe my brother Eli went with him. I am not sure.

Q. When did you next see any of these officers? That you saw Radovich? 3729

A. Captain Radovich started to come up very often.

Q. Alone?

A. Alone. Many a times he would come up with a chauffeur.

Q. Would he ever come with Vidal?

A. Yes.

3730 *Government's Exhibit 11.*

Q. Would he come with Jacobson?

A. Yes, sir, a couple of times that he was there I saw Radovich. In other words, it was this way I imagine. I am positive Capt. Radovich came after they were in my office. In other words, Vidal and Jacobson and Roser would be there and he would walk in there, like, after they were there; but he never would come—not that I remember, that they would come with him. I know they were together at one time.

Q. Eventually, the uniforms were made and delivered to these different officers?

A. Yes, sir.

3731 Q. Did they pay for them?

A. No, sir.

Q. Busch called you and told you that they had not been paid for?

A. Yes, sir.

Q. Whose uniform was delivered first?

A. I don't know which one was delivered first. I can tell you this, when the uniforms were delivered (interrupted by Mr. Wallace).

Q. They were delivered at the same time?

A. I don't know whether they were. I didn't check into the records so I don't know, but I can tell you this. There were a lot of complaints, specially from Capt. Radovich and Lt. Roser.

3732 Q. One minute. The uniform was delivered to Vidal?

A. Yes, sir.

Q. Did he pay for it?

A. No, sir.

Q. Did you call him to pay for it?

A. I hinted to him that the boys wanted, you know, they wanted to get paid, in a nice way. I didn't say to them (interrupted by Mr. Wallace).

Q. I mean Vidal?

A. When I said it, Mr. Wallace, they all heard that I passed a remark to my brother. You know, this Harold is after me for the money. They knew what it was.

Q. You said to your brother Eli that Harold Busch wanted you to pay for the uniforms. Is that correct?

A. Pardon me, sir.

Q. Did you say substantially to your brother Eli that Harold Busch wanted you to pay for the uniform?

A. I said to him, Harold asked for the money for the uniforms.

Q. Who was present there when you said that?

A. Vidal, Jacobson and Roser. 3734

Q. Radovich was not there?

A. I don't think so.

Q. And they knew you were talking about a payment for the uniform?

A. Whether they heard, I don't know. If they didn't want to hear, I don't know that.

Q. Is there any reason why you should not ask Vidal and Jacobson and Roser to pay for the uniform?

A. It was, you know. I thought they couldn't afford it. I thought they came to me in a better position. They know I am not making the uniforms and they went up and I told them they could get it at wholesale price. They are not babies. If they came up and would say, "give me a spool of thread", it is one thing. They know I am not in the uniform business and when they went it was understood that they would get it at wholesale price. 3735

(relieved by steno. L. D.).

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**Government's Exhibit 12.**

Stenographer's notes—D'Elia—pages 39 to one-half of 46.

3736

**Government's Exhibit 13.**

Continuation of

STATEMENT

OF

SAMUEL BAYER

(Previously taken by Frances Rolnik Ginsburg, Stenographer)

(Continued by Lena M. D'Elia, stenographer)

(Same appearances as before)

3737

Questions by: EDWARD C. WALLACE,
Assistant U. S. Attorney

Date: February 7, 1945.

*By Mr. Wallace.*

Q. Is that the only time that you ever hinted to these officers that they should pay for the uniforms?

A. As far as I can remember, sir.

Q. They didn't pay for them?

A. No sir.

Q. You did?

A. Yes, sir, I did.

3738 Q. You paid for them out of the funds of the Plymouth Yarn and Thread?

A. Yes.

Q. Did you ever ask Radovich to pay for his uniform?

A. No.

Q. Was his uniform delivered to him?

A. Yes, sir.

Q. Do you know Mervin Levine?

A. I don't know him personally; I heard of him, yes.

Q. Who mentioned him to you?
A. I know my brother buys clothes there.
Q. Did Radovich buy any clothes there?
A. I believe he did.
Q. Do you know who took him there?
A. I believe my brother.
Q. Do you know who paid for the clothes?
A. I believe Radovich did; I didn't pay.
Q. How long after he went to I. Buss & Co. did he go to Mervin Levine?
A. I couldn't just exactly say because I do not remember, the time lapsed.
Q. Do you know he went to Levine? 3740
A. When those suits were made for Radovich, he complained, he couldn't use them, too tight, something, and he kept on complaining until I myself went up with Roser, and I said to him, why don't you go back and let him fix it for you; they went, fixed and fixed, still no good; I said let me go up with you; I know I could do him a favor and see if it couldn't be fixed right, and my brother-in-law jumped on me, I think it was Joe there; He said those uniforms fit wide; he said look I don't know much about uniforms—they both got so they dropped the uniforms on the table and went away.
Q. Who went away?
A. Roser and Radovich.
Q. So they didn't take the uniforms from I. Buss?
A. No sir. 3741
Q. Was that the end, as far as you were concerned?
A. Yes.
Q. How did he happen to go to Levine?
A. Maybe my brother Ely took him there.
Q. You never asked Radovich to pay for the uniform he didn't take.
A. As far as I live, the uniforms were returned anyway.

3742 *Government's Exhibit 13.*

Q. Did you ever see any of these officers outside of your place of business?

A. Mr. Wallace, once I had dinner with Colonel Jacobson.

Q. Where?

A. At the Waldorf, his wife, my wife, and him; once I had dinner with Captain Radovich, his wife, my wife, and Miss Solomon, at the Waldorf; it happened Radovich brought his wife to my place and Miss Solomon was in the office, nice little woman came from California, so she asked her if she wouldn't mind having dinner with us in New York and she accepted the invitation.

3743 Q. Was this while your boys were out at Mitchell Field?

A. Yes.

Q. Did you ever buy anything else for Radovich besides uniforms?

A. Mr. Wallace, Captain Radovich had such a way about himself; every time he would notice something in the office, for instance I traveled quite a bit, and he would look at my bag, he would say it is nice, would like to get one, I remember I got him one.

Q. Where, from the Cornell Luggage Co.?

A. Yes.

Q. Anything else you purchased for Radovich?

A. I want to finish this; I don't know what makes me think he didn't like the little bag, and he went to the luggage company, how much he took there I don't know; I said how
3744 did you get the name—evidently the name was on the bag, and he got himself a set there, I think.

Q. Did you pay for the set?

A. Yes, sir, I did.

Q. Was there anything else you purchased for Radovich or his family?

A. For his family, no sir. The last I heard was my brother-in-law called me—Trousseau Uniform Co., he is bothering me—Captain Radovich took pillow cases and

towels with initals on—got some embroideries—I said who took him there, I said how did he know about that place—he came up one day to me and I told him there they—(interruption here——

Q. Which brother-in-law?

A. Phil, as a matter of fact he asked Phil to introduce—Phil Busch took him up there and he introduced him to this fellow I never met before in my life, never had any business with him and he ordered whatever he ordered.

Q. Did you pay for them?

A. He was after Phil, I believe, and Phil came to me, I bawled the devil out of him why he took him there.

Q. Was this after he returned the suit to Busch?

A. I believe it was; I don't know whether this is after or before.

Q. When was the first time that you paid him money?

A. First time I paid him money I knew in the summer time.

Q. Do you remember what month?

A. I don't sir.

Q. You paid him $450.?

A. Yes, I gave him $450.

Q. At that time your boys were at Mitchell Field?

A. Yes.

Q. Were they in Radovich's company?

A. I presume they were; they were working for Lieutenant Roser's office.

Q. Did Radovich make any threats as to what he would do to the boys if you didn't give him the $450.?

A. No, when he asked me the first time he turned to me and said, I have a new angle, and I can put the boys into the medical—he asked me that he needs $500. to send his wife to California.

Q. He made no threats?

A. No, sir, not at that time.

3745

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3748 *Government's Exhibit 13.*

Q. You gave him the $450. the following day?

A. Yes.

Q. Did you have the $450. in your pocket?

A. Mr. Wallace, my reputation is such that I can always get money.

Q. I am interested where you got this $450.?

A. I had $450.—if I didn't have it in my pocket I had it in my place.

Q. You got it from funds available?

A. Yes.

Q. You didn't borrow it?

A. I don't have to do that.

3749 Q. About a week or so later you gave him $500.?

A. No, Mr. Wallace, he came to me about a week later and told me he needed $500. more; then I didn't give it to him—well, I told him I would get it together, I didn't give it to him then; I didn't want to give it to him.

Q. How long after you gave him the $450. would you say that you gave him the $500?

A. He came the third time and he told me that he needed another $1000. because the [redacted]plication fell through and he had to give up $1000, and I—I didn't give him the $1000. the kids would go overseas. I still then didn't give him any money.

(At this point of statement continued by Celia Reitman, Stenographer.)

3750

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**Government's Exhibit 14.**

Stenographer's notes—Reitman—pages 1 to 15.

3751

**Government's Exhibit 15.**

Continuation of

STATEMENT

OF

SAMUEL BAYER

(Previously taken by Frances Rolnik Ginsburg and Lena M. D'Elia)

(Continued by Celia Reitman, Stenographer)

February 7, 1945.

3752

(Same appearances as before)

*By Mr. Wallace.*

Q. I am trying to fix the time when you did give him the second $500.

A. The second $500.—it was in the summer time.

Q. How long after you gave him the first $450.?

A. I imagine about three weeks.

Q. And you met him on the corner opposite Radio City?

A. I waited right in the entrance to Radio City.

Q. Is that the Music Hall Theatre?

A. Yes.

Q. And he came into the Music Hall Theatre and met you in the lobby? 3753

A. Yes, sir.

Q. And then you went into his car?

A. His car was parked in the side street.

Q. Where did you drive to?

A. I didn't drive with him.

Q. Just sat in the car?

A. Sat and gave it to him and went away from him.

Q. Where did you get the $500. that you gave to him?

A. Mr. Wallace, I always try to have a lot of money. I have money. I always have money—some money saved up too.

Q. How long was it after you had given him the $450.?

A. How long after?

Q. Yes?

A. It must have been about three weeks. I am not sure exactly. About that.

Q. Then the next amount you gave him was—?

A. $400.

Q. $400.?

3755 A. That's right, Mr. Wallace.

Q. And was that passed to him in his room in the St. Moritz?

A. Yes. He took me up to his room.

Q. How long after you gave him the $500. outside the Music Hall did you give him the $400.?

A. Maybe three or four days later.

Q. The next amount was $600.?

A. That's right.

Q. How long after you gave him the money in the St. Moritz did you give him the $600.?

A. About three or four days; maybe five days.

Q. Where did you give him the $600.?

A. In my office.

Q. Where did you get the $400. that you gave him in the

3756 St. Moritz and the $600. that you gave him in your office?

A. I took some from my wife. I have a brother-in-law who always gives me some money to hold for him.

Q. Which brother-in-law?

A. Goldsmith.

Q. How much did you use of Goldsmith's money?

A. Well, I owed Goldsmith quite a lot of money. From time to time, every time he has any money left that he—more than he has to give home, he would give it to me to

hold it for him, I would really ask him to give it to me to hold for him because I felt that if there is anything—God forbid—wrong in the family, and if he did not have it, he would come to me anyway.

Q. How much of Goldsmith's money did you give to Radovich?

A. I don't know. Maybe a couple of hundred dollars. I have my own too.

Q. Did you tell Goldsmith that you were going to use his money?

A. No. I did not tell Goldsmith at all.

Q. How much did you get from your wife?

A. I got from my wife $500. 3758

Q. Did you tell her for what purpose you were getting it?

A. No.

Q. How long after you made the last payment in your office of $600. did you pay him the $5,000. down in Goldsboro?

A. Mr. Wallace, when I gave him the last payment, the boys were then transferred to the medical in Mitchell Field. They were there for a week. They were in Westover Field, I think, for about three or four months, and when I gave him the last $5,000., it was the time when the boys were in Goldsboro.

Q. Would you say it was about a month?

A. No, Mr. Wallace. I am trying to explain you, sir. From the time that I gave him the last $600. the boys were 3759 then transferred to the medical in Mitchell Field. They were there for a week or so. Then they were transferred to Westover Field and Bradley Field. They were on Bradley Field for about three or four months, I think.

Q. Three or four months?

A. Yes, sir, I think so. When I gave him the money I gave it at the time when the boys were transferred out of

3760 *Government's Exhibit 15.*

Westover Field. It must be at least three or four months, the way I got it.

Q. Did you give the $5,000. to Radovich?

A. No, I did not.

Q. Who did?

(Mr. Keenan has advised his client in connection with his answer to the last question.)

Q. Who passed the $5,000. to Radovich in Goldsboro, North Carolina?

3761 (Mr. Keenan states that he has advised Mr. Bayer for the time being not to reply to that question, more than to say that he admits that he furnished the $5,000. that was paid by his direction to Radovich by another person who has been charged with the offense and represented by counsel, but other than that I don't know and, therefore, I don't want to take the responsibility of advising him with reference to this other person, and he, for the time being, does not desire to answer that question to implicate someone else.)

Q. Where did you get the $5,000.?

A. I got it from my brother-in-law.

Q. Which one?

Q. Goldsmith.

3762 Q. How much did you get from him?

A. About $1200.

Q. Did you tell him for what purpose you were getting it?

A. No, I did not.

Q. How long before the money was passed did you get the money from Goldsmith?

A. How long?

Q. Yes, how long?

A. It was practically the same day.

Q. Where did you get the rest of the money?
A. I got from my wife.
Q. How much?
A. Over $2,000.
Q. Did you tell her what the purpose of getting the money was?
A. I did not.
Q. When did you get it from her?
A. The day before it was going there.
Q. Where did Mrs. Bayer get the $2,000.
A. She has money saved up.
Q. Did she get it from a bank?
A. No. She had it in a vault. 3764
Q. In a safe deposit vault?
A. Yes.
Q. Where did you get the balance of the $5,000.?
A. I got some money from my sister.
Q. Which one?
A. Mrs. Yusan (?)
Q. How much did you get from her?
A. About $700.
Q. She knew what you were getting the money for?
A. No, she did not.
Q. Was the money to protect her son as well as your son?
A. No. It was my son.
Q. Not her son?
A. It was my son. 3765
Q. What did you do with the $5,000. after you received it?
A. I got it together. I gave it to someone.
Q. Did you give it to Elias? A. No, I did not.
Q. You did not give it to Elias?
A. No.
Q. Did you give it to someone else?
A. Yes.

3766 *Government's Exhibit 15.*

Q. Did you talk with Elias at the time that you gave the $5,000. to someone else?

A. Yes.

Q. Was Elias present when you passed the $5,000.?

A. No, sir.

Q. What talk did you have with Elias?

A. I told him that I gave this up and that he would go with him.

Q. That Elias would go with him?

A. Yes.

Q. Was anything else said?

A. No.

3767 Q. Did Elias go with this other person?

A. Yes.

Q. How long after you gave the money to this other person did you again see Elias?

A. It was the same day, sir.

Q. And then Elias left and went down to North Carolina?

A. Yes.

Q. And he came back to New York?

A. Yes.

Q. Immediately?

A. I don't know whether it was immediately.

Q. Did he go to any of the mills there?

A. I am not sure whether he came back the same day.

Q. What did Elias say to you when he came back from North Carolina.

3768 A. It was delivered.

Q. Did he say anything else?

A. That's all.

Q. Was anything else delivered besides the money?

A. No, sir.

Q. Are you sure of that?

A. Positive, sir.

Q. Now, at the time that Radovich told you that if you did not pay the $5,000. he would take the boys to Burma, did you discuss the transfer of those boys with any other officer?

A. No, sir. The only thing I did, I went to Captain Kogan, once when the boys were transferred to the air-borne engineers and I didn't know what airborne meant and being he was a friend of mine, I asked him, "Captain, tell me, what does airborne mean. Does it mean flying? You know my kid never flew in his life", and he said "No, they don't fly".

Q. You discussed the different transfers of the boys with Radovich, haven't you? 3770

A. Pardon me, sir?

Q. Maybe you don't understand me. You spoke to Radovich about the transfers into the medical corps at Mitchell Field?

A. He told me to transfer them there.

Q. You spoke to Radovich about transfers in connection with his expedition to Burma?

A. No, sir.

Q. He discussed it with you?

A. At the time, in 23rd Street, when he came, and he told us that a couple went out; that he is taking the kids over.

Q. He, Radovich, spoke to you about having the boys transferred from Westover Field and Bradley Field?

A. Back to Mitchell Field.

Q. And you spoke to Jacobson on one occasion or Jacobson spoke to you about transferring the boys from one outfit to another? 3771

A. That's right.

Q. Apart from these conversations, did you talk to any other officer about transferring your son and Yusan?

A. No, sir.

Q. You are sure of that?

A. Positive.

Q. You bought and paid for theatre tickets for Jacobson?

A. Not as I know of. I have a charge account there with the theatre ticket office and I know I never heard the name of Jacobson for theatre tickets, but I know I heard the name of Radovich for two tickets for the theatre.

Q. Did you ever entertain Jacobson at the theatre?

A. Never. Never went to the theatre with him myself.

Q. Did you ever pay for any tickets that Jacobson used?

A. Personally, I don't know whether Colonel Jacobson got any tickets for the theatre.

Q. Did you ever pay for any tickets for prize fights or other sporting events that Jacobson used?

3773

A. Not as I know of for anything like that.

Q. Did you ever pay for any theatre tickets or tickets for sporting events for Vidal?

A. Not as I know of.

Q. Or Engelhart?

A. Engelhart I only met once in my life.

Q. Or Roser?

A. Not as I know of.

Q. Did you ever give Jacobson anything outside of the uniforms?

A. I believe that my wife,—he had two beautiful little girls—I think she sent him—I am not sure—I think she sent little dresses to his little kids, or candy.

Q. How about neck ties?

3774

A. No, sir.

Q. How about automobile tires?

A. No, sir.

Q. You are sure of that?

A. Absolutely.

*By Mr. McGohey.*

Q. Does this theatre account run into substantial figures?

A. We have customers and we entertain.

Q. At the end of the month, does it run into substantial figures?

A. About $50. or $60.

Q. Did you make any inquiry as to who got the tickets?

A. No, sir.

*By Mr. Wallace.*

Q. Did you ever speak to Colonel Vidal on the telephone? 3776

A. Yes.

Q. You have?

A. Yes, sir.

Q. On how many occasions have you spoken to Colonel Vidal on the phone?

A. Not very much.

Q. About how many?

A. Maybe half a dozen times.

Q. Did you ever phone him or did he always phone you?

A. He would phone for Eli and when Eli was not in the office I would answer.

Q. Did you ever phone Colonel Vidal?

A. No, sir.

Q. You are positive of that? 3777

A. Positive.

Q. You never phoned him out at Mitchell Field?

A. No, sir.

Q. Now, after Radovich got the first money from you, the $450., did you ever give him any presents?

A. I got the bags (?)

Q. After that.

A. After that? No, sir.

3778 *Government's Exhibit 15.*

Q. After you paid him the $450. did he ever get any present from you at all?

A. No, sir.

Q. Did you ever call Jacobscon a rat to anyone?

A. No, sir.

Q. Do you know Colonel Dykmeyers?

A. No, sir.

Q. Have you ever been down to the Middletown Air Depot in Pennsylvania?

A. Yes, I was there once.

Q. To visit your son, Robert?

A. That's right. I was travelling through there and
3779 stopped off.

Q. Did you ever meet any officers there?

A. Colonel Clarke.

Q. Did you have a conversation with Colonel Clarke?

A. Nothing of importance, sir.

Q. Did you offer him a job?

A. Offer him a job?

Q. Yes?

A. No, I did not.

Q. You are certain of that?

A. I am certain.

Q. Did you ever meet any other officers at Middletown, besides Colonel Clarke?

A. No, sir.

3780 (Continued by Miss Kravet)

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**Government's Exhibit 16.**

Stenographer's notes—Kravet—pages 179 to 189.

3781

**Government's Exhibit 17.**

EDWARD C. WALLACE,
Assistant U. S. Attorney,
in charge of case

Continuation of

STATEMENT

OF

SAMUEL BAYER

(From CR)

Steno. EPKravet
2-7-45

3782

*By Mr. Wallace.*

Q. Do you know Campbell?
A. Where, sir.
Q. Philadelphia.
A. No, sir.
Q. Do you know Edward A. Martin?
A. No, sir.
Q. In Washington?
A. No, sir.
Q. Do you know Celia Denninberg?
A. No, sir.

3783

Q. Did you only meet Colonel Clark once?

A. I met him quite a few times. He used to come to New York and whenever he was in New York we always would go out together.

Q. Who paid the bills?

A. I paid the bills. At times he paid the bills. I paid most of the time, sir.

Q. Did you ever give any present to Colonel Clark?

A. Maybe a Christmas present. I think we sent him once a wallet or something. On the other hand, he sent me presents that are more than I ever spent on him in my estimate.

Q. Have you ever seen Colonel Clark outside of Middletown and New York?

A. No.

Q. Have you any factories in North Carolina?

A. Yes, sir.

Q. Paterson?

A. Yes, sir.

Q. Did you ever meet Colonel Clark there?

3785 A. Yes, sir, once, that's right.

Q. Where did he stay in North Carolina?

A. He didn't stay. He came in the morning and went——

Q. What was the purpose of his visit?

A. He was interested. His wife came from the south and he was interested in a mill and he wanted to see how the yarn was made, so he came up and I showed him around.

Q. Do you know Colonel Lipkin?

A. No, sir.

Q. Do you know Sergeant Gross?

A. No, sir.

Q. Do you know Colonel Johnston?

A. No, sir.

Q. Now, you say that when Radovich phoned Miss Solomon he asked that Miss Solomon and you both meet him at

3786 the McAlpin Hotel?

A. That's right.

Q. And there was another lieutenant there?

A. Yes.

Q. Who was the lieutenant?

A. I don't know, sir. It was the first time I met him and the last time I met him. I only saw him——

Q. But it was at Major Radovich's request that Miss Solomon was present?

A. That's right, sir.

Q. On one occasion Radovich phoned Mitchell Field and promised he would bring him a flying jacket?

A. That's right. That's when he came and asked me for the thousand dollars.

Q. Who was the officer he spoke to?

A. I don't remember.

Q. Had you ever heard the name?

A. No, sir.

Q. You don't know what it is now?

A. I don't know. 3788

Q. And when you gave Miss Solomon instructions at the time that she made the appointment at the McAlpin or you said to her that she shouldn't have made the appointment?

A. That's right, sir.

Q. Now, Radovich phoned you again and said he wanted to meet you at Cavanaughs.

A. Radovich phoned——

Q. Miss Solomon.

A. —and he got hold of Miss Solomon on the telephone and he said that he had to meet me and her very very important; that he was flying in from Washington.

Q. And she made this appointment?

A. That's right.

Q. This was after you had told her that she shouldn't have made the appointment at the McAlpin? 3789

A. That's right.

Q. And it was at Radovich's request that Miss Solomon was present?

A. That I don't know, my friend.

Q. Didn't you just tell us——

A. She was talking to him on the telephone. She told me he wanted me and her to be there.

Q. After you met him was there anything that he had to say that dealt with Miss Solomon?

A. No, sir.

Q. Was there anything in the conversation which indicated the necessity of having Miss Solomon present?

A. No, sir.

Q. Now, after Elias went to Goldsborough with the $5,000 and he paid it did he telephone you from Goldsborough that he had made the payment?

A. I don't think so, sir.

Q. Did you ever give any golf clubs to Radovich?

A. Yes, sir.

3791 Q. When?

A. One day he walked into the place and I had a set of golf clubs for my kid, it was for my older boy and they were standing there. It's a good thing you— He looked at them. He said, "Gee, they're nice. I would like to have—can I have it? I'd like to go playing golf." I told him they belonged to my oldest boy. I said, you can have them and bring them back. He said all right. He took them. He never returned them.

Q. When was that?

A. During the summer.

Q. Before or after you paid him the $450.?

A. That was all before.

Q. Did you ever speak to Radovich about automobile tires?

3792 A. No, sir.

Q. Did you ever speak to Radovich about an apartment?

A. No, sir.

Q. Did you ever give any money to Colonel Jacobson?

A. Never.

Q. Do you know a man named Perdem?

A. Yes. I met him once.

Q. Did you ever buy a uniform for him?

A. No, sir. I don't think so, sir. No, definitely not.

Q. Is he stationed at Mitchel Field?

A. I met him through Captain Kogan.

Q. But you never bought him a uniform?

A. No, sir.

Q. You remember when someone from the Army came up and asked you whether you knew these different people?

A. Yes; sir.

Q. After that conversation with Colonel Miller did you have a talk with your brother Elias?

A. Mr. Wallace, there was once an officer came from Washington.

Off the record:

A. I'll tell you what happened. I was out of town when 3794
Colonel I think it was Hogan from Washington came in and I wasn't there. My brother Eli was not there. So he left word that my brother Eli should call him. So I think it was on a Monday Eli called him and told him that if he wanted to come in that we are ready to see him. But he said he couldn't make it, see, because I was out of town. I was going out of town then again, see. So he said that he would see him himself, see, and that he would see me some time later. So he came and he saw my brother Eli. I was out of town then; I was at the mill. And he asked Eli questions. Eli denied it.

Q. What questions did he ask?

A. Whether we gave any money. I think it was whether we gave any money to Radovich. 3795

Q. And Eli said he had not?

A. I think so.

Q. And you said you had not?

A. I hadn't seen him.

Q. Later on you denied giving any money to Radovich?

A. I denied it to Colonel Schneider.

Q. And then there were statements typed up to that effect?

A. Yes, sir.

3796 *Government's Exhibit 17.*

Q. And Miss Solomon typed up those statements, didn't she?

A. Yes.

Q. And after the Army officers left did Eli call Harold Bush?

A. Mr. Wallace I don't know.

Q. Did you have a discussion with Eli about the records up at I. Buss & Company?

A. No.

Q. The records were changed, weren't they?

A. That's what I understand.

Q. Who told you that?

3797 A. Miss Solomon told me.

Q. Who ordered them to be altered?

A. I don't know, sir. I didn't.

Q. Have you purchased any insurance of any kind during the year 1943?

A. Insurance? '43, yes.

Q. What kind of insurance?

A. Life insurance.

Q. How much?

A. I took out a policy, one for five and one for ten.

Q. And who was the agent on those policies?

A. The agent? I believe one was in Far Rockaway, a fellow that I know. I think it is Cohen. And the other one was Levy in New York.

Q. Who is Levy?

3798 A. Equitable Brokerage.

Q. Have you done business with Levy before?

A. Yes, sir. He is my insurance broker.

Q. And had you done business with Cohen before?

A. No, sir.

Q. How did you happen to place the insurance with Cohen?

A. Cohen, I know him for a long time. My wife knows him.

Q. What's his first name?

A. Honestly I don't know. He lives in Far Rockaway. He is a poor man.

Q. Where is his office?

A. I don't know. I think in Far Rockaway. As a matter of fact from the synagogue where I belong, see, you know, the former president asked me to give him a break. I knew, see, that I was rejected on account of my heart, and I told him; Mr. Smith, I says, there is no use, I wouldn't pass anyway. Oh, give him a break. So I gave him a $5000 policy. I didn't even think he would put it through. And he rated me up to an awful high——

Q. Was there any other insurance you placed in '43? 3800

A. No.

Q. Placed on any member of your family?

A. Mr. Wallace, except in insuring my little boy.

Q. How much?

A. $2500.

Q. Who was that placed with?

A. That was placed either through the Equitable or through this fellow Cohen. Honest, I don't know.

Q. Did you ever talk to anybody else about insurance of any kind in '43 besides Cohen and Levy in the Equitable?

A. Positively not. I don't know anybody.

Q. You are sure that nobody spoke to you about insurance?

A. I am positive, Mr. Wallace.

Q. Did you ever obtain a copy of any of the transfer 3801 orders of your son?

A. I don't know what you mean, sir.

Q. Your son was transferred from different posts, wasn't he?

A. You mean from Mitchell Field.

3802 *Government's Exhibit 17.*

Q. He was transferred from Mitchell Field to Westover, and from Westover to somewhere else. There were a number of transfers.

A. That's right; when the boy used to come home. Mr. Wallace.

Q. Did you ever obtain a copy of any of the transfer orders?

A. No, sir.

Q. Did you ever try to obtain copies of the transfer orders?

A. The only time I used to see the orders when the boy used to come home, regular typewritten orders, and his
3803 name would appear and a lot of other names.

Q. Did you ever speak to any officer about obtaining a copy of transfer orders?

A. No, sir.

Q. You are sure of that?

A. Positively, sir.

Q. Did you ever tell an officer that you would do anything to keep the boys out of the fighting area?

A. I never did, sir. There was no occasion for me to say that.

Q. Did you ever pay any bills at the Park Central Hotel?

A. No, sir, I didn't.

Q. What?

A. I don't think so, sir. Not as I know.

3804 Continued by Miss E. L. Celander.

3805

**Government's Exhibit 18.**

STATEMENT

OF

SAMUEL BAYER—
Cont'd from EPK

Present:

EDWARD C. WALLACE,
Ass't. U. S. Attorney

JOSEPH B. KEENAN
WASHINGTON I. LEVY,
Attorneys for Witness

3806

GERALD FLYNN
J. I. BROWN,
Special Agents, F.B.I.

Stenographer: E. L. Celander,

Date: February 7, 1945

*By Mr. Wallace.*

Q. Did you at any time ever call Major Radovich on the telephone?

A. I don't remember.

Q. You may have called him?

A. I might have but I don't think so.

3807

Q. Did you ever telephone Col. Jacobson?

A. No, sir.

Q. Sure of that?

A. Positive.

Q. Never spoke to Col. Jacobson on the telephone?

A. The regular way. He probably would call Eli and Eli wouldn't be in the office and I would tell the girl "I will talk to him."

3808 *Government's Exhibit 18.*

Q. Did Col. Jacobson ever reverse the charges on any of the long distance calls he made to you?

A. I can't answer that. I don't know.

Q. Did Radovich ever phone you?

A. He did.

Q. After the money was paid?

A. After the $2,000. was paid.

Q. After the $5,000. was paid?

A. Yes.

Q. Did he ever reverse the charges?

A. If he did I wouldn't know. In my place it is such that we get a lot of collect calls from different customers. A
3809 customer calls me for goods, he calls collect. My telephone bill is usually three to four hundred dollars a month. We don't keep any particular system of what calls are what. What came collect, I don't know.

Q. Who would accept the calls?

A. We have a little girl there at the switchboard.

Q. Does she accept calls without consulting anyone?

A. Yes.

Q. What is her name?

A. Edith, we call her.

Q. How long has Miss Solomon been in your employ?

A. Five years.

Q. How much salary did you pay her when she went to work for you?

A. $18.00.

3810 Q. Five years ago she was paid $18. a week?

A. Something like that.

Q. How much is she getting now?

A. She was getting $35. from Plymouth Thread, their share and $30. from Thread Converters.

Q. She was getting $65. a week?

A. I don't know. I give her a raise. I don't know if she was getting $70 a week or $65.

Q. Have you a safe deposit box?
A. Yes.
Q. How many?
A. One.
Q. Where is it located?
A. Irving Trust Company.
Q. Which branch?
A. On 21st Street and Fifth Avenue.
Q. Has Miss Solomon a safe deposit box?
A. As far as I know yes:
Q. Has Eli?
A. I think so.
Q. Has your wife one? 3812
A. Yes.
Q. Where?
A. Far Rockaway National Park, I think.

(Adjourned).

3813

3814

**Government's Exhibit 19.**

STATEMENT

OF

ELIAS BAYER
333 West 86th Street,
New York, N. Y.

Present:

EDWARD C. WALLACE,
Ass't. U. S. Attorney

JOSEPH B. KEENAN
WASHINGTON I. LEVY,
3815 Attorneys for Mr. Bayer

GERALD FLYNN
J. I. BROWN,
Special Agents, F.B.I.

Stenographer: E. L. Celander
Date: February 7, 1945

*By Mr. Wallace.*

Q. Mr. Bayer, you have spoken to your attorney about coming in here and making a statement in connection with the matter in which you were arrested some months ago?

A. Yes.

Q. They have advised you to make this statement?

3816 A. Yes Sir.

Q. You are making it voluntarily?

A. Yes sir.

Q. You understand anything you might say might later be used against you in a criminal proceeding?

A. Yes Sir.

Q. You don't need to say anything if you don't want to?

A. Yes Sir.

*Government's Exhibit 19.* 3817

Q. Will you tell us the story in relation to Radovich?

A. Well, Sir, I originally met Lt. Col. Vidal and Lt. Roser. I met him by accident in a night club at the Copa Cabana. We had several drinks together and became quite chummy at the same time. In the course of conversation, I don't recall whether it was Lt. Roser or Lt. Col. Vidal. He asked me what business I was in. I told him I was in the thread business. One of them asked me was it the little spools of thread you buy in the store. I said "No, we cater to the manufacturing trade, people who make uniforms, clothing; volume business." One of them said "You must sell these people who make uniforms." I said "We do. We do a lot of business with the Government." 3818 One of them said "Well, can you get it wholesale. Can you save us some money on the purchase price?" As to the time, Sir, it was some time in the early part of 1943. I don't recall the date. The month, the particular time. It was just one of those nights, where I lived with two other friends of mine. I met them and with another friend of mine on one of the nights we went out. I didn't hear anything from either one of them. About a month later I think it was Lt. Col. Vidal called me on the phone at my office and asked me if I would take him up to that wholesale place we were talking about at the Copa Cabana. I said "I will be very glad to. You come up to my office." Roser and Vidal came in, I believe the following day and I asked my brother if he would mind if I took them up to my brother, so they could buy at wholesale price. He said "Sure, I don't 3819 mind." I took them up to I. Buss Uniform Company and they were both fitted for uniforms.

Q. Did you speak to anybody up there?

A. I don't remember if it was Mr. Phil Buss or Harold Buss.

Q. What did you say to him?

A. I introduced him to the two officers and I told him I would like him to sell them uniforms at wholesale price

3820 *Government's Exhibit 19.*

and save them as much money as possible. They were friends of mine. They were fitted for uniforms and they left. That evening they came up to my apartment.

Q. Where was your apartment?

A. I shared an apartment with two friends of mine, 120 Central Park South. A short time thereafter Lt. Roser brought in Lt. Col. Jacobson. He introduced me to him and he also told me that Col. Jacobson would like to get some uniforms, also that it is very hard to get them at the P.X. at Mitchell Field. I said "Certainly, I will be glad to help you." And I took him up and he ordered a uniform. After that we became very friendly and these
3821 army men came up to my apartment very often. They would wash up and go out for drinks or for appointments. We had dinner together. Sometimes they would pay or I would.

Q. Where would you take them?

A. Hickory House or a night club.

Q. What night club?

A. Martinique or Copa Cabana.

Q. Did you ever introduce them to any of the entertainers?

A. No Sir, I did not. I don't know any of them. As a matter of fact, Radovich wanted to take me up to introduce me to the Ritz Brothers. I said I wasn't interested.

Q. Did you ever meet Jimmy Durante?

A. I have seen him at a night club many times.

3822 Q. Did you ever meet him?

A. I don't recall meeting him, but I spoke to him at the night club.

Q. Did you ever introduce anybody to Durante?

A. No Sir. During one of the visits to the office Col. Jacobson asked me where my nephew was stationed.

Q. Before you met Radovich?

A. Yes Sir. I told him they were clerks in Mitchell Field. He said "I can use clerks in my outfit." He said "I am going to have him transferred to my outfit."

Q. Is this the first time Jacobson knew the boys were at Mitchell Field?

A. I believe so. He suggested that he was going to take him into his outfit. He had him transferred to his outfit. A week or two later Lt. Roser brought up Captain Radovich and he says "He is in our company and he would like to order some uniforms too." I said "Swell."

Q. How long was this after Vidal had ordered uniforms?

A. Maybe three or four weeks. A short time.

Q. Had the uniforms that Vidal and Roser ordered been delivered to them at this point?

A. I don't think so. I am not sure. And I took him up and introduced him to the Busses. 3824

Q. Which one?

A. Either Phil or Harold.

Q. What did you say to them?

A. I told them the same thing. Another officer; a very good friend of mine. I met him through Lt. Roser. I want you to treat him the same say as you treated the others. He said "All right." From then on Radovich used to come up to the office very often. Almost every other day. He used to drive up and make himself very much at home. My brother has a desk up against the wall and has chairs in back of it. He would seat himself up in back of that. There was a little cabinet over in the corner and he would have a drink. I thought he was a very good friend of mine and I didn't mind it at all. He was very sociable, nice and congenial. This went on for sometime until one 3825 day he called my brother. He kept avoiding me, I noticed for a while and playing up to my brother. He was my friend. Hello Sam and Hello Eli. He called my brother and he told him he has to see him. My brother said "Come over."

Q. Can you fix the date of this?

A. No Sir.

Q. Approximately?

A. Honestly, I can't.

3826 *Government's Exhibit 19.*

Q. How long was it after you first met him?

A. Oh, this was, it might be two or three months. It was a couple of months I should think. He came in and he told my brother that something happened at the field; that he has to transfer the boys out to another camp up in Massachusetts. So my brother looked at him and he says "What happened?" He says "The outfit is being broken up." He asked him if he could keep him in the Field for a little while longer. He said he could not. So if he couldn't, that was the end of it and he left.

(Cont'd by EKL).

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3827

**Government's Exhibit 20.**

STATEMENT (Cont'd)

OF

ELIAS BAYER

Before:

EDWARD C. WALLACE
Assistant U. S. Attorney

Date: Feb 7, 1945

Appearances:

Same as in earlier portion of Statement.

3828

Stenographer: E. K. Levy
(Relieving ELC)

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*By Mr. Wallace.*

(Continuing)

A. I don't know whether he called or came up the next day and he said Sam, I think I've got an angle. He says

*Government's Exhibit 20.* 3829

I think I can get him into the Medies. So we were listening and he says to him, he says, I want to see you alone for a minute. So Solomon and I walked out; it was very peculiar to me, as I said before, there's a man that was supposed to be my friend, I introduced him to my brother, and he has got secrets from me. This and other things. I walked out with Solomon, out of the door. The door opens up against the wall and we stood against the other side and I heard him ask my brother for $500. He said he needed it because, I believe, his wife was going to California. My brother hesitated awhile and told him he didn't have the money but would try to get it. He started to walk out; as he did we walked in and my brother says 3830
to me I don't know whether this is a loan or a holdup. I looked at him. I couldn't answer him. I didn't know what to tell him because he asked me what do you think. Sam, I says, I don't know, it's your problem and you will have to make up your own mind as to what to do. I believe he came up again and my brother gave him $450.

Q. How do you know that?

A. My brother told me. He comes up again in a couple of days later and he says to my brother, everything is all right. Transfers are going through. He says they will be through in a short time and again asked to see my brother. We walked out again and my brother looked up and Solomon and I walked out and I heard him ask for $500. more. My brother asked him what he needed the 3831
money for and he says he needed it. And I heard my brother tell him that he didn't have it, that he would see if he can raise it, and he walked out again and we walked in.

A few days later, he comes up again, or maybe about a week, I don't know, and he tells my brother that the transfers are not coming through; something happened; and my brother asked him what happened but he said he

3832 *Government's Exhibit 20.*

didn't know but they are not coming through, something happened. I believe he sat down. He had a drink, and he says to my brother again, I want to see you Sam. Out we walked again, and I heard him say Sam, he says, if I get an additional $1,000. from you which I have to give to somebody on the Field, I can put those transfers through. There was silence there for awhile and my brother told him again he didn't have that money or that kind of money on him and he would see what he could do about it. Just then we walked into the office, and, as I said, he was sitting behind a desk there; he was dialing Mitchell Field, to get them on the telephone and spoke to a Lieutenant there.

3833 Q. What was his name?

A. I don't remember, Mr. Wallace.

Q. Have you ever heard of it before?

A. No, sir.

Q. Would you recognize it if you heard it again? A. Perhaps, I don't know. I heard him tell this Lieutenant to fill out two applications for my two nephews and have them sign it and he says you know that jacket you asked me for, that flying jacket, I will see that you get it and he said if you do that for me, and he said don't worry Sam, everything is all right, and he hung up; and he said everything is going through now.

Q. Can you fix the time for this conversation?

A. Let's see—August or September.

Q. 1943?

3834 A. Yes. This is a guess, Mr. Wallace, believe me, I am just guessing. I imagine it was around that time. Well, I understand that my brother met him and gave him some money.

Q. Who told you that?

A. My brother. I wasn't there. I didn't see it. I didn't see Radovich again for several months. That's the last time I saw him when he—well, no, I wouldn't say that; he

came up to the office one time and spoke to my brother in the office alone and I understand my brother gave him some money at that time.

Q. Who told you that?

A. My brother did, and I didn't see him again for several months until one day he came up to the office and by that time I knew, my brother told me what was going on. I heard him telling my brother, Sam, he says, I can't do anything. He says, Walter, why can't you keep your hands off the boys; let things take its course; what did I ever do to you. He was pleading with him. He says, Sam, honest, if I had the money, I'd do it myself. This money isn't going to me. $1500. goes to one man, $2000. 3836
goes to another man; all I got is $1500. of the $5,000. we are talking about. He says we have to act pretty quick, I am going down South and we are pulling out. And he walked out.

He walked down the stairs and I walked right after him and I got him at the bottom of the stairs, in front of the door—we were walking toward Sixth Avenue—I said Rad, I said, what in hell did I ever do to you, and what did Sam do to you to take it out on the kids. He says, it's too late, I can't help it, this money has to be turned over if you want me to get the boys out of my outfit, which was supposed to be a very dangerous mission, and unless you are out at Goldsboro at a certain day I wouldn't be able to do that for you. He gave me the ulti- 3837
matum that the money had to be there at a certain day. So my brother asked me to go to Goldsboro, which I did.

Q. Who did you go with?

A. Well, sir—(addressing a gentleman in the room) do I have to answer that, sir?

Mr. Keenan: Well, it's the same situation that existed with his brother. This witness, this Elias Bayer,

admits that there was $5,000. paid that he knew about and that he had to do and pay to Captain Radovitz, but the man who paid him the money was represented by other Counsel and I am not representing him, and I have suggested at this time that they tell their own part and let the other people take care of themselves. That's correct, isn't it?

Witness: Yes, sir.

Q. Now, fix the time of this conversation which you had with Radovich at the bottom of the stairs?

A. It was the latter part of November.

3839 Q. 1943?

A. Yes, sir.

Q. And when did you go to Goldsboro, how long after that conversation?

A. I think a day or two.

Q. And when did Sam Bayer give you the $5,000?

A. He didn't give it to me.

Q. Who gave it?

A. Nobody gave it to me. I didn't have the money.

Q. Who did Sam Bayer give the $5,000. to?

A. He gave it to the other party that went down with me.

Q. How many of you went down?

A. Two.

Q. What time did you leave New York?

3840 A. We left New York late in the afternoon, it must have been around 3 or 4 o'clock, something like that.

Q. From the Penn. Station?

A. Yes, sir.

Q. Did you travel by Pullman?

A. It was a sleeper; yes, sir.

Q. When did you arrive in Goldsboro?

A. Very early in the morning, it must have been about 4 o'clock in the morning or thereabouts.

Q. What did you do when you got to Goldsboro?

A. We waited for Radovich at the station.

Q. What happened?

A. He came up in a staff car and I pointed him out and he walked in back of the station, with this other party that gave him the money.

Q. Did you go along?

A. No, sir.

Q. You didn't see the money pass?

A. No, sir.

Q. Then, what did you do?

A. We—I was supposed to do some business down there, to see the Mills, but instead we rented a cab that drove us 3842
to Raleigh and when we got there we took a train to New York.

Q. How far is Goldsboro from Raleigh?

A. It couldn't be very far because it only took us about —it must have been an hour before we got there.

Q. How did you know you could catch a train at Raleigh?

A. We didn't know. There was a train very late coming in from the South somewheres and we happened to catch it.

Q. Did you take a Pullman too?

A. We couldn't get it but after we were on the train the Conductor found space for us.

Q. Did you give anything else to Radovich besides the $5,000.?

A. Did I give anything else to Radovich? 3843

Q. Did you or the man that was with you?

A. Not that I know of.

Q. You are sure of that?

A. Yes, sir.

Q. You didn't have anything in your pocket to give to Radovich?

A. No, sir; no, sir.

Q. You didn't bring anything else down to give to Radovich?

A. No, sir.

Q. If the other man had you would know about it?

A. No, sir.

Q. Neither you nor the other man brought anything besides the $5,000. to give to Radovich?

A. No, sir.

Q. Now, is that the end of the contact that you had with Radovich?

A. Yes, sir.

Q. You received letters, didn't you, or Solomon did, that were torn up?

A. Yes, sir.

Q. Now, the first time you met any of these officers you
3845 say was in the early part of 1943, when you met Col. Vidal and Lieut. Roser, at the Bar of the Copacabana?

A. Yes, sir.

Q. And who was with you?

A. I believe my friend Martin Goldstein, he shared the apartment with me.

Q. Anyone else?

A. No, sir.

Q. And how did you happen to speak to these two officers?

A. We were standing next to each other. The bar at the Copacabana was no bigger than from here to the wall, very small, and we got to talking; how it happened I don't know. There we were talking.

Q. Then did you find out they were at Mitchell Field?

A. Yes, we did.

3846 Q. You knew your nephews were at Mitchell Field?

A. I don't believe they were in the Army yet.

Q. And was your other nephew Robert Bayer in the Army at that time?

A. Yes, he was.

Q. Where was he at?

A. At Pennsylvania, Middletown.

Q. And you gave Vidal or Roser your card?

A. I didn't give them my card but they marked my 'phone number or address down. Perhaps, they did. I don't know. We became quite chummy; we had several drinks, and you know how it is, we were patting each other on the back.

Q. And a few weeks or months later they called you and they came down to the office and you took them up to I. Bus?

A. Yes, sir.

Q. And they didn't pay for these uniforms?

A. No, they didn't.

Q. That was contrary to the understanding you had with 3848
Vidal and Roser?

A. It was contrary to my understanding.

Q. Now, Plymouth Thread paid for those uniforms?

A. Yes, sir.

Q. Did you ask Vidal to pay for his uniform?

A. Well, directly asking I wouldn't say, no. It was definitely decided that they were to pay at wholesale price and I did pass a remark, I believe, once that these uniforms hadn't been paid for as yet.

Q. And what did Vidal say?

A. Nothing much, he changed the subject and I just rode along with them.

Q. Well, is there any reason why you shouldn't ask him to pay for the uniform? 3849

A. No, I don't.

Q. Did you ask Roser?

A. No, I didn't.

Q. And subsequently Jacobson and Radovich bought uniforms there.

A. I believe Radovich and Jacobson subsequently returned the uniforms, they didn't like the fit.

Q. Did you go up to I. Bus & Company when Radovich went to place his order?

A. I took him up originally.

Q. And to whom did you introduce him?

A. As I say, to either Phil or Harold.

Q. And did you go back with Radovich at some later day?

A. I might have.

Q. Did Radovich return his uniform?

A. I believe he did return his uniform.

Q. At the time he returned his uniform, the other Officers' uniforms had been delivered?

A. Some of them.

Q. And they hadn't been paid for?

A. No.

3851 Q. What did you do when Radovich returned his uniform?

A. He asked me if I couldn't take him up to a place that makes better uniforms. I said I'd take him up to my tailor. I don't know whether that would be wholesale or not. If you want to I said I could take you up there. I believe he came up there with another officer.

Q. You took him where?

A. Mervin Levine.

Q. Did you introduce him to anyone there?

A. Yes, sir.

Q. Who?

A. Mervin Levine. I just said that these two men wanted to order uniforms, to take care of them.

Q. You didn't tell Levine that you would pay for the uniforms?

3852 A. No, sir.

Q. Who paid for the uniforms?

A. They did.

Q. Who?

A. Radovich, whoever took it out. I wasn't there when he took it out.

Q. Plymouth Thread and Yarn didn't pay for it?

A. I am sure they didn't.

Q. You are sure you didn't pay for it?

A. No, sir.

Q. You are sure you never told anybody at Levine's that you would pay for it?

A. No, sir.

Q. What do you mean by "no, sir"?

A. I didn't tell anybody that I would pay for it.

Q. Now, can you fix the time approximately when you took Radovich to Levine's?

A. I honestly can't.

Q. Did you buy Radovich anything at all?

A. I didn't buy anything for Radovich.

Q. Did Plymouth Thread and Yarn pay for anything that Radovich purchased?

A. Yes, I understand they did. 3854

Q. What?

A. I understand he went up to a monogram place and he ordered something.

Q. Before one of the Buses took him there had they spoken to you or Sam Bayer?

A. They didn't speak to me, and I don't think they spoke to my brother.

Q. Did they take him there after he returned the uniform? A. No, sir.

Q. This is before?

A. Yes, sir.

Q. Are you sure of that? A. Quite sure.

Q. What else did you or Plymouth Thread pay for that Radovich purchased?

A. I believe everything he took at this monogram place 3855
the Plymouth paid for. That's all that I know of.

Q. Did you ever take Radovich out of an evening?

A. Not alone, I don't think. He was in my company many times.

Q. Where did you take him?

A. Oh, we went out; we went to eat. When I say he was in my company there was always Lieut. Roser, Vidal or Jacobson around.

3856 *Government's Exhibit 20.*

Q. Did you ever go with Roser to theatre?

A. No, sir, I didn't.

Q. Did you ever go to Madison Square Garden with Roser?

A. We might have.

Q. How many times?

A. Once or twice.

Q. Who went?

A. I think Vidal and Roser, I am not sure.

Q. Did you take Radovich?

A. I believe he was there once or twice.

Q. Did you take Jacobson?

3857 A. I think so. I know we went to see a fight. Who was there—I know Radovich was there once.

Q. Who paid for the tickets?

A. Well, I ordered the tickets but they took me out for dinner that evening.

Q. Where did they take you?

A. I believe we went to the Hickory House. When I say the Hickory House, Mr. Wallace, it's because that's a favorite eating place of mine; it was right near the place where I lived and most of the time we walked in there. It's most possibly—likely that that would be the place.

Q. Well, the evenings that you went to fights at Madison Square Garden, you went to dinner first?

A. Yes, sir.

Q. And you say you didn't pay for the dinner; who did?

3858 A. One of the Army men.

Q. Would you say Jacobson?

A. I don't know, one of them paid it and split it up but I didn't pay.

Q. Was there any civilian present, besides yourself?

A. I don't think so.

Q. Now, after the fights, where did you go?

A. We had a couple of drinks.

Q. Where?

A. At the Martinique.

Q. Who paid the bill there?

A. I didn't.

Q. You are sure of that?

A. Yes, sir.

Q. Did the Army officers pay for them?

A. Yes, sir; one of them did.

Q. Now, was there any other occasion you went to the fights besides *this one you were talking about*?

A. There might have been one more, I don't recall Mr. Wallace. They used to call me up from the Field and say there was a fight on tonight and ask if I could get the 3860
tickets, and once or twice I did it.

Q. Who called?

A. Either Vidal or Roser, that there was a fight on Friday night, could you get me some tickets, and I said I will try, and once or twice I think I got them.

Q. Who do you remember seeing fighting at the Garden?

A. I don't remember.

Q. Was this after they ordered their uniforms?

A. Oh, yes.

Q. Was it after they hadn't paid for their uniforms?

A. Well, it must have been.

Q. Now, after this Col. Hogan and Col. Snyder had spoken to you, you gave him a statement, didn't you?

A. I gave one to Mr. Snyder.

Q. And I think you denied buying uniforms. 3861

A. I denied everything.

Q. You didn't deny knowing them?

A. No, I didn't.

Q. Miss Solomon typed up that statement?

A. I believe I made a copy of it.

Q. And what did you do after the Army officers left in relation to I. Bus & Company?

A. What did I do?

3862 *Government's Exhibit 20.*

Q. Yes?

A. I didn't do anything.

Q. Did you call Harold Bus?

A. No, I didn't.

Q. Did you ask Harold Bus to change the records?

A. I did not.

Q. You are sure of that?

A. I am positive.

Q. And did you speak to anyone up at I. Bus & Company regarding the records?

A. No, sir.

Q. Did you know that the records were changed?

3863 A. I did not.

Q. This is the first time you ever heard of it?

A. When you say did I know, are you talking about when Snyder was up to my office?

Q. I am talking about—at any time that the records of I. Bus & Company had been altered?

A. I heard something about it, yes.

Q. When for the first time, did you know anything about the changing of the records?

A. I don't know just when—what I heard was very little about it. I wasn't interested. I had nothing to do with it. I didn't know anything about it.

Q. Was it after your arrest that you heard of the changing of the records?

A. Yes, sir.

3864 Q. Who told you?

A. I think I heard it through Miss Solomon or my brother, one of the two.

(Relieved by D. H. M.)

3865

**Government's Exhibit 21.**

STATEMENT

OF

ELIAS BAYER
(Contd from EKL)

Before:

EDWARD C. WALLACE
Assistant U. S. Attorney

Appearances:

(Same as in previous portion of statement).

3866

Date: February 7, 1945
Steno: Dorothy H. Miller

*By Mr. Wallace*

Q. Have you ever spoken to Colonel Jacobson on the telephone?

A. Yes, sir.

Q. On how many occasions?

A. Many times.

Q. Did you ever speak to him at one time that your brother Sam Bayer also spoke to him on the phone?

A. Might have been.

Q. Did you ever speak to Jacobson about the transfers of the boys?

3867

A. I spoke to him about that after I knew that Ratovich kept calling my brother and bothering him for money and I tried to get the boys away from his clutches where he could do them any harm or to try and harm my brother. I asked him if he could do anything.

Q. Was this in person that you asked him or on the telephone?

A. Over the telephone.

3868 *Government's Exhibit 21.*

Q. Was this before you paid the $5,000?
A. Yes, sir.
Q. Where was Jacobson at the time?
A. In Albany.
Q. You phoned him in Albany?
A. Yes, sir.
Q. How did you know that he was in Albany?
A. I am very friendly with his wife and kids and I knew he was transferred out there.
Q. From where did you know him?
A. From my office.
Q. Was Sam Bayer present when you telephoned?
3869 A. I do not think so because my brother Sam didn't know anything about it.
Q. Tell us just what your conversation with Jacobson was.
A. I asked him—I couldn't tell him I wanted the boys to be taken out. I was afraid, my brother was afraid—I knew my brother was in a jam and I couldn't go to him because I was afraid he would do—I was asking him if he could have my brother transferred out to Mitchell Field.
Q. Well, in what outfit were they?
A. They were stationed in Massachusetts.
Q. One was in Massachusetts and one was in Connecticut?
A. Well, afterwards both outfits were transferred to Massachusetts.
3870 Q. Was this before Ratovich had said he was going to have them shifted into his outfit?
A. Yes, sir. You talking about Goldsboro now?
Q. Yes.
A. Yes, sir.
Q. Now both boys were in Massachusetts?
A. Yes, sir.
Q. Were they in Ratovich's outfit at this time?
A. I don't know.

3871

Q. They were at Westover Field?

A. Yes, sir.

Q. And you called up Jacobson?

A. Yes, sir.

Q. What was the conversation as best you can recall?

A. I asked him if there was anything he could do to get the boys out from the outfits they were in and he said he couldn't.

Q. And that was the end of the conversation?

A. Yes, sir.

Q. And that was the only time you spoke to Jacobson about having the boys transferred?

A. That's about the only time I can remember.

3872

Q. And do you where Sam Bayer got the $5,000 that he gave to you to give Sam Ratovich?

A. I understand he got it from the family.

Q. When I referred to the $5,000 that Sam Bayer gave you I meant the $5,000 that was paid to Ratovich in Goldsboro and I do not intend to put words in your mouth that you said that Sam gave you the $5,000.

A. Yes, sir.

Q. Now, did you talk to any other officers besides Jacobson about having the boys transferred?

A. Yes, sir.

Q. To whom?

A. My business took me through the state of Pennsylvania where I traveled for many years selling sewing thread to the different factories and one of my customers 3873
who was in Columbia, Pennsylvania, is an old army man and he introduced me by letter to Colonel Clarke.

Q. Who is the old army man?

A. General Sharron. He is in the dress business.

Q. What did you say to General Sharron?

A. At the time I got this introduction Robert was on Mitchell Field—my brother's oldest son—and he told me that he heard there were openings in Pennsylvania—Mid-

dletown—in the finance section. He had the schooling for it in college and he would like to apply for a transfer to Middletown and when I saw General Sharron and told him that my boy would like to get transferred into Middletown he said, "I know the Colonel and I will give you a letter to him and maybe he can help you out."

Q. What is the name of the firm that the General is connected with?

A. The Lucas Manufacturing Company.

Q. And he gave you a letter to Colonel Clarke?

A. He gave me a letter to Colonel Lundberg but when I got there Colonel Clarke was there.

3875 Q. What did you say to Colonel Clarke?

A. I explained to him that my son took up finance in college and he would like to get into finance and would it be possible for him to get in if he applied. He told me that if he applied and they approved it he would get in.

Q. Was that the only occasion you spoke to Colonel Clarke?

A. Oh, no. I saw him every week. I would drive by the Field every week.

Q. Where would he stay when he was in New York?

A. At the Waldorf mostly.

Q. Did you ever pay any of his hotel bills?

A. No, sir.

Q. Did you ever give him any presents?

A. I gave him a Christmas gift. I gave his wife a gift.

3876 He gave me a gift—here it is.

Q. What gifts did he give you or your wife?

A. He gave me this and a wedding present; when my baby was born he sent me a gift.

Q. And what did you give him?

A. Nothing of any consequence. Christmas I might have sent him a gift—flowers—I really never gave him anything. He was very nice. I entertained him when he came to New York and he entertained me.

Q. What officers have you ever met who were stationed at Mitchell Field?

A. Lt. Col. Vidal, Col. Jacobson, Lt. Roser, Captain Ratovich. I met one, a Captain Engelhart, I believe it is.

Q. Anybody named Pepper?

A. No, sir.

Q. Did you ever meet any medical officers?

A. No, sir.

Q. Do you know any medical officers in the army?

A. No, sir.

Q. Stationed anywhere?

A. No, sir.

Q. What presents have you or Sam given to Jacobson?

A. Jacobson?

Q. Yes.

A. His kid might have gotten a couple little dresses from me. That's about all.

Q. Did you ever give him a set of tires?

A. No, sir. Not that I know of.

Q. Did you or Sam Bayer give him any liquor?

A. No, sir.

Q. What were you going to say?

A. I was going to say Col. Jacobson—he came up to the office several months ago and I wasn't in. He left a gift for my baby—a belated gift when she was born—a blanket.

Q. Did you ever speak to Vidal on the telephone?

A. Yes, sir. Many times.

Q. Did he call you or you call him?

A. He called me.

Q. What did he call you for?

A. Well, when he was coming to New York, and sometimes he would ask me to meet him at certain places. On different occasions—it wasn't planned—he used to call me up.

3880 *Government's Exhibit 21.*

Q. What did you call him about?

A. Just purely social.

Q. Did you ever speak to Vidal about getting the boys transferred?

A. No, sir.

Q. Did Sam Bayer ever speak to Vidal?

A. Not to my knowledge.

Q. Did Sam Bayer ever tell you he asked Vidal to keep the boys at Mitchell Field?

A. No, sir. I never heard about it.

Q. And you never asked Vidal about that?

A. No, sir.

3881 Q. What about theatre tickets? Did any of the boys get theatre tickets and charge them to Plymouth Thread?

A. Well, I don't know that. I know that Ratovich would do that often.

Q. Do what?

A. Go in and buy tickets and charge it to Plymouth Thread.

Q. Did you approve it?

A. No, I never approved it.

Q. Did Sam Bayer approve it?

A. I don't know.

Q. Do you know a Col. Dykemeyers?

A. I don't know him. I heard his name mentioned by Ratovich.

Q. What did he say about him?

3882 A. I think he brought in a coat of his one time to have insignias made for him.

Q. Do you know a Lt. John Gimbel, Jr.?

A. No, sir.

Q. Ever hear of him?

A. No, sir.

Q. Do you know Ed A. Martin?

A. No, sir.

Q. Ever hear of a Charles Deninberg?
A. No, sir.
Q. Do you know a Lt. Bentley in the navy?
A. No, sir.
Q. Know a Col. Lipkin?
A. Yes. I met him.
Q. Where?
A. At his home.
Q. Where is his home?
A. I believe it is in Garden City.
Q. How did you happen to meet him?
A. Col. Lundberg I think pointed to a——
Q. You told us that you get a letter from General Sharron to Col. Lundberg but that he was not at Middletown? 3884
A. This was after that.
Q. When did you meet Col. Lundberg?
A. Sometime about a month after I met Col. Clarke.
Q. Well, Col. Lundberg was stationed at Middletown?
A. Yes, sir.
Q. And have you seen Col. Lundberg in New York?
A. I met him once.
Q. Now, how did you meet Col. Lipkin?
A. I told Col. Lundberg that—he knew I have two nephews in the army and I told him that my nephew was in Bradley Field and he said the commanding officer up at Bradley Field is a good friend of his.
Q. Who said this?
A. Col. Lundberg. I said that's fine and I explained to 3885
him that my brother is a very sick man and I knew that Ratovich was bothering him and wanted to push him out
Q. Did you tell that to Lundberg?
A. No, sir. So he gave me a letter to Col. Jones at Bradley asking if he could do something for me.
Q. What did you want done?
A. I wanted him to take him away from——

3886 *Government's Exhibit 21.*

Q. Just what did you say to Col. Lundberg?

A. I told Col. Lundberg that my nephew was in the Airborne Engineers and that he wasn't feeling well. I would like to have him remain on the field a little bit longer and he said "I can give you a letter to Col. Jones and he might be able to do something." But he wasn't able to do anything.

Q. What did you say to Col. Jones?

A. I explained that my mother was very worried about the boy. If they could keep him on the Field a little longer it would be very good.

Q. What did Col. Jones say?

3887 A. He said he'd try and nothing was done.

Q. What about Col. Lipkin?

A. Col. Lipkin was a friend of his. They made a trip together. He said, "I know this Colonel."

Q. Was this after you were up to see Col. Jones?

A. Yes, sir.

Q. Now, where did you meet Col. Lipkin?

A. At his home.

Q. Where?

A. In Garden City. I believe it is.

Q. Who took you to his home?

A. I drove there myself.

Q. Did you have an appointment with him?

A. I called and made an appointment.

Q. Who was present?

3888 A. His wife came in a little later I believe.

Q. What was your conversation with Col. Lipkin?

A. I told him the same thing I told Col. Jones. I have a nephew who is the son of my brother and the fellow was sick and if he couldn't arrange to have him kept at the Field where he was.

Q. And what did Col. Lipkin do?

A. He said he would try, but he didn't do anything.

Q. And did you communicate with him after that?

A. I called him after and he said he wasn't able to do anything.

Q. And you only called him once after you spoke to him, to find out if he had done anything?

A. Yes, sir.

Q. How many times had you spoken to Col. Lundberg about the boy or boys?

A. That's the only time.

Q. Do you know Sergeant Gross?

A. No, I don't.

Q. Ever hear of him?

A. I think I heard of him spoken of once. In the same office. Never met him. 3890

Q. Did you ever meet Col. Johnson?

A. No, sir.

Q. Ever hear of him?

A. No, sir.

Q. Ever hear of someone named Purdem?

A. No, sir.

Q. Did you ever give any liquor to Ratovich?

A. No, I never gave him any liquor.

Q. Did you ever give him any bottles of liquor?

A. He used to come into the office and if he'd see a bottle that was half full or full he'd grab it.

Q. But as far as you knew you never gave him any?

A. No, sir.

Q. Did you ever give any bottles or cases of liquor to any officer? 3891

A. No, sir.

Q. Now, when you met Rafovich in Goldsboro where were your nephews stationed?

A. At Goldsboro.

Q. Did you communicate with them?

A. No, sir.

3892 *Government's Exhibit 21.*

Q. After the first money was paid by your brother to Ratovich—that's $450, you recall?—

A. Yes, sir.

Q. Did Ratovich ever call your office collect?

A. He might have called my brother. He never called me. I don't know.

Q. Did you purchase any insurance in 1943?

A. Did I purchase any insurance?

Q. Yes.

A. I might have. I might have.

Q. Well?

A. I tell you truthfully, I know I took out a policy
3893 through my sister but I don't know about 1943.

Q. Well, aside from insurance gotten through your sister?

A. Well, I have insurance on my automobile——

Q. I don't mean renewal insurance I mean new insurance?

A. I can't answer that. I don't know what you mean. What kind of insurance do you mean?

Q. Any kind of insurance.

A. I might have taken out health insurance—I think I took out—and hospitalization through my broker.

Q. Who is your broker?

A. Equitable Brokerage.

Q. Have you placed all of your insurance either through the Equitable Brokerage or your sister?

3894 A. I think so.

Q. Well, would you know if you hadn't?

A. I don't remember any other insurance.

Q. Do you know anybody named Feldman?

A. No, sir. Feldman?

Q. Yes.

A. Might be a lot of people named Feldman.

Q. Have you got a friend named Feldman?

A. A friend?

Q. Yes.

A. I don't think so.

Q. Have you got a friend named Greenfield?

A. Oh, now that you mention his name, I do know this Feldman. Yes, I know a friend named Greenfield.

Q. Have you got a friend named Feldman?

A. Well, he is a friend of my nephew, Gerry Usedale.

Q. Where does he live?

A. Lives out in Long Island.

Q. And who is Greenfield?

A. He is also a friend of my nephew.

Q. What is his first name?

A. There are two brothers. One is George and one is 3896
Lou, I believe.

Q. Did Vidal or Roser ever use any rooms taken by you?

A. Col. Vidal and Roser flew in from where they were stationed out in Colorado—I believe it was last winter—and Roser called me from the hotel—I believe it was some place on 45th Street—might have been the Piccadilly Hotel, I am not sure. He told me they were in town and I was very glad to hear from them. I said, "Can I see you?" He said, "Sure, come up." He told me that this room was only for the night and they can't get a room and I knew that my nephew, Gerry, had an apartment at the Park Central Hotel which they leased by the month and I knew they were leaving for Florida and they had a few days coming to them on the monthly basis and I asked Gerry 3897
if he would mind if a friend of mine would use the apartment and he said, "No, not at all." And then I took Roser up and Vidal.

(Continued by L. Y.)

3898

**Government's Exhibit 22.**

Continuation of

STATEMENT

OF

ELIAS BAYER

Before:

EDWARD C. WALLACE, Esq.
Asst. U. S. Attorney

Present:

3899 Same, without exception

February 7, 1945
Steno: L. B. Young

*By Mr. Wallace:*

Q. Did Rosa Vidal ever pay for the use of the apartment?

A. No; was all paid for by them on a monthly basis.

Q. How long did they stay there?

A. Must have stayed a day or two.

Q. Are you sure it wasn't more than a day?

A. I'm sure it wasn't more than a day or two, it was a week-end. I didn't see them after I took them up.

3900 Q. This was in the fall of 1944?

A. I know it was during the winter, I know they went to Florida, had their wives down there.

Q. The fall of 1943 or the early part of 1944?

A. Was during the winter months.

Q. 1943-44, or the present winter?

A. This present winter.

Q. At that time Radovich or Vidal had not paid for their uniforms; had they?

A. No.

Q. You knew they had not paid for their uniforms?

A. Yes.

Q. You knew Plymouth Thread had to pay for them because they didn't?

A. That's right.

Q. Have you ever had any contact with Trousseau Monogram Co.?

A. Radovich took me up there.

Q. When?

A. He had to call for some stuff that he had up there, some coats or something that he left; I went with him.

Q. Did you speak to anybody up there?

A. The owner, yes. 3902

Q. What's his name?

A. I don't remember.

Q. What was the conversation?

A. He just came up there to get his coats and Radovich was talking to him, looking at different things—I went back again to this Monogram, I think, with Radovich again both times.

Q. Did you speak to the owner on both occasions?

A. Yes.

Q. What was your conversation with him on the second occasion?

A. Just about his work, he has nice work, liked his work very much.

Q. Did you buy anything from Trousseau?

A. No. 3903

Q. Did you pay for what Radovich bought?

A. I didn't pay for anything.

Q. Did Plymouth Thread pay for it.

A. Yes.

Q. Did you tell the owner of Trousseau you would pay for it?

A. No.

3904 *Government's Exhibit 22.*

Q. Did you tell them Plymouth Thread would pay for anything?

A. I did not.

Q. Did you tell them to send the check for what Radovich purchased to you, or to the Plymouth Thread?

A. No, sir, I didn't.

Q. Are you sure of that?

A. I'm positive of that.

Q. Were you ever at Mitchell Field?

A. Yes, I was out.

Q. (Mr. Keenan) Were you out there frequently?

A. I used to go out to visit Jacobson and Vidal; they
3905 lived near there.

Q. (Mr. K.) Why did you not ask these different officers to pay for their uniforms they had taken?

A. I took these officers up with the understanding they were going to get it wholesale. We became very friendly, we went out; and, heck, if he wasn't man enough to offer to me to pay for it—he was morally responsible for it.

Mr. K. Q. Did you ever ask any individual at any time to do anything for your nephews in the Army by way of transfer, or otherwise, for any sums of money you were to pay such individual?

A. No, sir.

Q. (Mr. K.) Or for any other gifts, or presents of any kind?

A. No, sir.

3906 Q. (Mr. K.) Did you ever suggest to any of these officers you mentioned, or to your brother, that arrangements be made to pay some money, or give something of value, so that your nephews could be treated different than anyone else in the Army, transferred from one company to another?

A. No, sir, I didn't.

Q. (Mr. K.) Why—when you were asked about this by the army intelligence officers—did you tell them falsehoods?

A. Well, in the first place, I knew that my brother denied everything and I knew that my brother was in a jamb; was afraid and scared, and denied everything, like my brother did.

Mr. K.:

Q. What were you afraid of?

A. Afraid of scandal; afraid of what would happen; afraid it would get into the papers—there were a lot of things in my mind; just scared, and denied everything.

Q. (Mr. Wallace) How old are you? 3908

A. Either 44 or 45—when I say that, it's undecided.

Q. Where were you born?

A. Russia.

Q. When did you come to this country?

A. I came here around 1908, 1909, 1907, around that time.

Q. You are married?

A. Yes, sir.

Q. How long?

A. Will be 2 years in June.

Q. Is that your first marriage?

A. No, sir.

Q. How many children have you?

A. One child by my first wife; and one child by this wife. 3909

Q. The first marriage resulted in a divorce?

A. Yes, sir.

Q. When did that occur?

A. About 20 years ago.

Q. You registered for the draft in 1940?

A. Yes, sir.

Q. How were you classified in 1940?

A. I had a 2B classification, I think it was.

3910 *Government's Exhibit 22.*

Q. You were single at that time?
A. Yes.
Q. What's that; essential industry?
A. Yes, they classified me in 1-A. I was up to the board, I had government orders, was ready to give up my business in a certain time and go into the army. They gave me time to complete my orders, and then I was to go in the army. In the meantime the new law came into effect about the age, and I was automatically left out.
Q. You only asked for one deferment?
A. That's all.
Q. Where is your draft board?
3911 A. Broadway & 81st St. Local Board #26.
Q. You are a citizen?
A. No, sir.
Q. You are not?
A. No, sir.
Q. Did you register under the Alien Registration Act?
A. Yes, sir.
Q. (GJF) Did you ever apply for citizenship?
A. Yes.
Where?
A. Applied down the Court House on Apr. 4, 1941—Supreme Court New York City (producing card).

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3912 **Government's Exhibit 23.**

Original check.

3913

**Government's Exhibit 23-A.**

(Photostat of Exhibit 23)

FIRST NATIONAL BANK IN PALM BEACH

No. 49896

Palm Beach, Florida. Dec 6 1943

Pay to the order of Captain Jack Pepper.....$500.00
500 Dols 00 Cts

Cashier's Check

(*Stamped*)

Payment Stopped

3914

---

**Government's Exhibit 24.**

Dear Sir

I am writing to inquire as to the necessary steps that I should take to obtain $500.00 which I gave your bank for a cashiers check on Dec. 6, 1943

It was made out to a Capt Jack Pepper and the check no. is #49896—the reason for the claim is that the check was destroyed and never cashed.

Will you kindly inform me as to the procedure by the 1st of Sept

3915

Thank you

WALTER RADOVICH

Address

Major Walter Radovich
Ward 15
New Cantonement Hospital
Mitchel Field N. Y.

3916

## Government's Exhibit 25.

COPY STATEMENT OF MAJOR RADOVICH MADE TO FBI AGENTS:

March 15th, 1945
New York, N. Y.

I, MAJOR WALTER V. RADOVICH, Air Corps Serial number 0-416891 make the following voluntary supplementary statement to Special Agents E. J. McCabe and G. J. Flynn who have identified themselves to me and whom I know to be Special Agents of the Federal Bureau of Investigation. I make this statement of my own volition. No
3917 threats of force, promise of favors or duress of any type has been offered to me to induce me to make this statement and I know that anything I say may be used in a criminal proceeding. I have been told that I do not have to make this statement unless I desire to do so.

Sometime about April, 1943 I was introduced to Elias Bayer by a Lt. Roser. The introduction took place in the apartment of Elias Bayer which was located on Central Park So. At this time I was (end of p. 1) Hq. Squadron Commander of the First Fighter Command stationed at Mitchell Field. About a week later Col. Felix Vidal, Lt. Col. Alfred H. Jacobson, Lt. Ferdinand D. Roeser and I went to the I. Buss Uniform Co. where we were introduced by Elias Bayer. Major Englehardt was
3918 also with us at this time. Englehardt and I were fitted for uniforms. I recall that at the time we were unable to obtain a definite price on the uniforms. The other officers had apparently been there before inasmuch as their uniforms were already being tailored.

After leaving I. Buss Uniform Co. we went to the office of the Plymouth Thread & Yarn Co. where I was introduced to Sam Bayer and where we were treated to several drinks. I became very friendly with Sam Bayer and

*Government's Exhibit 25.*

saw him on numerous occassions (end of p. 2) after this. Sam Bayer took my wife and myself to dinner at the Waldorf Astoria Hotel. His wife Blanche Bayer and his secretary were with us at the time. Sam introduced me to the headwaiter and gave me permission to sign his name to the checks at the Waldorf Astoria whenever I wanted to go there. I never made use of this privilege. I recall that my wife wanted a piece of the silverware as a souvenier and that Sam Bayer called the waiter and ordered a full set which he gave to my wife.

Sam Bayer's son Martin Bayer and his nephew, Melvin Usdan were in my organization at Mitchel Field. They had been transferred to my organization at the request of Lt. Col. Jacobson before I had been introduced to Sam Bayer. Sam often spoke to me about the boys and on many occassions asked me (end of p. 3) to assign them to special jobs such as moving them to the "line" from the file room. I refused to do this and told him that I intended to leave them where they were.

Sometime during July, 1943 I received a phone call at Mitchel Field from Sam Bayer. He asked me to meet him at his office at 30 W. 21st St., N. Y. C. I did so. Sam asked me why his boys (Martin Bayer and Melvin Usdan) had to be transferred from Mitchel Field. I told Sam Bayer that the boys had to go because I had learned that they had been held at Mitchel Field because he, Sam Bayer had furnished entertainment and had given gifts and uniform's to different officers at the field. I told him that a Lt. Pepper knew the names of the officers who had received uniforms and where the uniforms were purchased. I told him that I would have nothing (end of p. 4) to do with any arrangement of this nature. Sam said "What's the difference, the boys don't ask for any special favors" I told Sam that the boys had to go and that I intended to ship them out. He asked me to wait for a week before doing anything and I agreed to do so.

3922 *Government's Exhibit 25.*

Prior to the above conversation with Sam Bayer I had refused to accept the uniform which had been made for me at the I. Buss Uniform Co. When I refused to accept the uniform because it did not fit properly. Phil Busch asked me what I was kicking about and told me that I was not going to have to pay for the uniform. About this time Sam Bayer sent Elias Bayer and myself to Rogers Peet at 5th Ave and 41st St and told Elias to buy me an officers cap. Elias bought me a summer peak cap. I believe the cap cost about twelve and one half (end of p. 5) dollars.

I recall telling Sam Bayer that I had refused to accept the uniform which had been made at the I. Buss Uniform
3923 Co. Sam Bayer told me that he did not blame me for refusing to take the uniform and said that he did not intend to pay I. Buss for the uniform as long as I had not taken it. He sent me down with Elias Bayer to the shop of Mervin Levine & Co. where I was fitted for two uniforms. My adjutant Lt. Irving Zarowsky was with us at the time and he also was fitted for a uniform. Elias Bayer told Mervin Levine, "These are two friends of mine; I want you to fix them up with uniforms and do a good job." Although I understood that a deposit was required to the best of my recollection no money was paid for the uniforms that day. I returned for several fittings as I had ordered both (end of p. 6) a winter and a summer uniform. A short time later I stopped in to see Sam
3924 Bayer at his office. He asked me if I was going to pick up my uniform and when I told him that I was he gave me the money to pay for both my uniform and that of Lt. Zarowsky. I don't remember the amount of money which Sam Bayer gave me that day but I do recall that he knew what the uniforms would cost and that he gave me the exact amount of money. I picked up the summer uniform and paid Mervin Levine the money which I had received from Sam Bayer. I never returned to pick up the winter uniform.

3925

About a week after I had told Sam Bayer that I intended to transfer the boys, I met him in his office. He told me that he had made arrangements with an adjutant at the Base Hospital, by the name of Fabbricatore and a "full chicken" colonel (end of p. 7) of the First Air Force to have the boys transferred to the medical corps at Mitchel Field. He told me that he had made this contact with the "full chicken" colonel through an insurance agent whom he either knew or had done business with. He said he had been obliged to purchase a $50,000 insurance policy in order to make the above contact. I asked Sam Bayer to tell me the name of the colonel but he said he would rather not do this. Sam Bayer then told me that he would 3926
give me $2,500 for each of the boys if I would approve the transfer of the boys to the Medical Corps. He told me that the transfers would mean a lot to him and that he made a lot of money and that money did not mean anything to him. I told Sam that I would approve the transfers but that I could not guarantee the results. I recall that at this meeting he spoke to me about my desire to go overseas (end of p. 8) and told me that he thought I was very foolish.

Shortly after the above meeting with Sam Bayer, the transfer requests of Pvt Martin Bayer and Pvt Melvin Usdan came across my desk and I approved them.

Thereafter Sam Bayer and I were in frequent contact with each other. At times he was very emotionally upset 3927
and would cry and kiss my hand and tell me that I did not realize what a good thing I was doing for him. He told me that he had worried so much about the boys being sent overseas that he had suffered a heart attack and had been forced to go to a sanitarium. Upon these occassions his secretary Anne Solomon would usually comfort him. Anne Solomon often expressed great concern as to whether the transfers would be approved and expressed fear that the

boys might be stuck. She told me that they were counting on me (end of p. 9) and that I was the only one who could help them.

About July, 1943 a short time after I had approved the transfers of the boys Sam Bayer gave me a roll of bills containing about $800.00. I recall that we were riding in a cab at the time. About four days later I met Sam Bayer in front of Radio City. We both sat in my car and he gave me another roll of bills containing about $700.00. He asked me if there was a chance of anything going wrong. I told him that the matter was out of my hands. About a day or so later I met Sam Bayer in the Hotel St. Moritz.
3929 He gave me another wad of bills amounting to about $450.00.

A short time later Sam Bayer called me up and told me that something had gone wrong, that the boys had been shipped to Westover and Bradley Field. I told him that I knew nothing about it and had nothing to do with those transfers. I (end of p. 10)offered to return the money to him but he refused.

About September, 1943 I met Sam Bayer and had breakfast with him on a Sunday morning. He asked me if there was any way I could have the boys transferred out of Westover and Bradley Fields or if I knew anyone who could arrange this. I told him I would look into the matter. When I returned to Mitchel Field I spoke to Capt.
3930 Jack Pepper and asked him what he could do to arrange a transfer for the boys. He told me he would look into the matter.

During this time I had been transferred to the First Air Commando Unit which was scheduled for immediate overseas duty. I decided to transfer the boys to my outfit and then to transfer them out as "overstrength" before our unit went overseas. I completed all the necessary arrangements and asked Capt. Pepper if he would keep an eye on

(end of p. 11) things to see that everything went according to schedule. I told him that I would give him $500.00.

About Oct. 1943 I called Sam Bayer from Washington D. C. and told him that everything was arranged. He agreed to have Elias Bayer meet me at Goldsboro, North Carolina about midnight on about the 27th or 28th of November, 1943. It had previously been agreed that Sam Bayer would give me $5,000 and an extra $1,000 for arranging these transfers. The extra $1,000 was for "other people" whom I told Sam Bayer I had to work with. By "other people" I meant Pepper. Before I left New York I gave the name of Capt. Pepper to Anne Solomon in order that she could contact him if anything went wrong. 3932

On about the 27th or 28th of November, 1943 I met Elias Bayer and a man whom Elias introduced to me as the older brother of Pvt Melvin Usdan who had come along (end of p. 12) because Pvt Usdan's father was dead. This man asked me if I was sure that everything would be "OK" and appeared greatly concerned less the plan slip up. Elias Bayer gave me a white envelope containing $5,000. They also gave me three bottles of bourbon whiskey. The orders transferring the boys had already gone through.

I left Elias Bayer and the older brother of Pvt Usdan at the railroad station. Elias told me that they intended to catch a train for the south.

I recall that the last time I had seen Sam Bayer in New York, he had cautioned me against displaying the money and that he said "the F.B.I. is looking for things like this." 3933

About December 5th, 1943 while at Morrison Field, West Palm Beach, Fla. I purchased a cashier's check for $500.00 at the First National Bank to the order (end of p. 13) of Capt. Jack K. Pepper. I put this in an envelope and mailed it to Pepper at Mitchel Field. I did not enclose a note because I knew that all the mail was being censored.

3934 *Government's Exhibit 25.*

I have read the above statement consisting of thirteen pages and this page and it is true.

WALTER V. RADOVICH
March 17, 1945

WITNESSES:

E. J. McCabe & Gerald J. Flynn, Special Agents, F. B. I., N. Y. C. 3/17/45.

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**Government's Exhibit 26 for Identification.**

3935

Marked in evidence as Bayer Exhibit D.

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**Government's Exhibit 27.**

11 cards from files of Adjutant-General's Office, U. S. Army, indicating changes of station of Martin B. Bayer:

1. Dec. 22, 1942—First Base Hdqtrs & Air Base Sqdrn, Mitchel Field, N. Y.
2. Apr. 15, 1943—Transfer to Hdqtrs & Hdqtrs Sqdrn, Mitchel Field, N. Y.
3. Aug. 20, 1943—Transfer to Medical Detachment, Aviation, Mitchel Field, N. Y.

3936

4. Aug. 28, 1943—Transfer to Medical Detachment, Aviation, Airborne Engrs, Bradley Field.
5. Nov. 25, 1943—Transfer to 715 Training Group.
6. July 31, 1944—Transfer to 1060 Army Air Force Base, Greensboro, N. C.; shows change of status to corporal.

*Government's Exhibit 27.* 3937

7. Dec. 21, 1944—Transfer to CAS. AQ. 448 A.
8. Jan. 23, 1945—Transfer to Port of Debarkation.
9. Feb. 1, 1945—Transfer to 147 Replacement Co., Army Air Force.
10. Feb. 16, 1945—Transfer to 412 Air Service Sqdrn.
11. Feb. 20, 1945—Transfer to 305 Air Service Group.

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**Government's Exhibit 28.**

ENLISTMENT RECORD 3938

ARMY OF THE UNITED STATES

duration plus 6 mos.

BAYER, MARTIN BERNARD. Army serial number—12219010. Race—White

Home address—721 Reads Lane, Far Rockaway, New York

Enlisted at 480 Lexington Ave., N. Y. C., on the 15 day of December, 1942, in the grade of private by M. C. Tatum, 2nd Lt., Inf. for Air Force, Unasgd. to serve duration plus 6 mos. for service in Camp Upton, New York. Service completed for longevity pay 0 years 0 months.

Urban ☒ Mother tongue—English 3939

DECLARATION OF APPLICANT

1. When and where were you born? December 4th, 1923. New York, New York
   How old are you? 19 years 0 months.
2. Are you a citizen of the United States? yes
   What is your race? white

3940 *Government's Exhibit 28.*

3. What grade or year did you complete in: Grammar school—8. High school—4. College or university —0

4. What is your civilian trade or occupation? student.

6. Are you single, married, widower, or divorced? single. Is anyone dependent on you for support? no

7. Have you ever been convicted (a) of a felony? no. (b) of any offense? no
Have you ever been imprisoned under sentence of a civil court? no

3941 Have you ever been discharged other than honorably from the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

8. Have you ever served in the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

9. Have you ever previously applied for enlistment and been rejected? no

10. Do you know that if you are rejected because of any disqualifications known to you and concealed from the accepting officer, you will not be furnished with
3942 return transportation to the place of acceptance? yes

11. Have you ever: Used cocaine, heroin, morphine, marihuana, or any habit-forming drug or narcotic; since childhood wet the bed while asleep; had gonorrhea, sore on penis, convulsions or fits, or spells of unconsciousness; raised or spat up blood; had any illness, disease, or injury that required treatment at a hospital or asylum? no

*Government's Exhibit 28.* 3943

12. To the best of your knowledge and belief, are you now sound and well? yes

13. Do you know that if you secure your enlistment by means of any false statement, willful misrepresentation, or concealment as to your qualifications for enlistment, you are liable to trial by court martial for fraudulent enlistment? yes

I declare that I am not now a member of the Army (Regular Army Reserve excepted), Navy, Marine Corps, National Guard, or Coast Guard in an active, inactive, reserve, or retired status; that the foregoing questions and my answers thereto have been read to me; that my answers 3944
have been correctly recorded and are true in all respects and that I fully understand the conditions under which I am enlisting.

Given at 480 Lexington Ave., N. Y. C., the place of acceptance, this 15 day of December, 1942

Signature of applicant:
MARTIN B. BAYER

Witness:
M. C. TATUM

Verified at ..... by M. C. Tatum, 2nd Lieut., Infantry,
Asst. Recruiting & Induction Off.
Canvasser—door

3945

PHYSICAL EXAMINATION

1. Eye abnormalities—none
2. Ear, nose, throat abnormalities—none
3. Mouth and gum abnormalities—none

4. Teeth—

Right (Examinee's) Left

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| ~~8~~ | 7 | 6 | 5 | 4 | 3 | 2 | 1 | | 1 | 2 | 3 | 4 | 5 | 6 | 7 | ~~8~~ |
| ~~16~~ | 15 | 14 | 13 | 12 | 11 | 10 | 9 | | 9 | 10 | 11 | 12 | 13 | 14 | 15 | ~~16~~ |

(Strike out those that are missing; circle those that may be restored)

5. Skin—normal

6. Varicose veins—none

7. Hernia—none

3947 8. Hemorrhoids—none

9. Genitalia—normal

10. Feet—normal

11. Musculo-skeletal defects—none

12. Abdominal viscera—normal

13. Cardiovascular system—normal

14. Lungs, including X-ray, if made—normal
x ray negative

15. Nervous system: reflexes, pupillary—normal, patellar —normal normal

16. Endocrine disturbances—none

3948 17. Results of laboratory examinations, when made— serology negative

18. Remarks on defects not sufficiently described above— scarlet fever at 7 years of age ND

19. Summary of defects in order of importance, impression of physical fitness—1 A

*Government's Exhibit 28.* 3949

Vision: Right eye—20/20. Left eye—20/20
Hearing: Right ear—20/20. Left ear—20/20
Height—67½ in.
Weight—152 lb.
Girth (at nipples): Inspiration—37 in. Expiration—35 in.
Girth (at umbilicus)—29 in.
Posture—good
Frame—medium
Color of hair—brown
Color of eyes—black
Complexion—brunette
Pulse: Sitting—96
Blood pressure: Systolic—146. Diastolic—60. 3950
Urinalysis: Sp. gr.—1.019. Albumin—negative. Sugar—negative

I certify that I have carefully examined the applicant and have correctly recorded the results of the examination; and that, to the best of my judgment and belief, he is mentally and physically qualified for service in the Army of the United States.

Place—480 Lexington Ave., N. Y. C.

Signature—LOUIS SCHNEIDER

Date—December 15, 1942

Name typed or stamped:

LOUIS SCHNEIDER, Capt. Medical Corps. 3951

3952 *Government's Exhibit 28.*

OATH AND CERTIFICATE OF ENLISTMENT

STATE OF NEW YORK
CITY, TOWN, OR MILITARY POST— } ss.:
480 LEXINGTON AVE., N. Y. C.

I, MARTIN BERNARD BAYER, a citizen of the United States, do hereby acknowledge to have voluntarily enlisted this 15 day of December, 1942, as a soldier in the Army of the United States of America for the period of duration plus 6 mos. under the conditions prescribed by law, unless sooner discharged by proper authority; and do also agree
3953 to accept from the United States such bounty, pay, rations, and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

Signature: MARTIN B. BAYER

I certify that the above oath was subscribed and duly sworn to before me this 15 day of December, A. D. 1942. I further certify that this soldier was minutely inspected by me previous to his subscription to the oath; that I found
3954 him entirely sober and in full possession of all [redacted]mental faculties; that to the best of my judgment and belief he fulfills all legal requirements; and that in enlisting him into the service of the United States I have strictly observed the regulations which govern the recruiting service.

I further certify that the above oath, as filled in, was read to the applicant before his subscription thereto.

M. C. TATUM
Recruiting Officer.
(Summary court)

M. C. Tatum,
2nd Lieut., Infantry,
Asst. Recruiting & Induction Off.

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**Government's Exhibit 29.** 3956

ENLISTMENT RECORD

ARMY OF THE UNITED STATES

duration plus 6 mos.

USDAN, MELVIN. Army serial number—12219208. Race—white

Home address—1058 New McNeil Ave. Lawrence LI N.Y.

Enlisted at 480 Lexington Ave., N. Y. C., on the 15 day of Dec., 1942, in the grade of pvt. by M C Tatum 2nd Lt Inf for Air Force Unasgd to serve duration plus 6 mos. for service in Camp Upton N. Y. Service completed for longevity pay—0 years 0 months. Last enlisted service 3957
in the Regular Army, Regular Army Reserve, or National Guard: none. Urban ☒ Mother tongue—English

DECLARATION OF APPLICANT

1. When and where were you born? Nov. 27, 1923. N.Y.C. N.Y.
How old are you? 19 years 0 months.

3958 *Government's Exhibit 29.*

2. Are you a citizen of the United States? yes
What is your race? white

3. What grade or year did you complete in: Grammar school—8. High school—4. College or university —1

4. What is your civilian trade or occupation? machinist. How long did you work at it? 3 yrs. Weekly wage? $35

5. What special military qualification or occupation have you? none

3959 6. Are you single, married, widower, or divorced? single. Is anyone dependent on you for support? no

7. Have you ever been convicted (a) of a felony? no (b) of any offense? no
Have you ever been imprisoned under sentence of a civil court? no
Have you ever been discharged other than honorably from the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

8. Have you ever served in the United States military or naval service, the Marine Corps, Coast Guard, or National Guard in an active, inactive, or reserve status? no

3960 9. Have you ever previously applied for enlistment and been rejected? no

10. Do you know that if you are rejected because of any disqualifications known to you and concealed from the accepting officer, you will not be furnished with return transportation to the place of acceptance? yes

*Government's Exhibit 29.* 3961

11. Have you ever: Used cocaine, heroin, morphine, marihuana, or any habit-forming drug or narcotic; since childhood wet the bed while asleep; had gonorrhea, sore on penis, convulsions or fits, or spells of unconsciousness; raised or spat up blood; had any illness, disease, or injury that required treatment at a hospital or asylum? no

12. To the best of your knowledge and belief, are you now sound and well? yes

13. Do you know that if you secure your enlistment by means of any false statement, willful misrepresentation, or concealment as to your qualifications for 3962
enlistment, you are liable to trial by court martial for fraudulent enlistment? yes

I declare that I am not now a member of the Army (Regular Army Reserve excepted), Navy, Marine Corps, National Guard, or Coast Guard in an active, inactive, reserve, or retired status; that the foregoing questions and my answers thereto have been read to me; that my answers have been correctly recorded and are true in all respects and that I fully understand the conditions under which I am enlisting.

Given at 480 Lexington Ave., N. Y. C., the place of acceptance, this 15 day of Dec., 1942

3963

Signature of applicant:
MELVIN USDAN

Witness:

M. C. TATUM

Verified at.....by M. C. Tatum, 2nd Lieut., Infantry, Asst. Recruiting & Induction Off.

Canvasser—door

3964 *Government's Exhibit 29.*

PHYSICAL EXAMINATION

1. Eye abnormalities—none
2. Ear, nose, throat abnormalities—none
3. Mouth and gum abnormalities—none
4. Teeth

Right (Examinee's) Left

| | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| 8 | 7 | 6 | 5 | 4 | 3 | 2 | 1 | | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| 16 | 15 | 14 | 13 | 12 | 11 | 10 | 9 | | 9 | 10 | 11 | 12 | 13 | ~~14~~ | 15 | 16 |

(Strike out those that are missing; circle those that may be restored)

3965

5. Skin—normal
6. Varicose veins—none
7. Hernia—none
8. Hemorrhoids—none
9. Genitalia—normal
10. Feet—normal
11. Musculo-skeletal defects—none
12. Abdominal viscera—normal
13. Cardiovascular system—normal
14. Lungs, including X-ray, if made—normal

3966 x ray negative

15. Nervous system: reflexes, pupillary—normal, patellar normal normal
16. Endocrine disturbances—none
17. Results of laboratory examinations, when made—serology negative

* * * * * *

*Government's Exhibit 29.* 3967

19. Summary of defects in order of importance, impression of physical fitness—1 A

Vision: Right eye—20/20. Left eye—20/20.
Hearing: Right ear—20/20. Left ear—20/20.
Height—64½ in.
Weight—149 lb.
Girth (at nipples): Inspiration—37 in. Expiration—35 in.
Girth (at umbilicus)—32 in.
Posture—good
Frame—medium
Color of hair—black
Color of eyes—brown 3968
Complexion—fair
Pulse: Sitting—80.
Blood pressure: Systolic—130. Diastolic—70
Urinalysis: Sp. gr.—1.021. Albumin—negative. Sugar—negative

I certify that I have carefully examined the applicant and have correctly recorded the results of the examination; and that, to the best of my judgment and belief, he is mentally and physically qualified for service in the Army of the United States.

Place—480 Lexington Ave., N. Y. C.

Signature—LOUIS SCHNEIDER

Date—Dec. 15, 1942 3969

Name typed or stamped:

LOUIS SCHNEIDER, Capt. Medical Corps.

3970 *Government's Exhibit 29.*

OATH AND CERTIFICATE OF ENLISTMENT

STATE OF NEW YORK
CITY, TOWN, OR MILITARY POST— 480 LEXINGTON AVE., N. Y. C. } ss.:

I, MELVIN USDAN, a citizen of the United States, do hereby acknowledge to have voluntarily enlisted this 15 day of Dec., 1942, as a soldier in the Army of the United States of America for the period of duration plus 6 mos. under the conditions prescribed by law, unless sooner discharged by proper authority; and do also agree to accept from the United States such bounty, pay, rations,
3971 and clothing as are or may be established by law. And I do solemnly swear (or affirm) that I will bear true faith and allegiance to the United States of America; that I will serve them honestly and faithfully against all their enemies whomsoever; and that I will obey the orders of the President of the United States, and the orders of the officers appointed over me, according to the Rules and Articles of War.

Signature: MELVIN USDAN

I certify that the above oath was subscribed and duly sworn to before me this 15 day of Dec., A. D. 1942. I further certify that this soldier was minutely inspected by me previous to his subscription to the oath; that I found him entirely sober and in full possession of all his mental
3972 faculties; that to the best of my judgment and belief he fulfills all legal requirements, and that in enlisting him into the service of the United States I have strictly observed the regulations which govern the recruiting service. I further certify that the above oath, as filled in, was read to the applicant before his subscription thereto.

M. C. TATUM,
Recruiting Officer.
(Summary court)

M. C. Tatum,
2nd Lieut., Infantry,
Asst. Recruiting & Induction Off.

3973

**Government's Exhibit 29-A.**

1058 New McNeil Avenue, Lawrence
L. I. N. Y.

December 3, 1942

I the undersigned, being the mother of Melvin Usdan a minor, an applicant for enlistment in the UNITED STATES ARMY, do hereby give my consent to his enlistment therein, for the DURATION AND A PERIOD OF 6 MOS. I further certify that I am not dependent upon him for support and that he is not married. I have no objection to his assignment or to his enlistment in the Regular Army Reserve upon his discharge from his enlistment in the Regular Army.

3974

The said Melvin Usdan was born on the 27th day of November, 1923, at New York in the State of New York.

I further certify that my husband the father of my son Melvin Usdan is deceased.

IDA USDAN
Signature of mother

---

**Defendant Bayer's Exhibit A.**

HEADQUARTERS
552ND AAF BASE UNIT
(2ND FERRYING GROUP)

FERRYING DIVISION—AIR TRANSPORT COMMAND
NEW CASTLE ARMY AIR BASE
WILMINGTON 99, DELAWARE

3975

RCM/wb
12 April 1944

201.22—Bayer, Martin B. (Enl).

SUBJECT: Commendation

To : Enlisted Personnel of Order Writing, Personnel, Printing Publications & Distribution, Classification, Central Files, and Adjutant Sections

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3976 *Defendants Bayer's Exhibit A.*

1. To accomplish the recent reorganization of this Station confronted all concerned with a staggering amount of paper work. The task was an intricate one requiring a thorough understanding of alf its ramifications and tedious attention to the countless details attendant in a job of such size.

2. The successful manner in which this task was completed has elicited the highest praise from the Officers in charge of your respective Departments, to which I wish to add my own appreciation for your able performance. The arduous hours you worked willingly and ungrumblingly, your accurate recording of the many changes and, above
3977 all, the fact that this gigantic task was performed with very little interruption of your normal duties, reflects credit on your individual abilities and your devotion to duty as a soldier.

While the unspectacular tasks are often forgotten in the rush of business, such excellent accomplishment cannot go unnoticed. To all enlisted personnel who participated in this work, I extend my sincere commendation.

RONALD C. MCLAUGHLIN
Lt. Colonel, Air Corps
Commanding

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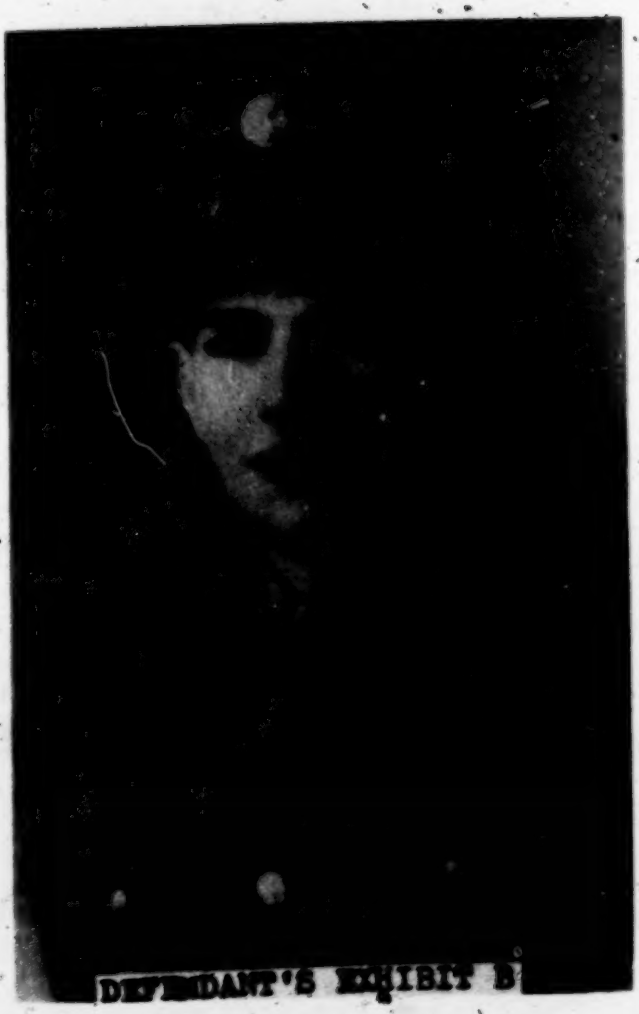
3978 **Defendant Bayer's Exhibit B.**

Photograph of Martin Bayer.

(Bound in Opposite.)


DEFENDANT'S EXHIBIT B

3982

**Defendant Bayer's Exhibit C.**

HOTEL WELLINGTON
Albany, N. Y.

June 26th 1943

Dear Eli:

I am so sorry that I missed your call yesterday. I should have got a big kick out of hearing your voice again. Here it is only a week and it seems as tho I was gone for a month. I sure do miss all of you.

This Command is a dandy. I am enjoying every minute
3983 of it so far. I am kept busy from early morning until late at night. Believe me the old slam bang has come back to me. My staff looks good, the officers and men appear to know their jobs & are capable.

I sure miss reaching out for the phone & talking to you at will. I hope you can find time to come up here and visit me. I have had a hell of a time finding a house the rents range averagely from $150.00 to $175.00 per month. I finally found a great place for the bargain(?) price of $115.00 per. It is right next door to some of our old friends here. Remember it has a bedroom in it for Uncle Eli.

How is Sam? I hope he isn't worrying himself too much. Please remember me to him & tell him that I send my most affectionate regards to himself & Mrs. Bayer.
3984 Also remember me to your niece & Miss Solomon & Mr. Weinburg. By the way I just received a note from Julius Weinburg from Denver, Colo.

Eli I want to thank you for all that you have done for me & mine & I hope that some day I can repay you in some small measure. I know I shall never be able to equal your generosity except in friendship alone.

The heat here has been almost unbearable as the temperature was accompanied by high moisture & humidity. But I hear you have been experiencing the same dose.

How goes the 'passion grand' or is it the 'pursuit of Eros'? Yes sir I am proud of the powers of my friend Eli "Barrymore" Bayer. Remember me to Anita & tell her I like her best of *all*, even tho her old man is a poor picker of horses.

Eli please take some time out & write to me, better yet come up & see me when you can.

So until the next letter my best to all the family & the gang.

With the warmest regards 3986

Your friend

AL.

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**Defendant Bayer's Exhibit C-1.**

Lt. Col. A. H. Jacobson A.C.
Hq. Albany Air Defense Region
P. O. Box 1833
Albany 1 N. Y.

(Postmark)
Albany N. Y.
Jun 26 1943
4 PM

Mr. Elias Bayer
30-32 West 21st St. 3987
New York City
N. Y.

3988

**Defendant Bayer's Exhibit D.**

Paragraph 32, S. O. 325, Hq. AAB, Westover Field, Mass., dated 22 November 1943. T/5 Melvin Usdan 12219208, and Pfc Martin Bayer 12219010, were transferred in grade to Project CA-281, Goldsboro, N. C., to report thereat not later than 25 November 1943 to the Commanding Officer, Overseas Replacement Depot #3, reporting to CO thereof for further overseas assignment, semi-tropical climate on permanent change of station. Authority AR 615-200, 15 March 1943, and TWX AFPMP 3888 from the CG, AAF, Washington, DC, dated 22 November 1943.

3989

20 July 1943

SUBJECT: Request for Transfer.

To : Commanding Officer, Headquarters Squadron, I Fighter Command, Mitchel Field, New York

1. It is requested that I, Pfc MARTIN BAYER, #12219010 be transferred from the Headquarters Squadron, I Fighter Command, Mitchel Field, New York to the Detachment, Medical Department, Army Air Base, Mitchel Field, New York.

3990

2. I was inducted into the service at Camp Upton, Long Island, N. Y. and received my basic training at the Army Air Base, Mitchel Field, N. Y. I have not received any army technical school training. I am a high school graduate and competent that I have the mental capacity to be a good medical department soldier.

*Defendants Bayer's Exhibit D.* 3991

3. Although I have no practical or specialized training in the Medical Department, it is my sincere belief that if said transfer is favorably considered, my services to the goverment would be of much greater value than at present.

4. No travel is inyolved.

MARTIN BAYER,
Private First Class
#12219010

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3992

REQUEST FOR TRANSFER (7-20-43)
220.3 1st Ind. WVR/dw

HQ & HQ SQDN, I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK, 22 July 1943.

To: CO, Station Hospital, Army Air Base, Mitchel Field, New York.

For remarks.

WALTER V. RADOVICH,
Capt., Air Corps,
Commanding.

3993

3994 *Defendants Bayer's Exhibit D.*

220.3 (20 Jul 43) 2nd Ind. AJF/mk/rn

STATION HOSPITAL, Mitchel Field, New York, 22 July 1943.

To: Commanding Officer, Hq & Hq Sqdn, I Fighter Command, Mitchel Field, N. Y.

1. Approved.

2. A vacancy exists in this organization.

FOR THE SURGEON:

3995 A. J. FABBRICATORE
1st Lieut., Med Adm C
ADJUTANT.

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REQUEST FOR TRANSFER (7-20-43)
220.3 Pfc MARTIN BAYER (501), 12219010 3rd Ind.
WVR/aw

Hq & Hq Sq, I FITR COMD, Mitchel Field, N. Y., July 23, 1943.

To: Commanding General, I Fighter Command, Mitchel Field, N. Y.

3996 1. Approved.

2. Race: White.

3. Age at enlistment: 19 years.

4. Physical condition: Excellent.
service.

5. Date of enlistment: 15 December 1942—no prior

6. Soldier was not convicted by courts martial during current enlistment.

7. Soldier is not under charges, in confinement, or undergoing company punishment.

8. Statement of accounts: Due US: Nothing. Due soldier: accrued pay and allowances.

9. Military specification number: 501; civilian; student.

10. Single.

11. Character: Excellent.

12. Authorized strength of Squadron: 376. Actual strength: 317. 3998

13. Soldier attained a score of 11, 124 on the Army General Classification Test type 1c, taken 18 December 1942.

WALTER V. RADOVICH,
Capt., Air Corps,
Commanding.

3999

4000 *Defendants Bayer's Exhibit D.*

REQUEST FOR TRANSFER. (20 Jul 43)
220.33—Bayer, Martin (Enl) 4th Ind C/HTD/mcr

HQ I FIGHTER COMMAND, Mitchel Field, New York, 25 July 1943.

To: CG, AF, EDC and First Air Force, Mitchel Field, New York.

Approved.

For the Commanding General:

4001 R. B. TRAVIS
Major, A. G. D.,
Adjutant General.

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201—Bayer, Martin (Enl) 5th Ind. C/SAD/MO-25

HQ AIR FORCES E. D. C. AND FIRST AIR FORCE, Mitchel Field, N. Y.

To: Commanding General, I Fighter Command, Mitchel Field, N. Y.

1. Not favorably considered in view of shortage of ad-
4002 ministrative technical clerks within your command.

2. It is desired that Private Bayer be reassigned where needed by unit under your jurisdiction.

By command of Major General ROYCE:

MARVIN OLIV,
1st Lt., AGD,
Asst Adj Gen.

*Defendants Bayer's Exhibit D.* 4003

REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (enl) 6th Ind. C:HTD:mer

HQ I FIGHTER COMMAND, Mitchel Field, New York,
3 August 1943.

To: CO, Hq & Hq Sq, I Fighter Command, Mitchel Field, N. Y.

Attention invited to 5th Indorsement.
By command of Brigadier General BARCUS:

R. B. TRAVIS
Major, A. G. D., 4004
Adjutant General.

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REQUEST FOR TRANSFER (20 Jul 43)
220.33 Bayer, Martin (enl) 7th Ind. WVR/cfk

HQ & HQ SQDN, I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK, 5 August 1943.

To: CO, Station Hospital, Army Air Base, Mitchel Field, N. Y.

1. Attention invited to 5th indorsement. 4005

2. Private Bayer has expressed his desire for a mutual transfer. Request remark.

WALTER V. RADOVICH,
Captain, Air Corps,
Commanding.

4006 *Defendants Bayer's Exhibit D.*

REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (Epstein, Jerome L.) (Enl)
8th Ind. AJF/jfm

STATION HOSPITAL, Mitchel Field, New York, 7 August 1943.

To: Commanding Officer, Hq & Hq Sq, I Fighter Command, Mitchel Field, N. Y.

1. Approved.
2. Race: White
3. Age at enlistment: 21 years
4. Physical condition: Good

4007

5. Date of enlistment: 27 January 1943—no prior service.
6. Soldier was not convicted by courts martial during current enlistment.
7. Soldier is not under charge, in confinement, or undergoing company punishment.
8. Statement of accounts: Due U. S.: Nothing. Due soldier: Accrued pay and allowances.
9. Military specification number: 501; Civilian: Supervisor
10. Single.

4008

11. Character: Excellent.
12. Authorized strength of Detachment: 335. Actual strength: 322.
13. Soldier attained a score of 111-97, on the Army General Classification Test type 1d, taken 3 February 1943.

FOR THE SURGEON:

A. J. FABBRICATORE,
1st Lieut., Med Adm C.,
EXECUTIVE OFFICER.

*Defendants Bayer's Exhibit D.* 4009

AB 220.33 (20 Jul 43) 9th Ind. VS/fg/rmm

HEADQUARTERS ARMY AIR BASE, Mitchel Field, L. I., N. Y., 7 August 1943.

To: Commanding Officer, Hq & Hq Sq, I Fighter Command, Mitchel Field, N. Y.

Approved.

By order of Lt. Colonel SPARKS:

VERN SANDY,
1st Lt., A. C., 4010
Asst. Pers. Adj.

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REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (Enl) 10th Ind. WVR/cfk
HQ & HQ SQDN, I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK, 7 August 1943.
To: Commanding General, I Fighter Command, Mitchel Field, New York.

1. Attention invited to 8th and 9th indorsements.

2. Request reconsideration for transfer of Pvt. Bayer from this organization to the Detachment Medical Department, Army Air Base, Mitchel Field, New York. 4011

3. The named enlisted man has expressed a sincere desire to be transferred and it is believed would be of greater service to the government in the Medical Department.

4. Pvt. Bayer has been in this organization 5½ months. During that period has conducted himself as a good soldier without reservation. However, it is believed that Pvt. Bayer's capabilities are not being fully utilized in his pres-

ent capacity since his interests are directed toward medical administration. Transfer to the medical department would accomplish the above and obtain from Pvt. Bayer the maximum of work.

WALTER V. RADOVICH,
Captain, Air Corps,
Commanding.

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REQUEST FOR TRANSFER (20 Jul 43)
220.33—Bayer, Martin (Enl) 11th Ind. HTD/cfk
4013 HQ I FIGHTER COMMAND, MITCHEL FIELD, NEW YORK,
8 August 1943.
To: CG, AF EDC and First Air Force, Mitchel Field, New York.

1. Approved.

2. Mutual transfer will not effect current shortages of administrative and technical clerks in this command.

For the Commanding General:

J. LEGAKIS,
1st Lt., Air Corps,
Actg. Asst. Adj. Gen.

4014

*Defendants Bayer's Exhibit D.* 4015

REQUEST FOR TRANSFER.

201—Bayer, Martin (Enl) 12th Ind. C/SAD/MO-25
HQ AIR FORCES E. D. C. AND FIRST AIR FORCE, Mitchel Field, N. Y.
To: Commanding General, I Fighter Command, Mitchel Field, N. Y.

1. Issue necessary orders transferring Private Bayer to the Detachment Medical Department, Army Air Base, Mitchel Field, N. Y.

2. A replacement will be furnished in the usual manner.

By command of Major General ROYCE: 4016

MARVIN OLIV,
1st Lt., AGD,
Asst Adj Gen.

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**Defendant Bayer's Exhibit E.**

721 Reeds Lana Far Rockaway, NY
December 4, 1942

We I the undersigned, being the father and mother of Martin Bernard Bayer, a minor, an applicant for enlistment in the UNITED STATES ARMY, do hereby give our my consent to his enlistment therein. We I further certify that we are I am not dependent upon him for support and that he is not married. We I have no objection to his assignment, or to his enlistment in the Regular Army Reserve upon his discharge from his enlistment in the Regular Army. The said Martin Bernard Bayer was born on the ..... day of December 1923, at New York, in the State of NY 4017

SAMUEL BAYER
Signature of father

BLANCHE BAYER
Signature of mother

4018

**Defendant Bayer's Exhibit F.**

ELR—reb—5D527—73563.

WAR DEPARTMENT
THE ADJUTANT GENERAL'S OFFICE
WASHINGTON 25, D. C.

AGAP

10 April 1944.

MEMORANDUM FOR: Enlisted Branch, AGO.
Room 3018, Munitions.

Subject: Orders.

4019

1. Provided no military objections, request that orders be issued transferring Private First Class Melvin Usdan, 12219208, 881st Airborne Engineers, Medical Detachment, Westover Field, Massachusetts, in grade, to the Postal Battalion, Army Post Office, New York Port of Embarkation, Hotel Breslin, 29th and Broadway, New York, New York.

2. Request the Army Postal Service, Room 5D527, The Pentagon, be notified of action taken.

For the Director, Army Postal Service:

EARL L. RHODES
Earl L. Rhodes,
Lt Col, AGD;
Pers & Tng Br, APS.

4020

(Seal)

4021

**Defendant Bayer's Exhibit G.**

201
Usdan, Melvin
12219208
ERS
Index Number

INDEX SHEET

AG 220.31
TAG

12-18-42
2nd Serv. Comd.

Re orders assigning F. Geiger, M. Usdan, M. B. Bayer and others to stations indicated, provided they possess the necessary qualifications. 4022

hbe 1-21-43

(Seal)

4023

4024

**Stipulation as to Bill of Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK:

UNITED STATES OF AMERICA,
Appellee,
against
SAMUEL BAYER, ELIAS BAYER and
WALTER V. RADOVICH,
Defendants-Appellants.

4025

IT IS HEREBY STIPULATED AND AGREED that the foregoing is the Bill of Exceptions herein as agreed on by the parties, and that the said Bill of Exceptions, together with the exhibits, constitutes all of the evidence in the case, and that the same may be settled and ordered on file as the Bill of Exceptions herein.

Dated: April 15, 1946.

JOHN F. X. McGOHEY,
United States Attorney for the
Southern District of New York,

By EDWARD C. WALLACE,
Assistant United States Attorney.

4026

ARCHIBALD PALMER,
Attorney for Defendant-Appellant
Samuel Bayer.

MAX E. SANDERS,
Attorney for Defendant-Appellant
Elias Bayer.

SAMUEL T. ANSELL and
ROGER ROBB,
Attorneys for Defendant-Appellant
Walter V. Radovich.

4027

**Order Settling Bill of Exceptions.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA,
Appellee,

against

SAMUEL BAYER, ELIAS BAYER and
WALTER V. RADOVICH,
Defendants-Appellants.

4028

Upon the annexed stipulation, the within Bill of Exceptions is hereby settled and allowed, and ordered to be filed with the Clerk of this Court, and made a part of the transcript of record herein.

Dated: April 15, 1946.

*United States District Judge.*

4029

4030

**Judgment and Commitment of Defendant Samuel Bayer.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>vs.<br>SAMUEL BAYER, alias SAMUEL BOYARSKY. | C. 120/468<br>Violation of U. S. C. Title 18 Secs. 88<br>Conspiracy to defraud the Govt of the faithful services of an officer of the U. S. |

On this 24th day of October 1945, upon the proceedings heretofore had herein and on motion of the United States
4031 Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of TWO YEARS and FINED $10,000.

Defendant not ordered to stand committed for non-payment of fine.

IT IS FURTHER ORDERED that defendant surrender Oct. 31, 1945 at 10:30 A.M. Bail Continued.

IT IS FURTHER ORDERED that the Clerk deliver a certified
4032 copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

ALFRED D. BARKSDALE,
*United States District Judge.*

A TRUE COPY. Certified this 24th day of October 1945.

WILLIAM V. CONNELL,
Clerk.

(Seal)

*Judgment and Commitment of Defendant Samuel Bayer.* 4033

RETURN

I have executed the within judgment and commitment in the manner following: On Nov. 5 1945 I delivered said Samuel Bayer to the Warden of Detention Headquarters Temporarily pending transfer to the institution herein designated for the service of sentence; and on Nov. 15 1945, I delivered said Samuel Bayer to the Warden at Fed. Corr. Inst., Danbury, Conn. the institution designated, together with certified copy of the within Judgment and Commitment.

JAMES E. MULCAHY,
U. S. Marshal. 4034

by JOHN F. PICKETT,
Deputy.

Notice of appeal filed Oct. 29, 1945.
Elected to start service of sentence Nov. 10, 1945.

4035

4036

**Judgment and Commitment of Defendant Elias Bayer.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>vs.<br>ELIAS BAYER, alias ELIAS BOYARSKI. | C. 120/468<br>Violation of U. S. C. Title 18 Secs. 88<br>Conspiracy to defraud the Govt of the faithful services of an officer of the U. S. |

On this 24th day of October 1945, upon the proceedings heretofore had herein and on motion of the United States
4037 Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of EIGHTEEN MONTHS and FINED $5000.

Defendant not ordered to stand committed for non-payment of fine.

IT IS FURTHER ORDERED that defendant surrender Oct. 31, 1945 at 10:30 A.M. Bail Continued.

IT IS FURTHER ORDERED that the Clerk deliver a certified
4038 copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

ALFRED D BARKSDALE,
*United States District Judge.*

A TRUE COPY. Certified this 24th day of October 1945.

WILLIAM V. CONNELL,
Clerk.

(Seal)

*Judgment and Commitment of Defendant Elias Bayer.* 4039

RETURN

I have executed the within judgment and commitment in the manner following: On Nov. 5 1945 I delivered said Elias Bayer to the Warden of Detention Headquarters Temporarily pending transfer to the institution herein designated for the service of sentence; and on Nov. 19 1945, I delivered said Elias Bayer to the Warden at Fed. Corr. Inst., Danbury, Conn. the institution designated, together with certified copy of the within Judgment and Commitment.

JAMES E. MULCAHY,
U. S. Marshal. 4040

by JOSEPH C. DONOVAN,
Deputy.

Notice of appeal filed Oct. 29, 1945.
Elected to start service of sentence Nov. 10, 1945.

4041

4042

**Judgment and Commitment of Defendant Walter V. Radovich.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA<br>vs.<br>WALTER V. RADOVICH. | C. 120/468<br>Violation of U. S. C. Title 18 Secs. 88<br>Conspiracy to defraud the Govt of the faithful services of an officer of the U. S. |

4043

On this 24th day of October 1945, upon the proceedings heretofore had herein and on motion of the United States Attorney, IT IS BY THE COURT

ORDERED AND ADJUDGED that the defendant be hereby committed to the custody of the Attorney General or his authorized representative for imprisonment in an institution to be designated by the Attorney General or his authorized representative for the period of ONE YEAR AND ONE DAY.

IT IS FURTHER ORDERED that defendant surrender Oct. 31, 1945, 10:30 A. M. Bail Continued.

4044

IT IS FURTHER ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the same shall serve as the commitment herein.

A. D. BARKSDALE,
*United States District Judge.*

3045

**Notice of Appeal of Defendants Samuel Bayer and Elias Bayer.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA, Appellee, v. SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH, Defendants-Appellants. | C-120-468 |

4046

Names and addresses of appellants: Samuel Bayer, 657 Doughty Boulevard, Lawrence, Long Island, New York; Elias Bayer, 333 West 86th Street, New York, New York.

Name and address of appellant's attorney: Samuel Conrad Cohen, 32 Broadway, New York, New York.

Offense: Conspir cy to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army (18 U. S. C. A., 88).

Date of judgment: October 24, 1945.

Brief description of judgment and sentence: Samuel Bayer—imprisonment for two years; fine, $10,000. Elias Bayer—imprisonment for 18 months; fine, $5,000.

4047

We, the above-named appellants, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment above-mentioned on the grounds set forth below:

Dated: October 29, 1945.

SAMUEL BAYER
Appellant

ELIAS BAYER
Appellant

4048 *Notice of Appeal of Defendants Bayer.*

GROUNDS OF APPEAL

1. The statute under which appellants were indicted and convicted is unconstitutional in that it fails to set up any ascertainable standard of guilt.

2. The Court erred in denying appellants' motions to dismiss the indictment at the close of the Government's proof, on the ground that the Government failed to adduce proof sufficient to establish the commission of any crime by appellants.

4049 3. The Court erred in denying appellants' motions at the close of the Government's case to dismiss the indictment, on the ground that the Government failed to adduce proof sufficient to establish the *commission of any crime* beyond a reasonable doubt.

4. The Court erred in denying appellants' motions for directed verdicts of "Not Guilty", on the ground that there was no evidence in the case upon which a jury could find that appellants had committed any crime.

5. The Court erred in overruling appellants' motion made after the verdict, to set aside the verdict of "Guilty" on the ground that the verdict was contrary to the evidence and against the weight of the evidence.

4050 6. The verdict of "Guilty" against the appellants is contrary to law.

7. Appellants did not have a fair trial in that the United States Attorney in his summation was permitted by the Court to make inflammatory appeals to the passions of the jury to the prejudice of appellants.

8. The Court erred in denying appellants' motion to reopen the proofs before the verdict was rendered, to introduce material, competent and relevant evidence then acquired tending to establish the innocence of appellants of the crime charged.

9. The Court erred in denying appellants' motion to withdraw a juror on the ground that a material misstatement of fact was made to the jury by the United States Attorney concerning a fact, the proof of the contradiction of which was, during the course of the trial, in the possession of the United States Attorney.

4052

10. The Court erred in its rulings on the receipt of evidence at the trial.

11. In instructing the jury, in response to a question asked by it, the Court gave the jury the impression that it would consider its recommendation for clemency, whereas the Court did not intend to take into consideration such recommendation.

SAMUEL BAYER,
Appellant.

ELIAS BAYER,
Appellant.

SAMUEL CONRAD COHEN 4053
By: SAMUEL CONRAD COHEN,
Attorney for Appellants.

Received a copy of the foregoing Notice of Appeal and grounds for appeal this day of October, 1945.

United States Attorney.

4054

**Notice of Appeal of Defendant Walter V. Radovich.**

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| UNITED STATES OF AMERICA,<br>v.<br>ELIAS BAYER, SAMUEL BAYER and WALTER V. RADOVICH,<br>Defendants. | Criminal No. 120-468 |

4055 *Name and Address of Appellant:*

Walter V. Radovich, Mitchell Field, Long Island, New York.

*Name and Address of Attorneys for Appellant:*

Samuel T. Ansell and Roger Robb, Tower Building, Washington 5, D. C.

*Offense:*

Violation Section 88, Title 18, United States Code (Conspiracy to defraud the United States).

*Date of Judgment:*

4056 October 24, 1945.

*Description of Judgment or Sentence:*

The indictment was in one count, charging a violation of Section 88, Title 18, United States Code. Upon a verdict of guilty as indicted the appellant was sentenced to confinement in a penitentiary for a term of one year and one day.

*Name of Prison where now confined, if not on bail:*

The appellant, a Major in the Army of the United States, is presently under orders from his superiors directing him to report to the United States Attorney, Southern District of New York, for temporary duty, and upon completion of such duty, to proceed to proper station. The appellant has been ordered by the Court to surrender himself to the United States Marshal, Southern District of New York, for commitment, at 10:30 o'clock a. m., October 31, 1945.

I, the undersigned appellant, hereby appeal to the United States Circuit Court of Appeals for the Second Circuit from the judgment of conviction hereinabove set forth on 4058 the grounds set forth below.

s/ WALTER V. RADOVICH
Appellant

October 29, 1945.

GROUNDS OF APPEAL

1. The Court erred in sustaining the demurrer interposed by the Government to the appellant's Plea in Bar to the indictment.

2. The Court erred in overruling the appellant's Demurrer to the indictment. 4059

3. The Court erred in permitting the jury to consider against the appellant acts and declarations of his alleged co-conspirators, which acts and declarations were done or made out of the presence of the appellant and prior to the existence of any conspiracy, and which never came to the knowledge of the appellant.

4060 *Notice of Appeal of Defendant Radovich.*

4. The Court erred in admitting in evidence against the appellant a written confession made by the appellant to Government investigators.

5. The Court erred in instructing the jury that the Court had ruled as a matter of law that the confession made by the appellant to Government investigators was voluntary, and that the jury might consider the circumstances surrounding the making of such confession only for the purpose of determining whether or not the confession was true;

4061 6. The Court erred in refusing to instruct the jury that if the confession of the appellant was induced or coerced in any degree by the circumstances of the appellant's confinement, then the jury must reject the confession entirely.

7. The Court erred in refusing to instruct the jury that the burden was upon the Government to prove beyond reasonable doubt that the confession of the appellant was voluntary.

8. The Court erred by reading and giving consideration to certain written statements made by the appellant to Government investigators, which statements were not identified by any witness or offered in evidence or shown to counsel for the appellant, but were furnished to the Court
4062 by the United States Attorney and read and considered by the Court in private.

9. The Court erred in refusing to instruct the jury that they must consider the presumption that the defendant was innocent as evidence in his favor.

10. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 3.

11. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 4.

12. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 5.

13. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 9.

14. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 10.

15. The Court erred in refusing to instruct the jury as requested in the appellant's prayer No. 11. 4064

16. The Court erred in attempting to summarize for the jury the charge of the indictment, in that the Court's attempted summary of the charge was inaccurate and misleading.

17. The Court erred in instructing the jury that counsel for the co-defendants Bayer claimed that the co-defendants had paid money to the appellant as a result of extortion by the appellant, while the Government claimed that such money was paid as a bribe; the Court failing and refusing to advise the jury that the appellant did not admit nor concede that any money whatever had been paid to him, and that the burden was upon the Government to prove such payment. 4065

18. The Court's charge in respect of the evidence required to prove the existence of a conspiracy was argumentative.

19. The Court erred in charging the jury that the guilt or innocence of persons other than those on trial was no

4066 *Notice of Appeal of Defendant Radovich.*

concern of the jury, except as it might bear upon the credibility of certain witnesses who had testified.

20. The Court erred by entering into a colloquy with the jury in which the Court underfook to point out to the jury the witnesses who had given testimony relating to or supporting certain statements made by the United States Attorney in his argument to the jury.

Service of copy of the foregoing Notice of Appeal acknowledged this day of October, 1945.

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United States Attorney
Southern District of New York

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**Assignment of Errors by Defendants Bayer.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

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|---|---|
| UNITED STATES OF AMERICA<br><br>against<br><br>SAMUEL BAYER, alias Samuel Bayersky, ELIAS BAYER, alias Elias Bayersky, and WALTER V. RADOVICH,<br><br>Defendants. | Criminal No. 120-468 |

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NOW COME SAMUEL BAYER and ELIAS BAYER, defendants herein, and file the following Assignment of Errors and respectfully show that error has intervened to their prejudice, to wit:

1. The Court erred in denying the motion to dismiss the indictment upon the ground of insufficiency at the opening of the case, to which denial the defendants Bayer duly and legally excepted (R. p. 89, fol. 266).

2. The Court erred in overruling the motion of the defendants Bayer at the close of the Government's case for a dismissal of the indictment and a directed verdict of acquittal of the defendants Bayer, to which ruling the said defendants duly and legally excepted (R. p. 717, fol. 2151) as follows:

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"Mr. Keenan: Your Honor, in asking the Court to grant a motion for the jury to be instructed to return a verdict for the defendants Samuel and Elias Bayer, I wish to specifically point out to the Court our objection, which we think is seasonably made at some time

during the prosecution's case, that we think that particularly important to make at the close, and that is: that the indictment does not charge an offense against the United States, and specifically that this purports to be a charge of conspiracy in violation of Title 18, Section 88, and that part of Section 88 which we may refer to I believe intelligently as two-pronged, the second portion of it, the first part of it being conspiracy to commit an offense against the United States and the second part conspiracy to defraud the United States in any manner or for any purpose.

We point out briefly but with great respect to your
4073 Honor, that we believe this is a novel theory in prosecution where Section 88 of Title 18 is adverted to, where reliance for the subject matter of the crime is the bare use of the word 'defraud' without reference to any other section of the United States Code. For example, in all other prosecutions that we know of, where we have been able to examine the authorities, the indictment specifies in one form or another that even if Section 88 is adverted to and even if there is a departure from the usual course of specifying the section of the Code of the offenses against the United States by section number, such as, for example, in some of the preceding indictments, Section 91, that even when reliance is made upon defrauding the United
4074 States there is of necessity reference to some statute of the United States which describes what is meant by 'fraud'.

And we say to your Honor that we believe upon reflection it will become very clear that if this indictment be sustained in this manner and fashion as alleged in this case, it just means that anything which would come within the definition of the word 'defraud', whatever it might be, and two people agreed or confederated

to perform, to do that thing, whatever it would be, and a single act were taken in pursuance thereof, we would have as claimed by the Government in this case, as they must claim, a violation of Section 88 of the second what I might call prongs for want of a better expression.

Now, your Honor, reflection on that will show that here is a felony with a very substantial criminal sanction attached thereto, where citizens of the United States could go about with so many opportunities and occasions to run afoul of the law, that we would get to the most absurd, to say nothing of cruel, situations imaginable, resting entirely upon the good sense of the 4076
administrative or executive branches, in the first instance, of the Government. For example, under the statute, in an indictment it is alleged that merely speaking to the elevator girl on the way up purposely to get her to slow up an elevator to keep a lawyer from arriving on time before your Honor in this case, and coupled with a stick of chewing gum, would amount to a conspiracy to defraud the United States, punishable with a long term in the penitentiary.

The point I am making is this, your Honor, that to sustain the indictment in this form would be to establish a pattern and type of crime where there would be no fabric, no clear-cut pattern that any citizen could ever know or anyone else ever know when 4077
he was within or without the law. And with great respect we submit to your Honor that the Congress of the United States never intended to create a mass, a class of crimes where the only limitation would be the limit to the fantastic, if he saw fit, notions of the prosecutor with the acquiescence of the grand jury.

So that, succinctly stated, or as clearly as we can, we think that there is a failure to state an offense

without the entire conspiracy relating to some better defined offense or area of offense than the particular term 'defraud', especially when the statement is made in the statute 'Defraud the United States in any manner or for any purpose.' We do not believe, your Honor, that it ever was contemplated or could have been in good sense by the Congress of the United States that the broad field of conspiracy, uniting with the broad field of fraud, with no definition of 'fraud' excepting that found presumably in Webster's Dictionary or the Century Dictionary or that had come into usage through practice—that is the only way
4079 where a man can find now whether he is running afoul of the criminal statutes—we do not believe that it was ever intended that that field of crime should be established in the United States.

And so on that ground, with great respect, we ask your Honor to consider whether to direct a verdict on the ground that the statute is so vague and so uncertain, that the indictment is so vague and so uncertain that it contravenes the requirements in that respect.

Now, secondly, we ask your Honor to consider our objection that there has been a failure dehors or aliunde, and let us call it independently of the so-called admissions—or admissions—to establish that which the law requires by way of data on the corpus
4080 delicti, which in this instance we claim, your Honor, is the conspiracy itself.

I think in a previous argument to your Honor I erroneously stated my position, and in a re-examination of the Forte case and allied cases, it became very clear that if whatever quantum of proof is necessary for the Government to meet to establish the corpus delicti, that the corpus delicti is more than the agreement; it would be enough, your Honor, we claim in

this case to require a directed verdict for the defendants Bayer if the corpus delicti were synonymous with the agreement. But very specially, in cases of conspiracy, we contend that that is the one crime where there is an exception to the rule, and the corpus delicti in a charge of conspiracy is the conspiracy itself, and of course every part of it.

Therefore, we do not know, with great respect, whether your Honor is following the Forte case or whether your Honor is following the Kertess case, if there be a difference in the two. And, very candidly, the Kertess case is in the Second Circuit. I know that it is familiar to counsel for the Government because 4082
the distinguished Assistant United States Attorney Mr. Wallace was counsel in that case, if my memory serves me correctly, or of counsel.

And there, your Honor, we seek at this time, if there is any way we can do it on such highly important matters as those touching admissions or confessions, and I think it can be conceded that we are on fundamental ground for the reservation of the rights of the defendants in Anglo Saxon courts, in contradistinction to those of foreign nations in that regard—it is well settled in our court that we do have certain safeguards that are foreign to the ideas of people that live in other groups, other parts of the world; but here we have some rules that are laid down; we have the requirements with reference to the corpus delicti—— 4083

The Court: You express a doubt as to which case I was following. I am in equal doubt and I would be grateful if you would elucidate a little on the two cases and the distinction, differentiation between the two.

Mr. Keenan: I think your Honor has posed a pretty good question to me, but let me state first what I be-

lieve the Forte case, written by the distinguished Justice Stevens, who happened to be an associate of mine in the Department, also a classmate in law school, so I am quite familiar with his views and those expressed—the Forte case is plain and clear authority for this. First, that if a confession or admission—confession or admission—is to be considered there must be some evidence aliunde of the corpus delicti. Now the Forte case follows the Eighth Circuit—there are two chief cases there, they are grouped together—and the Forte case claims that it states the overwhelming weight of authority in this country on that subject. It holds that the corpus delicti is not alone the 4085 agreement, but is the conspiracy, with the anomaly that I have mentioned before. And it holds, therefore, that before a confession can be considered adequate, the fact determining body must find in outside evidence substantial evidence of the conspiracy. And 'substantial evidence' the Forte case says, is the conspiracy or the corpus delicti, which it identifies, one or the other, and every part of it. That is the language of the Forte case. There is no blinking. The Forte case is as clear as a bell.

So that under the Forte case, and it doesn't make much difference, your Honor, in my opinion, whether there would be an independent ascertainment of the aliunde quantum before it was sent to the jury or not; 4086 it would still be the duty, with great respect to the court, to make its finding to be the determination of the Government's case. That must be there. And the Court itself, not being desirous to evade the duty, never could, anyway because it had a plain function it has to perform.

Now it gets down to this, that before the Bayers can be found guilty by the use of these statements

that they made, if they be guilty admissions or confessions, and I am not going to differentiate for the moment between the two, whatever they are, whatever they may be—that there must be proof offered of every single part of this conspiracy. And, your Honor, it must be the conspiracy that is alleged in this indictment. It can't be any other conspiracy and it must be the whole of it. They can't divide it into two parts or it can't be the more particulative; it must be that this was the whole thing because that is what the authority says—the corpus delicti is the whole entire conspiracy and it should be from—from September 1, 1942 until July 15, 1945; and the Forte case says that 4088
outside any admissions or confessions there must be evidence supporting every single essential element of that entire conspiracy, every part of it as alleged in the indictment.

The Court: Do you construe that 'every part' means that the Government has to prove everything complained of in the indictment, the dates and everything else?

Mr. Keenan: Exactly, your Honor. That is the burden the Government undertook and that is the conspiracy that it has described.

The Court: I do not believe the Forte case holds that, and I am not going to suppose——

Mr. Keenan: The Forte case—I say that point was 4089
not before the Forte case. That case was not before the Court on this precise question.

The Court: I do not believe the Court would have held the Government to as strict a requirement as that.

Mr. Keenan: I do not have the Forte case before me at the moment, but the language is very clear.

As your Honor will recall the language, every part of it—so that the Forte case is talking about the con-

spiracy alleged in the Forte case. It is not talking about any other.

Now, your Honor, I think that we have got to get to a point—getting a little bit ahead of our subject—that in fairness a defendant ought to be apprised of what the Government does claim the conspiracy was. And it is not sufficient merely to say It is a conspiracy to defraud. That would be hideous. It must be some kind of a conspiracy to defraud, starting with a certain time and ending at another time. I do not see why the time of the beginning and the time of the ending does not identify the conspiracy.

4091 I do not think the Government has any opposition to spreading itself all over the lot and then saying 'Well, if I can dig out any kind of a conspiracy from this proof that is offered, we are going to substitute that.'

Nor do I think that the Government can just allege a certain date and ignore it entirely. But, however that may be, certainly we have a right at some time or other, your Honor, to be informed what it is the Government does claim in this case is conspiracy.

Now, I know that they might come back and say, 'Well, they claim there was a conspiracy on the part of the two Bayers and Radovich.'

Your Honor, they do not describe any other conspiracy between the two Bayers. They say there was
4092 a conspiracy between the two Bayers and Radovich. They might have alleged that there was an initial agreement between the two Bayers subsequently joined into by Radovich, but that is not what is alleged in this indictment. Not at all. They allege a conspiracy and an agreement between the two Bayers and Radovich.

Now, to come back to the law question, your Honor: Certainly, the Forte case says that whatever the con-

spiracy is that the Government is resting upon, and there must be some agreement, there has got to be some conspiracy. It must be defined in some manner; that some time the Government must say, 'Well, we claim there were three in it, there were four in it, or five.' I do not understand that the claim is any more than three individuals in this conspiracy.

And they say that it was a conspiracy to defraud the United States Government out of the fair and impartial services of officers.

Your Honor, some time or other in a court of justice we are entitled to have the United States Attorney tell us who the officers are that he claims that 4094
we were attempting to defraud. Or name them or describe them in some manner or other. And we have not had it or heard it yet in the indictment, unless it is all the officers.

Now, in any event, under the law of the Forte case, there must be substantial evidence aliunde of every essential part of the conspiracy. That is what the Forte case says. So, therefore, in this case there must be substantial evidence aliunde of some conspiracy which is reasonably to be interpreted, I hope, within the confines of the general language used in this indictment.

Now, I say to your Honor that I do not know that the Kertess case goes that distance. I think the 4095
Kertess case—I do not want to say and I have no right to interpret it—that the Kertess case says that we are differing from the Forte case, but Mr. Justice Frank——

The Court: In what particulars?

Mr. Keenan: I say—I am not making that claim that it so states, but the language of the Kertess case is that even if we were to follow the Forte case—

4096 that is the language of that decision, which leaves it delightfully indefinite as to whether they are following it or not, to say the least.

I am saying to your Honor that if we arrive at such an important point in matters of confessions and admissions, and I am not going to waste the time of this Court in urging the importance, that the law be clear with reference thereto, and that in this great United States of ours that it be not any different treatment for someone who lives in the District of Columbia and someone who lives out in the Eighth Circuit and someone who lives here. There is a higher court above
4097 all those circuits, and we are entitled to have the interpretation of that court on this all important subject matter. It ought to be left out of the vagaries of Wigmore and Greenleaf and brought finally so that the citizens of the United States can look at some single authoritative work and say 'This is the law.'

So that is why I am saying that under the Forte case we contend and we urge with great earnestness, not sufficient perhaps to convince your Honor, that the quantum of proof aliunde offered in this case extra these admissions or confessions, so-called, does not rise to the standard required to meet the requirements set forth in the Forte case, to wit: we claim that there is not substantial evidence of a conspiracy without these confessions.

4098 Now the Kertess case refers to the Dykes case, I think it is called. We say that the Kertess case has not attempted to overrule or depart from the Forte case, but it does leave counsel, and it is humanly possible, the learned District Courts, not too clear as to whether the departure has been made from the rule in the Forte case.

I have not any right to urge any more to your Honor than I think that the Forte case is the law of

this country; and I do not think that the Kertess case has attempted to create any new rule or different rule. It does not say so. There was an entirely different set of facts quite sufficient, I think, to meet the requirements as set forth in the Forte case.

But in any event I want to confine my argument at this time to your Honor to state that we think that if the Forte case is the law, that we do not believe that there is substantial evidence of all of the essentials of the conspiracy or any conspiracy—we go that far.

I am not going to take the time to review all the evidence, but I will say in passing that they have 4100
brought witnesses and put them on the stand, the Government. I do not think the Government can call a witness like Colonel Jacobson to the stand and offer him to your Honor and to the jury as a Government witness and then just laugh about his statements. They vouch for his, generally for the truth of what he says when they put him on the witness stand as a witness. And every single witness I have asked the question whether or not Samuel Bayer or Martin Bayer in any manner did anything to attempt, as far as he could observe, to affect his judgment as an officer adversely, from the standpoint of bias and disinterestedness and faithfulness and conscientiousness and so on and so on, and all these words that are in 4101
the indictment, and each one of them answers in the negative.

So that from the witnesses who have been called, I do not recall a witness—it isn't Colonel Vidal. I asked him as broad a question as counsel could ask, perhaps most offensively broad: if in any manner, fashion or nature they tried to affect his judgment. I have asked him if they tried to affect his judgment wrongfully, or if they tried to get him into some

scheme to affect someone else's judgment. I suppose it won't be binding, his statement, but it ought to be highly persuasive, an officer of the United States Army who has been tendered to the Court and the jury as part of the Government's case.

This whole case divides itself, your Honor, from the standpoint of common sense, into two episodes: one is the uniforms and one is the money. And when you come to the uniforms, your Honor, if it were to be a fact to be argued to the Court and not to the jury, we would not hesitate to embrace that alternative as showing that if there was anything clear in
4103 this case it is that there was no conspiracy to go out and buy uniforms for these officers.

The mountain came to Mohammed, your Honor. The officers came down for the uniforms and they asked for them. There was no one who dangled uniforms in front of them and said 'Have a uniform and do something for it.'

Now I do not say it is vitally essential that in anything by way of gratuities and the like that the initiative come from the other side, but it is a pretty good indication as to whether or not there was a plan, or whether or not there was an agreement, because if this evidence is coming in at all properly about these uniforms and the amounts, I can get all through with it. The uniform business must be related to some
4104 agreement and it must be an agreement reached by and between, let us say, Samuel Bayer and Elias Bayer: 'Well, what will we do in order to affect adversely'—I am going to use that phrase—'the judgment of these officers? We are going to do what? We are going to get them uniforms.'

Your Honor, that is just plainly doing violence to the record in this case. That is not true. The evi-

dence in this case does not prove it is true and the evidence offered by the Government shows it is not true.

The evidence in this case shows, as far as these uniforms are concerned, that never were individuals more innocent of getting into difficulty. It took a little probing in cross-examination of one of the Government's witnesses to find out really what happened, as far as even the statements of so-called admissions were concerned. And I find myself, your Honor, constantly, like a cat chasing its own tail, unable to differentiate the aliunde testimony from these admissions, and I am trying to keep these separate. 4106

But even assuming that the admissions here, as far as the uniforms are concerned, it is the plainest thing in the world that first of all the uniforms came up because Vidal or Roeser said to Elias Bayer, 'What business are you in? I am in the thread business.'

'Well, you must know tailors? Yes, I do.

'Well, can you get us a uniform at discount, at cost?'

Now, your Honor, that is not our side of the testimony; that is the whole testimony. There is not any other testimony on that point. Well, that is a long distance, your Honor, if we took the theory of the Government that this was some kind of a conspiracy of these two Bayers to be lurking around in order to find out what night clubs they might find officers from Mitchel Field. 4107

It is a long distance from saying that this was a plan outlined in the beginning to go and debauch the judgment and the honesty and the service of the United States officers by giving them uniforms, when the evidence offered by the Government clearly shows that it was the officers themselves. I do not think it was in any venal manner. I say evidence of gentle-

ness on the part of these officers. I can understand how it could happen. They looked rather shamefaced when they came into this court, men of distinction and rank, talking about uniforms.

Or they may try to pass it off by saying 'I heard there was a bit of good gabardine.' But the fact was that we were in war times. It was a time when Edward G. Robinson was announcing a $100,000 gift of his own to the U. S. O., and times of generosity and entertaining men in uniforms in canteens, and everybody for the time being was doing everything for the soldiers.

4109 And in that atmosphere they have a drink around a bar and a man says, 'Are you in the business of thread?' 'Yes.' 'Do you know some tailors?' 'Yes.' 'Can I get a uniform at cost?' And that is supposed to be evidence of a conspiracy to corrupt this man.

Your Honor, I perhaps will have gone too far in discussing the evidence, with the great respect I have for this Court, but I cannot refrain from adverting to it. If you get into this evidence and if you analyze every section of it, and if you go all the way with the uniforms, what do you find? You find that the men would not pay for the uniforms. Why? You find that most of them, the uniforms were not any good. They went to these three tailors who attempted to make

4110 them look like Fifth Avenue tailors would. They were three little tailors sitting cross-legged on a bench, and they had some material and they did not know how to make the uniforms.

It is not very much of a joke if you had to earn your living that way, and had people from the Army come in and take your time.

The evidence in this case with reference to uniforms shows that the officers came in and they asked for that

courtesy, and there is no evidence, your Honor, of anything with reference to these two boys that are the subject matter of this lawsuit.

Perhaps this thing ought to be laughed at. It is perhaps a funny joke at the cost of men's reputation and a lifetime of probity and decency, which are going to be smashed to pieces, but to me it is a mighty tragic affair I can't squeeze any laughter out of any part of it at all. I think it is a desperately important thing to analyze this evidence and I am trying to do my duty as a lawyer in doing it, and I cannot find where there is any evidence aliunde of a substantial nature to show any kind of a conspiracy at all. 4112

If they came in and showed that they bought uniforms for people, but that is not the evidence, your Honor, in this case. And if it turns out to be a joke or a picayune affair of a few dollars for officers that are fastidious out there at Mitchel Field, acting like a lot of WACS about different shades of uniform, we cannot help that.

When you get all through, it is a tempest in a teapot and it does not rise to the dignity of substantial evidence to support any charge of corruption, because that is really what it is.

Your Honor, when it comes to the matter of the payment of the money, there is not evidence, your Honor, of the payment of a five-cent piece in this case aliunde of the admissions or confessions. 4113 There is no evidence of the payment or the passing of any money at all. Not a speck. Not a scintilla. There is evidence of the uniforms, whatever that means. I am not responsible. I do not know why the United States Attorney did not see fit to call witnesses that perhaps could have been called and put on the stand to prove that money was passed. There were other indictments that I cannot

close my eyes to, but all I know is that in this case there was no evidence whatsoever of any kind, nature or description of even as much as a five-cent piece passing, unless you take these admissions and these so-called confessions.

Of course we can talk about conspiracy to defraud the United States Government out of the honest and conscientious service of their officers, but everyone in this courtroom knows that as piously as we say it to this jury, this is not a question of bribery; it is not a question of conspiracy to bribe—everyone in this courtroom knows that in his heart and soul that in
4115 essence it is nothing but that.

Because what is the charge of the Government? The charge of the Government, if we can make head or tail out of it, is that there were things of value given to officers of the United States Government to affect their judgment and thereby obtain substantial favors for members of the families of the Bayers, and that the officers got the money and the Bayers paid it.

If that is not a good Anglo-Saxon description of the crime of bribery, I would like to know what it leaves out in the process.

Whether you call it bribery or—your Honor, you might just as well come before this jury and say, as they might consider one to another, or among each
4116 other: 'Well, John Smith, my neighbor, got into trouble last night.' 'Well, what happened to him?' 'Oh, there is something terrible. They have taken him away from his home. He is in a court room.' 'What is he charged with?' Wait a minute. They look and see. They read it: that the said John Smith did take the said John Brown and his right forearm and his right wrist and his right thumb and his index finger, and did press the same with great force and violence

against the trachea and the windpipe of the said John Brown for a sufficient length of time that it defrauded him out of nitrogen and oxygen for a period of hours, so they had to bury him under terra firma.

About that time someone would say, 'Well, they killed the man, didn't they?' 'Yes.' 'Why don't they say so then?'

Your Honor, in this case, of course the United States Attorney has the right to prosecute for an offense of any kind against the United States Government, but if he is prosecuting for bribery, he has not proved it. And I say to your Honor that to get any substantial evidence of the offense charged in this case in the manner in which the Government has outlined its case to the jury, you have got to get the essentials of bribery in the case. But whatever name you call it, the Government has not produced any such evidence aliunde these confessions. 4118

They have shown—they have not, your Honor, shown any entertainment excepting of a trivial nature. And to be square about this, to enforce the law as it is enforced in our own courts, and not in the French fashion that has been in vogue recently of charging him with being guilty and make him prove his innocence in this case, they show that people were taken to restaurants and bought meals. They have shown that people were given a drink now and then, but they don't connect those individuals with anything concerned with the essence of the corpus delicti, which is Martin Bayer; for example, in this case. 4119

It is of more than passing importance, your Honor, that we don't even hear these boys mentioned until Colonel Jacobson walks into the office of Samuel Bayer, his little shop, and sees the pictures of these boys on the wall and says, 'What are they doing?'.

They met Vidal and Roeser and Jacobson before these boys are known by these men to be out at Mitchel Field, before there is anything hooked up, unless we are going to have flights of fancy imagination.

Well, your Honor, I don't know whether it will serve any particular purpose to attempt further to analyze the evidence. I would like to go down one witness after another, and after all, we don't get evidence out of thin air, and I hope the time has not come where we call atmosphere substance.

If the Forte case is the law, you have got to have more than atmosphere and you have got to have more
4121 than a trickle of a suspicion here and there. You have got to have your proof rise to the dignity of substantial evidence.

Your Honor, I think it might be a fair question to ask of the United States Attorney, what does he claim outside of these so-called admissions or confessions by way of proof that rise to the dignity of substantial evidence to prove the existence of any conspiracy of the type set forth in this indictment? It is always a difficult thing attempting to prove a negative, but I think the Government—it is not up to us—at this stage to show that we have proved our innocence. I think we have a right to challenge this Court's attention to the peculiarities of this case, and it means something, your Honor. I don't think anyone has the right to laugh at
4122 my argument when I say——

The Court: Why do you keep referring to people laughing? I have not noticed any evidence of that.

Mr. Keenan: Well, I have.

The Court: I have not noticed any evidence of jocular conduct.

Mr. Keenan: I have.

The Court: Well, I have not.

Mr. Keenan: Well, that perhaps is a little feeling of my own. I ought to be experienced enough in the courtroom to throw it aside. I beg your Honor's pardon for repeating that.

But I say, with all the seriousness at my command, that if we are going to get away from atmosphere and we are going to take away these confessions and admissions, it is a pretty difficult thing, I think, for trained legal minds to do. We have got to do it, and I know, with great respect to this learned Judge, that he has laws laid out for him to follow that he must charge to juries. Every court has to act in accordance with the law and precedent. They are mighty 4124
difficult things to do. It is the law and it has to be done, but we are entitled to come to your Honor at this time and ask for a careful examination and an analysis of the aliunde evidence under any rule.

There is some requirement. You just cannot come in today with an admission or a confession and just entertain a conviction in a courtroom. You have got to prove a corpus delicti, and it has got to be something. I believe the rule is substantial evidence. It is not beyond a reasonable doubt. That is certain. It is more than a scintilla. And that, your Honor, I think is the office and function and obligation of the court, to measure up this evidence outside of these admissions and confessions, with the conscience that I know is possessed and exercised by everyone of au- 4125
thority in this courtroom, to determine whether or not under such circumstances there is any evidence at all that arises to maintain suspicion.

For example, the only way we can determine that is to forget entirely these admissions or confessions and then look at this evidence. We find evidence of what? Of the Busch man called on the witness stand. He

says that Radovich came there to get a uniform. He is asked a question, your Honor—all Government witnesses; we put on none—and he is asked the question: 'What did Elias Bayer say about who is going to pay for this uniform?' He said, 'Why, Radovich is going to pay for it.' And who says 'No', your Honor. Nobody says to the contrary. That is the testimony that comes from the witnesses.

If the evidence is that these officers asked the courtesy of coming in and having their uniforms at cost—and, your Honor, it is also significant that there is not one single witness who has testified to these uniforms
4127 that ever hooked them up in any way with the giving of a gratuity or a favor or any consideration of any venal or venial complex. Nothing.

You cannot convict men of a conspiracy and say there is a substantial conspiracy to adversely affect the judgment of officers of the United States because they ask you if you know where you can take them to get uniforms at cost and you say, 'Sure, I will try to do that.'

If we were to do that, your Honor, we would have to build concentration camps in this country and fill them with everybody that could be accused of affecting the judgment of officers.

Then the cruel thing comes in: that we all know that
4128 all types of gratuities and considerations were extended toward men in the armed services, not alone to enlisted men but to officers. People were rather proud of doing those things. You can take those matters which were perfectly innocent, your Honor, and then hook up something that happened later of which there is no evidence at all, your Honor, excepting in these extra-judicial affairs—I think I will so describe them—and then try to hook those on to conduct that is abso-

lutely compatible with innocent conduct, and is the rule rather than the exception, and then say, now, that all fits into a nebulous conspiracy to affect the judgment and defraud, with the wide use of the definition of the word. And the bright aurora flushes of crime start to come. From what? From picking a soldier out and giving him a meal. From taking an officer, who lives on limited pay in an inflationary period, even the officers, who have to go out and dandify themselves pretty well, living in the environs of Greater New York, Copacabana, etc., and taking them out to a meal at the Hickory House, where they don't feed you at the same prices as they do at Childs Restaurant. All of 4130
those things went on, and that is all the evidence that you have in this case.

It is true that you have Major Saffron, a doctor. He says that he had a talk way back, months and months before, with Sam Bayer, where Sam Bayer said that he would give anything in the world if his boy would not have to go overseas.

Well, your Honor, I had a boy that I lost a little while ago, and I want to tell you that I could have sat right at the table with Mr. Bayer and said—I mean, I would not have considered myself a criminal in so stating, or on my way to a careef of crime.

And I say that anyone that takes a perfectly innocent statement, with nothing more to it than 'I would give anything to see my boy not have to go overseas,' 4131
the expression of an honest man and nothing more. It is just like a man who said that he was afraid when he was going into battle. The greatest generals tell us those are the men who told the truth.

I say, your Honor, that a careful examination of all the evidence that has been introduced by the Government in this case, excluding these extra—that is, so-

called admissions of Radovich and of the Bayers, and you find nothing that arises above the dignity of loose suspicions and conduct that not alone is equally compatible with innocence as with guilt, but is almost compelling in the circumstance of the times in which we were living, to compel a finding of honest rather than dishonest conduct.

So therefore, your Honor, I, with great earnestness and at the risk of being quite tedious, I am afraid, ask your Honor, with all the sincerity at my command, to carefully examine the evidence aliunde to see that a great mistake is not being done and a blow being
4133 struck at something more important than reputations of individuals or obtaining successes or victories in courtrooms, but the lives of Samuel Bayer and Elias Bayer and their liberty—the fundamentals of liberty that says that 'better that 99 guilty escape than one just man be convicted.' That is the philosophy behind it.

Now I have expounded at some length my views on what constitutes admissions. This is all hearsay that is coming before your Honor—every single part of it. It is all objectionable under the hearsay rule, and it was let in only on the basis of being given in circumstances that a man knows that he is telling something that hurts him and hurts his position.

4134 I say to your Honor that reading the whole statement of the Bayers—and I think you cannot do anything else; you cannot read statements out of the context; you cannot interpret them. You have got to have the whole statement. And when you do, then I think we find in this case, as far as the two Bayers are concerned—again, your Honor, I find myself wandering into the vagaries of these so-called admissions and statements. I cannot keep away from them. I cannot separate them.

So therefore, your Honor, I am going to ask that a great effort be made to separate, to see what is the testimony outside of these so-called admissions that arise to the height that could be called substantial evidence of the commission of a crime of defrauding the United States Government. Therefore, your Honor, I make a motion that the verdict be directed for the defendants Bayer.

The Court: I do not care to hear the Government's side. As to the basis of the motion assigned by counsel that the indictment does not state a crime, I am satisfied that the indictment does state a crime and that the indictment is sufficient, and that basis is not 4136 sufficient for granting the motion.

As to the other basis of his motion, which counsel has argued at some length and with great ability, I simply cannot agree with the contention of counsel.

At the time the admissions were tendered I then very carefully reviewed in my own mind the evidence which had been introduced up to that time. I do not think it appropriate, and certainly not necessary, and I think it would be inappropriate for me to undertake to summarize the evidence, as I recall it, up until the time the admissions were tendered, but I have it very clearly in mind, in my opinion it is amply sufficient to prove a conspiracy under the strictest rules contended for by counsel for the defendants.

Of course there is no proof that at the opening of 4137 business on September 1, 1942, a conspiracy was entered into which terminated at five p. m., July 2, 1945, nor is there any proof that there was a directors' meeting of any kind, a formal gathering of any kind in an office, and a minute entered that 'We do hereby establish a conspiracy.' Of course there is no such proof as that. And it is not novel to hear the defense made

that, as to certain details of testimony, those details are not sufficient to constitute a conspiracy. But in a conspiracy charge all the evidence must be considered which is proper evidence and the circumstances, and all of them taken together, and the necessary and proper inferences to be drawn from those circumstances. And taking all the evidence which has been introduced in this case prior to the admission of the admissions or confessions, I am satisfied that that evidence was sufficient to justify the jury in believing that there was the conspiracy alleged in the indictment, and to be convinced of that beyond a reasonable doubt.

4139 So the motion is overruled and an exception may be noted" (R. pp. 697 to 717, incl., fols. 2090 to 2151, incl.).

3. The Court erred in denying the motion of the defendants Bayer at the close of the entire case for a directed verdict of acquittal in favor of the defendants Bayer, and for a dismissal of the indictment, as follows:

"Mr. Keenan: The defendants Bayer renew the motion made at the end of the Government's case that the jury be directed to return a verdict of not guilty, and renew the request of the Court for the continuance of this cause until the return of Martin Bayer, because of the development of evidence in the case demonstrating the necessity of his appearing as a

4140 witness as to matters most material.

And the defendants Bayer move now to strike out all parts of the statement—withdraw that, let it go.

The Court: The motion of the defendant Samuel Bayer——

Mr. Keenan: Another thing I would say: Furthermore, the defendants Bayer renew their motion for dismissal on the ground that the indictment fails to state a cause of action, that if the indictment be

interpreted as depending solely upon that portion of Section 88 of Title 18, having to do with defrauding the United States Government, and if it be interpreted that said section covers the alleged offense contained in the indictment, that such was the intention of Congress in enacting such Section 88 of Title 18, the same is against and in violation of the Constitution of the United States, as is demonstrated by the case of Cohen Grocery Company v. United States. I will give you the citation of that in a minute, your Honor.

The Court: All right. The motions of the defendant Samuel Bayer and Elias Bayer by counsel are 4142
overruled.

Mr. Keenan: And I would like to renew the motion on account of Elias Bayer on the ground that the evidence now shows no connection of Elias Bayer with any so-called agreement, arrangement, confederation or conspiracy to defraud the United States.

The Court: Motion overruled" (R. pp. 948, 949, fols. 2842 to 2845, incl.).

4. The Court erred in its charge to the Jury in neglecting to outline the theory of the defense, to which the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3436) as follows:

"Counsel for the defendants Bayer claims that pay- 4143
ments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer" (R. p. 1134, fols. 3400, 3401).

4144 *Assignment of Errors by Defendants Bayer.*

5. The Court erred in certain instructions to the Jury to which portions of the charge the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3436) as follows:

"If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. • • •" (R. p. 1134, fol. 3401).

4145 6. The Court erred in instructing the Jury as follows, to which the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3436):

"However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants" (R. p. 1135, fol. 3403).

4146 7. The Court erred in instructing the Jury as follows, to which the defendants Bayer duly and legally excepted (R. p. 1153, fol. 3458):

"The Court: Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you

that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word 'alias' is 'other or otherwise', and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I charge you not to infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name 4148
before they became Americanized. So I direct you to disregard the alias reference entirely" (R. pp. 1152, 1153, fols. 3455 to 3457, incl.).

8. The Court erred in permitting the District Attorney, in his summation, to address an inflammatory argument addressed to the passions of the Jury in times of war and in refusing to charge the Jury on the subject and in refusing to caution the Jury not to be swayed by the nature of the argument which had been made (R. pp. 1150 to 1152, fols. 3450 to 3454, incl.).

9. The Court erred in overruling the objection of the defendants Bayer to a certain portion of the summation for the Government, to which the defendants Bayer duly 4149
and legally excepted (R. p. 1046, fol. 3138) as follows:

"Now, a short time thereafter, about April 21st, the testimony was, 1943, the evidence shows that there was a party tendered to Colonel Jacobson at the Waldorf-Astoria Hotel by Sam Bayer, and that very night Sam Bayer gave a new set of tires to Jacobson. Now, you know as well as I do, ladies and gentle-

men, that in April, 1943, it was almost impossible to obtain new tires. And Jacobson's testimony is very clear about that.

Mr. Keenan: I object to that, your Honor. There is nothing in the evidence about how difficult or not it was to get tires.

The Court: I overrule the objection.

Mr. Keenan: Exception" (R. p. 1046, fols. 3137, 3138).

10. The Court erred in permitting the District Attorney, in his summation for the Government, to make an
4151 improper comparison of the statements of Sam Bayer and the defendant Radovich which read, in part, as follows:

"Now, some of the evidence with respect to the arrangement for that transfer varies. In that statement of Sam Bayer, which is in evidence, he claims that Radovich told him that the boys had to be transferred because the outfit was being broken up and that Radovich thereafter arranged the transfer to the Medical Detachment. Radovich in his statement claims that the boys were being transferred because of these unsavory rumors around the field about the entertainment. The records, this Exhibit D that we have been looking at, show that the outfit was not being broken up, as Sam Bayer says Radovich told him, but
4152 that actually there was a shortage of clerks. And, in fact, the transfer was not able to be effected until two men came into the First Fighter Command to replace Martin Bayer and Melvin Usdan" (R. pp. 1048, 1049, fols. 3144, 3145)

and, further:

"Somewhere about the time that the boys were transferred out of the Air Commando Group to the

Air Transport Command, Sam Bayer, through some agents of his, paid $5,000 to Major Radovich. There is no conflict between the statements of the Bayers and the statements of Radovich on that fact" (R. p. 1057, fol. 3169).

11. The Court erred in allowing the District Attorney to state, over the defendants' Bayer objection and exception, that there is no contention by the defense that the statements of the defendants Bayer were other than voluntary, since objection had been made to these statements on the ground that they were "induced" (R. pp. 1060 to 1062, incl., fols. 3180 to 3184, incl.). 4154

12. The Court erred in permitting the District Attorney, in his summation, to refer to the statements of the two defendants Bayer and of Radovich in juxtaposition, really using one against the others and comparing them, which was in violation of the Court's admonition that the statements of each defendant could only be considered against him individually (R. pp. 1059, 1060, fols. 3175 to 3180, incl.).

13. The Court erred in overruling the objection to that part of the summation for the Government as follows:

"• • • let us look at the record and see what Sam Bayer's statement shows as to his participation in the conspiracy. It shows the following: 4155

One, that he entertained various officers, all of whom were connected with the unit at Mitchel Field to which the boys were attached.

Two, that he paid for uniforms for these officers.

Three, that he made numerous gifts to Radovich.

Four, that he paid approximately $2,000 to Radovich during the time when the boys were being trans-

ferred from Radovich's First Fighter Command to the Medical Detachment at the base at Mitchel Field.

And, five, that he sent $5,000 to Radovich for the transfer of the boys out of the Commando Unit to a unit which was destined to stay in this country.

Now, let us see——

Mr. Keenan: Just a moment. I object to that statement. That summation is absolutely false. He made no such admission in that statement. I object to it.

The Court: Mr. Keenan, it is perfectly apparent that the United States Attorney is not quoting from
4157 it; he is giving a summary of what he considers it to mean. The statement itself will be before the jury. The District Attorney is not purporting to read from it. He is arguing what he considers to be a synopsis of the case.

Mr. Keenan: But, your Honor, he is now quoting the admission, not a synopsis of the case.

The Court: No. He is not undertaking to quote at all. You may proceed" (R. p. 1059, fols. 3175 to 3177, incl.).

14. The Court erred in receiving in evidence Government's Exhibit 5 (Ledger [page 4] I. Buss Uniform Co.) (R. p. 1218, fol. 3654) to which the defendants Bayer duly and legally objected as follows:

4158 "Mr. McGohey: Now I offer the book in evidence your Honor.

Mr. Keenan: Objected to.

Mr. Robb: May we see it?

Mr. McGohey: I am offering only that page at this time.

The Court: You said you offered the book.

Mr. McGohey: I withdraw that. I intend to offer only the page that I showed to the witness.

Mr. Keenan: The record ought to show what page it is.

Mr. McGohey: The page entitled, 'Mitchel Field, New York, U. S. Army.'

Mr. Keenan: 'Mitchel Field, New York, United States Army.'

Mr. McGohey: That is right. That is the page.

The Court: Is there objection, gentlemen?

Mr. Keenan: Yes, your Honor. We object to this. We understand that the Government is offering it on the theory that it was part of the conspiracy to conceal, and your making the suggestion that not necessarily would the conspiracy terminate with the departure of Major Radovich for the war in the Pacific on November 5th, 1943, we think, your Honor, with great respect, that it indulges in flights of fancy in the ridiculous assumption that there would be a continuing conspiracy to which Major Radovich would take part when he was at the same time thousands of miles away from the scene, in the United States Army, engaged in war. In other words, we think that there is entitled to be some sense to the allegation of the terms or agreement of the conspiracy. And we are alleging that we are objecting on that ground. 4160

The Court: Rather strenuously, I would say.

Mr. Robb: We object also, if the Court please, on the ground that these acts and conversations took place after any conspiracy which may have ever existed even which could be alleged to exist had terminated. We think that should not be admitted against the defendant Radovich for that reason. 4161

The Court: Objections overruled. The page may be received" (R. pp. 191, 192, fols. 571 to 575, incl.).

15. The Court erred in receiving in evidence Government's Exhibit 6 (page 74 of cash book—I. Buss Uniform

Co.) (R. pp. 1220, 1221) to which the defendants Bayer duly and legally objected and excepted as follows:

"Q. Now are the entries that appear on page 74 of this book in your handwriting, Mr. Busch? A. Yes.

Q. Is that a book that is kept in the regular course of your business? A. Yes.

Q. Is that a book in which you enter the receipts of cash which come into your company each day? A. That is right.

Mr. McGohey: I offer page 74 of this book in evidence.

4163 Mr. Robb: We make the same objection, your Honor.

The Court: I hope the objection will be in more temperate language.

Mr. Robb: I hadn't thought I was being intemperate, if the Court please.

The Court: Quite so.

Mr. Robb: Very earnest, though.

The Court: Objection overruled. Exception may be noted.

Mr. Keenan: We have the same objection, your Honor.

(Government's Exhibit 6 received in evidence.)" (R. p. 193, fols. 377, 378.)

4164 16. The Court erred in receiving in evidence Government's Exhibit 7 (Entries of items 5512, 5580 and 5604 in record book of I. Buss Uniform Co.) (R. pp. 1222, 1223), to which the defendants Bayer duly and legally objected as follows:

"Mr. McGohey: Now, if your Honor please, I would like to offer the entries appearing as items 5512, 5580 and 5604 from this book as evidence.

Mr. Robb: We make the same objection.

Mr. Keenan: I have never seen the book. I would like to see it. We object to that on the same theory, your Honor.

The Court: Objections overruled.

Mr. Robb: The same objection for the defendant Radovich. Exception.

(Government's Exhibit 7 received in evidence.)" (R. p. 195, fols. 580 to 583, incl.)

17. The Court erred in permitting John J. Pepper, a Government witness, to testify as to conversations that he had with Captain Radovich, to which the defendants Bayer 4166
duly and legally objected and excepted (R. p. 208, fols. 622, 623) as follows:

"Q. Will you tell us what Captain Radovich said and you said?

Mr. Keenan: I object to the conversation.

The Court: Overruled. Go ahead Captain.

A. We had just a general conversation. Some time during the conversation the men—the names of the two men came up—this man Bayer. I told Captain Radovich of the rumors which were rampant at Mitchel Field at that time concerning the two men, those rumors being——

4167

Mr. Keenan: I object.

The Court: I don't know what the rumors were, Captain, but I do want you to tell the Court and jury what you told Captain Radovich; just what you told him in the conversation.

Q. Tell us what you said to Captain Radovich? A. I told him I had been——

Mr. Keenan: Objection.

The Court: Objection overruled. Go ahead.

A. (Continuing) Told that there was a remarkable similarity in uniforms worn by different people on the base, and that people in the home districts where the men lived were also complaining about the fact that they had spent so much time at home, which was unusual for low ranking men—it is usually restricted to the first three grades. I also repeated to him the fact that they appeared to have claimed that they were established at Mitchel Field. Major, Captain Radovich at the time, made no substantial comment that I can recall.

Mr. Keenan: I ask that all that be stricken out.

4169 The Court: Motion overruled.

Mr. Keenan: Exception.

Q. Was there anything said in that conversation about a transfer of these men to the medical unit?

Mr. Keenan: I object to the leading form of the question, your Honor.

The Court: Objection overruled.

Mr. Keenan: Exception" (R. pp. 207, 208, fols. 620 to 623, incl.).

18. The Court erred in receiving proof as against the defendants Bayer of the receipt of a cashier's check in the sum of $500.00 by Captain John K. Pepper, and in denying the motion to strike out said testimony, to which the de-

4170 fendants Bayer duly and legally objected and excepted (R. p. 213, fols. 637 to 639, incl.) as follows:

"Q. Now, in December of 1943, did you receive in the mail a cashier's check in the sum of $500? A. I did.

Q. Did you know at the time you received it by whom it had been sent? A. I received a check in an envelope which was postmarked from West Palm Beach,

Florida, and in the envelope was a cashier's check drawn on a West Palm Beach bank. The check surprised me, and I kept it for two or three days, wondering first what it was, and who from. Finally, knowing that no one owed me that money and I had no relative who would ever send me a check like that, I decided that the Air Commando Group must have moved or be moving, and it must have been from Major Radovich.

Q. Did you subsequently find out——

Mr. Keenan: Just a minute. Your Honor, I ask that all that answer be stricken out and this jury instructed by this Court to disregard every single word of it. 4172

The Court: I shall grant that motion. I will strike that out and direct you ladies and gentlemen not to consider that at all.

Mr. McGohey: Do I understand your Honor is striking out the testimony that he received the check?

The Court: No, not that; only the surmise as to where it came from. That is a surmise and I will direct you not to consider that.

Mr. Keenan: Your Honor, we object to any evidence of his receiving a check. Is it charged that we sent that check? We haven't heard of that yet.

Mr. McGohey: May I proceed?

The Court: You may proceed.

Mr. Keenan: We object to this, and the jury being left to consider the fact that this man had received a check unless there is some showing or some charge made as to who sent it. 4173

The Court: Objection overruled.

Mr. Keenan: Exception.

Q. Did you subsequently find out who sent that check to you?

Mr. Keenan: I object.

Mr. Robb: We object to that.

Mr. Keenan: It is highly improper.

The Court: Objection overruled.

Mr. Keenan: Exception.

Mr. Robb: Exception.

The Court: You were asked did you find out.

The Witness: Yes, I did" (R. pp. 212, 213, fols. 634 to 639, incl.).

19. The Court erred in examining and reading statements made by Samuel Bayer, Elias Bayer and Walter V. Radovich without giving the attorney for the defendants
4175 Bayer an opportunity to examine said statements at that time and without requiring the prosecution to give a copy of said statements to the attorney for the defendants Bayer, to which procedure the defendants Bayer duly objected and excepted (R. p. 360, fols. 1078 to 1080, incl.) as follows:

"The Court: I would not permit the Government to put in the full statement for the reason that the statements which I have read are prolix and contain a substantial amount of matter which is immaterial and irrelevant. If at the conclusion of this witness' testimony defendants, or any of them, wish to introduce the full text of the statement, I will consider that when we get to it.

4176 Mr. Keenan: Could we have the record show, your Honor, what statements your Honor examined, that you referred to?

The Court: I have examined statements made by Samuel Bayer, Elias Bayer and the defendant Radovich. If you wish the dates, the District Attorney can give them to you. Will you be ready to proceed in ten minutes?

Mr. McGohey: Yes, I think so.

Mr. Robb: If the Court please, we have not seen those statements to which your Honor referred as those which you had examined. May we have copies of those?

The Court: I don't think it necessary to require the Government to produce the statements. You are not taken by surprise. Your associate counsel, Mr. Keenan, was present throughout the taking of his clients' statements; you were present at the court-martial trial of your client, and I don't understand that there is anything to take any of you by surprise.

Mr. Robb: It occurs to me that if the Court examined them counsel should also have them. 4178

The Court: It does not so occur to me. I examined them for the purpose of determining whether or not I should admit evidence with relation to them. There are many instances when the Court may properly——

Mr. Robb: I bow to your Honor's ruling. May I have an exception to your Honor's ruling?

Mr. Keenan: May I have an exception to your Honor's reference, with great respect, both to your Honor and to the distinguished General Ansell and his colleague, that we are associate counsel. We are not associate counsel.

The Court: The Court used that word inadvertently and retracts it. I understand——

Mr. Keenan: Nor have I any knowledge of what was contained in the Radovich statement, nor have I ever seen it, nor have I been tendered a copy of the statement that was made back some time in January or February of this year. And I was present only at a part of the court-martial and was respectfully requested to leave during other parts of the proceeding, through no fault of my own. 4179

The Court: I assumed that.

Mr. Keenan: And I am caught by surprise in that I do not claim, and I say this seriously, your Honor, that I have any unusual memory and I do not purport to remember everything that is in the statement accurately, and since I assume that your Honor is referring to a stenographic statement that was purported to have been taken down by competent reporters and transcribed, and it was of considerable length, I take exception to your Honor's failing to require us to get a copy and, with the greatest respect to this Court, to this Court examining those without counsel—without myself having the right to inspect them or knowing
4181 what is in them, or testing their accurateness with even my own memory. And I take exception to your Honor taking any consideration in passing upon any phase of this case instruments so delivered to your Honor.

The Court: Very well" (R. pp. 212, 213, fols. 634 to 639, incl.).

20. The Court erred in denying a motion for the withdrawal of a juror and a mistrial on the ground that the Court read the statements of all three defendants, to which the defendants Bayer duly and legally excepted (R. p. 362, fol. 10[illegible] as follows:

"(The following proceedings took place at the bench, without the hearing of the jury:)

4182 Mr. Ansell: If your Honor please, we want to move for the withdrawal of a juror and a mistrial in this case grounded upon the fact that your Honor has read the statement of Sam Bayer.

The Court: All three defendants.

Mr. Ansell: Of all three defendants.

The Court: All right, sir. Motion overruled.

Mr. Ansell: Thank you, sir.

Mr. Robb: Exception.

Mr. Keenan: We take an exception on the same ground.

The Court: Very well.

Mr. Keenan: We join in the same motion.

The Court: That is all right" (R. p. 362, fols. 1084, 1085).

21. The Court erred in receiving in evidence Government's Exhibits 8 and 9 (Statement of Samuel Bayer and Stenographer's notes, pages 155-163—Neisner) (R. pp. 1224 to 1231, incl., fols. 3670 to 3791, incl.), to which admission in evidence the defendants Bayer duly and legally objected and excepted (R. p. 491, fol. 1471) as follows: 4184

"The Court: All right, you may be excused. And the exhibits offered pursuant to this testimony will be admitted. Call the next witness.

Mr. Keenan: The record shows our objection——

Mr. McGohey: I didn't hear what was said.

The Court: I understood your objection to be to the admission of the statement until it had been identified and authenticated by a witness.

Mr. Keenan: I did not say that, your Honor. I object to the introduction of it on the ground that it is inadmissible for reasons that were urged before your Honor for a full afternoon in this court room.

The Court: Oh. That objection will be overruled. Exception noted. With the same—— 4185

Mr. Robb: I hadn't thought of that, because we also objected on that ground, but on that ground alone——

The Court: Very well, then, and it may be considered that the same objection is made to all the different portions on both sides.

Mr. Robb: Yes, sir.

The Court: That objection being, ladies and gentlemen, as to the admissibility, and I repeat to you what

I said when the verbal testimony from the witness was admitted, that you are to consider these statements as evidence in your consideration of the case of the person making the statement, but not consider it as evidence as to the co-defendants. All right, call the next witness.

(Government's Exhibits 8 and 9 for Identification received in evidence.)

The Court: That admonition goes throughout all the statements presently involved.

Mr. Keenan: If your Honor please, I want to renew the objection on the additional ground that your
4187 Honor has already stated that you would not permit some of the exhibits which you read to be introduced because of extraneous matter that you thought was not proper to be introduced in this court. I don't know which your Honor had reference to. But I want to save my objection and exception in the event it is contained in either of these two documents.

The Court: You will have to make your objection more specific than that. If you wish to object to any particular portion I will hear it.

Mr. Keenan: I can only say to your Honor that I can't make it any more specific from the information I have. And, furthermore, I make an objection to it on the ground that it is improper to introduce in bulk
4188 a statement of that kind without seeing whether there is prejudicial matter that is not germane to this case under the rules of evidence, and I cite to your Honor the case of——

The Court: No, I don't want to hear a legal argument, sir.

Mr. Keenan: All right, your Honor. I am willing to give it.

The Court: That is, on that matter. I have admitted a certain portion of the statement. If there is another one offered I will pass on it when it is presented. If you have a specific objection I will entertain it. Proceed" (R. pp. 490 to 492, incl., fols. 1469 to 1475, incl.).

22. The Court erred in receiving in evidence Government's Exhibits 10 and 11 (Statement of Samuel Bayer—Feb. 7, 1945—44 pages, and Statement of Samuel Bayer [continuation of statement taken by steno. F. M.], R. pp. 1231 to 1245, incl., fols. 3692 to 3735, incl.), to which admission into evidence the defendants Bayer duly and 4190
legally objected and excepted (R. p. 495, fol. 1483) as follows:

"Mr. McGohey: I offer in evidence Government's Exhibits 10 and 11.

Mr. Keenan: I object. I don't care for any voir dire examination. I am objecting to these exhibits coming in.

The Court: All right, sir. Objection overruled.

Mr. Keenan: And I want to state the specific ground in the language of the Court, that it contains material that has not been proven or shown to be germane to the issues of this case, and improper.

The Court: I am going to do this about that. Let me finish with this situation. It is my understanding 4191
that you do not propose to read these exhibits to the jury at this time, or do you?

Mr. McGohey: I do not propose to read them at this time, your Honor.

The Court: All right. Well, now, inasmuch as the exhibit is somewhat lengthy, I am going to suggest, or direct that as to any matter in any of the exhibits which you consider and which you contend is irrele-

vant and immaterial and inadmissible for that ground, that you take time to consider the matter and make a motion to strike such matter as you consider improper, upon that ground.

Mr. Keenan: I except to your Honor's ruling on that point, on these following grounds: that your Honor has already permitted to be introduced without qualification and over objection, and with great respect, without desiring to listen to legal argument, for the reason for the objection, and now in the presence of the jury an anomalous proceeding is taking place in which it is suggested that after it has been introduced over objection it may be restricted by a motion to strike, and that such direction is being made by the Court in the presence of the jury, which is prejudicial to the defendants, and I except on that ground, your Honor.

4193

The Court: Motion overruled.

Mr. Robb: If the Court please, may I address your Honor?

The Court: Yes, sir.

Mr. Robb: If the Court please, we have been more or less on the outside looking in on this particular matter. I haven't had a chance yet to see these statements. I have glanced at them, I glanced at them this morning very briefly while I was having my breakfast. I think the jury ought to have these stenographic statements so far as they have anything to do with this case, but I understood from your Honor that these statements may contain some matters which do not have to do with this case. I would like to have a chance to read them prior to their being read to the jury, to see if there is anything in there which ought not to go in.

4194

The Court: It is exactly that that I suggested.

Mr. Robb: Yes, sir. Your Honor's thoughts and mine run along the same channel.

The Court: I would be glad to let you have that privilege and entertain at any time before they are read any motion which you may wish to make as to materiality of any particular portion of the statement.

Mr. Robb: Before they are read, yes.

The Court: Yes.

Mr. Keenan: I would like the record to show, your Honor, that we make our objection, and in view of the Court's statement that he had already examined these exhibits and that if they were offered, some of them; he would not permit them to be brought into 4196
this case because he felt there was material in them that was improper.

The Court: I think you have stated your position.

Mr. Keenan: Thank you, your Honor.

The Court: Objection overruled, with the understanding that if you desire to move to strike out any portion thereof, as to immateriality, I will consider your motion. Proceed.

Mr. McGohey: Your Honor, may the record state that the very copies of transcript which are now being introduced were delivered to counsel for Samuel Bayer and Elias Bayer yesterday afternoon.

The Court: I think the record already so shows.

Mr. Robb: That is true, if your Honor please, but 4197
I didn't get a chance to see them; and I am not counsel for Samuel and Elias Bayer.

The Court: I understand that. Go ahead.

(Government's Exhibits 10 and 11 for Identification received in evidence.)

Mr. Keenan: I think the record also should show, your Honor, that when I called for them for the week-end, so that I would have time to look them over, the

United States Attorney refused to permit me to see them.

The Court: Your statement may go in. All right, sir.

Mr. McGohey: Just one more question of this witness" (R. pp. 494 to 496, incl., fols. 1480 to 1487, incl.).

23. The Court erred in receiving in evidence Government's Exhibits 12 and 13 (Stenographer's notes—D'Elia—pages 39 to one-half of 46, and continuation of Statement of Samuel Bayer) (R. pp. 1245 to 1250, incl., fols. 3735 to 3749, incl.) to which admission into evidence the defendants
4199 Bayer duly and legally objected (R. p. 498, fol. 1493) as follows:

"Mr. McGohey: I offer in evidence Government's Exhibit 12 for Identification and 13 for Identification.

Mr. Cohen: How many pages?

Mr. McGohey: Of the transcript? Four and a half.

Mr. Cohen: Five pages.

Mr. Keenan: We object, for the same reasons stated before, your Honor.

The Court: Very well, the objection is overruled and the exhibits accepted upon the same terms and conditions as those previously offered. Proceed.

(Government's Exhibits 12 and 13 for Identification received in evidence.)"

4200

24. The Court erred in receiving in evidence Government's Exhibits 14 and 15 (Stenographer's notes—Reitman—pages 1 to 15; continuation of Statement of Samuel Bayer) (R. pp. 1250 to 1260, incl., fols. 3750 to 3780, incl.) to which admission into evidence the defendants Bayer duly and legally objected (R. p. 500, fols. 1499, 1500) as follows:

"Mr. McGohey: I offer Government's Exhibits 14 for Identification and 15 for Identification in evidence.

Mr. Keenan: May the record show the same objection for the same reasons?

The Court: On the part of counsel for all defendants, the same objection. The same ruling. The exhibits are admitted under the same terms and conditions. Proceed.

(Government's Exhibits 14 and 15 for Identification received in evidence.)" (R. p. 500, fols. 1499, 1500.)

25. The Court erred in receiving in evidence Government's Exhibits 16 and 17 (Stenographer's notes—Kravet—pages 179 to 189, and continuation of Statement of Samuel Bayer) (R. pp. 1260 to 1268, incl., fols. 3780 to 3804, incl.), 4202 to which admission into evidence the defendants Bayer duly and legally objected (R. p. 503, fol. 1509) as follows:

"Mr. McGohey: I offer in evidence Government's Exhibits 16 for Identification and 17 for Identification.

Mr. Keenan: We object, your Honor, for the same reasons, the former reasons stated.

The Court: The objection of counsel for all parties is overruled and the exhibits are admitted under the same terms and conditions as those previously stated. Any questions of this lady?

(Government's Exhibits 16 and 17 for Identification received in evidence." (R. pp. 503, 504, fols. 1509, 1510.)

4203

26. The Court erred in receiving in evidence Government's Exhibits 18, 19, 20, 21 and 22 (Statement of Samuel Bayer, cont'd from EPK; Statement of Elias Bayer; Statement [cont'd] of Elias Bayer; Statement of Elias Bayer [cont'd] from EKI; and continuation of Statement of Elias Bayer) (R. pp. 1269 to 1304, incl., fols. 3805 to 3911, incl.) to which admission into evidence the defendants

Bayer duly and legally objected. (R. p. 505, fol. 1513) as follows:

"The Court: All right. Let it be so stipulated and the documents offered and admitted over the same objections of counsel for both defendants under the same terms and conditions.

Mr. McGohey: Then, your Honor, may I have them all marked?

The Court: Yes. Just have them all marked and introduced as I indicated, and while you are doing that we will take a ten-minute recess, ladies and gentlemen.

Mr. McGohey. Your Honor, perhaps to save time,
4205 there are four sets of papers comprising the statement of Elias. Could we have them all marked as one exhibit? I withdraw that request, your Honor, and we will have the transcription of each——

The Court: Let it be uniform.

Mr. McGohey: And have each one of them marked in order, marked in evidence.

(Government's Exhibits 18, 19, 20, 21 and 22 received in evidence.)" (R. p. 505, fols. 1513, 1514.)

27. The Court erred in receiving in evidence Government's Exhibit 25 (Copy Statement of Major Radovich made to F. B. I. Agents) (R. pp. 1306 to 1312, incl., fols. 3916 to 3934, incl.) to which admission into evidence the
4206 defendants Bayer duly and legally objected and excepted (R. pp. 659, 660, fols. 1977, 1979, 1980) as follows:

"The Court: Call the jury. I might say that I will limit the statements to the jury's consideration of the charge against the defendant Radovich as I have to the other statements.

Mr. Keenan: We still want our exception noted.

The Court: Yes, it has been. Where is your witness?

Mr. McGohey: Mr. Flynn was my witness, but I am just going to offer the statement. It has been identified. Yes, I think we had better call the witness Flynn.

The Court: Yes, I think you had better have him back on the stand.

(The following proceedings took place before the jury:)

GERALD J. FLYNN resumed the stand.

The Court: Ladies and gentlemen of the jury, when 4208
we parted company there had been offered in evidence a statement which this witness, Mr. Flynn, testified was made to him in March, 1945, and reduced to writing and signed by the defendant Radovich.

I charge you now in similar fashion to the way I charged you when I admitted statements made by the defendants Samuel and Elias Bayer. I am admitting this statement made by the defendant Radovich for your consideration of the charges here made against the defendant Radovich. I charge you specially that you should not consider this statement or anything in it in your consideration of the cases against the two Bayers. You may consider it and give it such weight as you feel inclined to in your consideration of the 4209
case against the defendant Radovich. All right, you may proceed.

Mr. McGohey: I now offer in evidence Government's Exhibit 25 for Identification.

Mr. Robb: If the Court pleases, may we have our objection and exception to this?

The Court: Very well.

4210 Mr. Keenan: And I want to again renew my objection to a charge to the jury, to ask them to recall the incidents set forth in this paper that is introduced, or about to be introduced or received, as against Major Radovich only, and not as against the two defendants Bayer, on the ground of the practical impossibility of any jury being able to make such distinction and hold it throughout the course of a long trial to their ultimate deliberation.

The Court: Very well. The objection is overruled. You may proceed.

(Government's Exhibit 25 for Identification received
4211 in evidence.)

Mr. McGohey: I have no further questions of this witness, your Honor.

The Court: All right. Do you wish to cross-examine?" (R. pp. 659 to 661, incl., fols. 1976 to 1981, incl.).

28. The Court erred in refusing to permit the defendants Bayer, through their counsel, to cross-examine the Government's witness Gerald J. Flynn in connection with Government's Exhibit 25, to which the defendants Bayer duly and legally excepted (R. p. 672, fols. 2014, 2015) as follows:

4212 "Mr. Keenan: I would say to your Honor that I think it would be logical that I ought here to pursue this line of inquiry of this witness or not be permitted to interrogate him at all at this time.

The Court: Do you wish to be heard further on it?

Mr. Keenan: No, that is all, your Honor.

The Court: Well, with a personal reluctance, but being satisfied of the legal correctness, I am going to hold that you have no right to cross-examine this wit-

ness because his testimony does not refer or apply to the defendants whom you represent. It is my understanding that you do not represent the defendant Radovich.

Mr. Keenan: No, your Honor. That is very clear, I do not represent him. He is very ably and capably represented by the distinguished former Judge Advocate General, General Ansell, and Mr. Robb.

The Court: I concur in the last part of your statement entirely. It is the ruling of the Court that the counsel for the defendants Bayer may not cross-examine upon the statement just introduced, and I take it that you wish to except. 4214

Mr. Keenan: Yes, your Honor. Thank you for the exception.

The Court: All right. Do you wish to be heard on this matter?

Mr. Robb: No, your Honor.

The Court: All right. Bring the jury in.

(The following proceedings took place before the jury:)

The Court: All right, you may proceed, gentlemen" (R. pp. 671, 672, fols. 2012 to 2015, incl.).

29. The Court erred in refusing the request of the defendants Bayer for the statement made by the defendants Radovich in the hospital ward, to which the defendants Bayer duly and legally excepted (R. p. 681, fol. 2042) as 4215 follows:

"Mr. Robb: I am asking for the statement which was made in the hospital ward. Your Honor ruled on it the other day but I would like your Honor to rule on it again today. I think I have a right to ask for it again.

The Court: Do you want to be heard on it?

Mr. McGohey: Yes, your Honor, I do.

The Court: We will excuse the jury.

Mr. Robb: If the Court please, to save time, if Mr. McGohey still takes the same position, I will withdraw my request.

The Court: All right, go ahead.

Mr. Keenan: May the record show that we join in the request for that statement of September and that it is refused, to which we take exception.

The Court: Yes" (R. p. 681, fols. 2041; 2042).

30. The Court erred in overruling the motion made by
4217 the defendants Bayer to be apprised as to which officers the defendants Bayer attempted to influence, to which the defendants Bayer duly and legally excepted (R. p. 687, fols. 2059, 2060) as follows:

"Mr. Keenan: At this point, your Honor, in view of the suggestion of moving to strike out parts that are not material, I think it is entirely proper at this time to ask the Government if it will state what officers it refers to in this indictment besides Radovich that these defendants conspired with to defraud the Government by influencing their judgment, by failing to have it free from impartiality and in direction and the like. I think that is a fair time to ask this, your Honor. Otherwise I won't know how to state what suggestions
4218 there may be about striking out evidence that your Honor has so kindly suggested we do with reference to this statement introduced by the prosecution.

Mr. McGohey: Your Honor, I will withdraw that suggestion that we leave out any part of the statement your Honor has admitted it all in evidence. We will go ahead and read it. As far as the declaration demanded by counsel, I don't think I have to make it and I decline to make it.

Mr. Keenan: Regardless of any withdrawal or otherwise of Mr. McGohey, I suggest to your Honor that it is the timely inquiry of defense counsel, if the suggestion of your Honor that we move to strike out anything in these statements is to mean anything, that we ought to be apprised at this time what officers the Government contends these three so-called conspirators attempted to influence, whose judgment they attempted to influence, because I won't be able to properly move without having that information. And with great respect I point out to your Honor that the indictment uses just the word 'officers.' I have listened attentively to find out which ones they meant, and each 4220
one as they appeared on the witness stand, offered by the Government as witnesses I have asked them if any effort was made to influence their judgment and I have the reply—a negative reply from each one. I don't know how near the Government is to the termination of its case, but I do say that there is a time when we should be advised what officers the Government claims we attempted to subvert, whose judgment we attempted to subvert.

The Court: The motion is overruled.

Mr. Keenan: I note an exception" (R. pp. 686, 687, fols. 2056 to 2060, incl.).

31. The Court erred in refusing to permit the defendants Bayer to cross-examine the witness William J. Pender 4221
to which the defendants Bayer duly and legally excepted (R. p. 743, fol. 2228) as follows:

"Mr. Keenan: I would like to ask a question, your Honor.

The Court: I will have to deny you that privilege, sir, if it bears on Radovich's statement.

Mr. Keenan: We feel that it bears on the whole case, the type of man that the Bayers were dealing with.

The Court: I have ruled on that.

Mr. Keenan: All right. Note my exception, please.

The Court: Very well" (R. p. 743, fol. 2228).

32. The Court erred in refusing to permit the defendants Bayer to examine the witness Edward C. Wallace with respect to the statement of Captain Radovich, to which the defendants Bayer duly and legally excepted (R. pp. 815, 817, fols. 2444, 2449, 2450) as follows:

4223 "*Direct examination by Mr. Keenan.*

Q. You are Mr. Wallace, the Assistant United States Attorney, and you have previously testified in this case, is that correct? A. That is correct.

Q. And you have had charge of the preparation, you have had charge, as Assistant United States Attorney, of this prosecution from its inception to date; is that not correct? A. That is correct.

Q. Under, of course, Mr. McGohey, the United States Attorney? A. That is correct.

Q. And you had Major Radovich come to your office at some time in 1943?

Mr. Robb: If the Court please, might counsel approach the bench at this point?

4224 The Court: Yes.

(The following proceedings took place at the bench, not in the hearing of the jury:)

The Court: What is in your mind?

Mr. Robb: If your Honor please, we find ourselves——

The Court: What I had in mind was, I have ruled that—as to the statement of Radovich that I

have directed the jury, and will direct them again, that it is not to be considered against your client, and I ruled that you could not examine him on that question.

Mr. Robb: That is the point I had in mind, your Honor.

Mr. Keenan: Yes, but I want to bring out that a part of the defense in this case, the attitude of the United States Government in this prosecution as it affects not alone the presentation of the matter against Radovich, but against my defendants, the Bayers, that the sequence shows pressure being brought to bear on Major Radovich with reference 4226
to his testimony, and we have a right to have Major Radovich available as a witness to tell the truth, free from any type of pressure or influence. And the evidence shows that he was subpoenaed down here and that indictments were returned against Samuel and Elias Bayer—Samuel, two substantive indictments for bribery, and Samuel and Elias together with Greenblatt for conspiracy to violate Section 91, I believe, of Title 18, and that as long as Radovich continued to co-operate with the Government, as they called it, they did not indict him, but when he refused to co-operate with them he was indicted.

Now, as a circumstance of the case I think I have
a right to show this to the jury as reflecting upon 4227
the opportunity this defendant has had to present its defense in all aspects, and I think that is highly pertinent, your Honor. It is significant that he was brought back to be interrogated.

The Court: I can't agree with you. I am going to adhere to the ruling heretofore made, which ruling is that based upon everything you have said that

would only go to the admissibility of the weight of Radovich's statement, which I have directed the jury may not be considered against your clients, and I adhere to that ruling and decline to permit you to examine or cross-examine the witness on the stand as you indicated you desired to.

Mr. Keenan: While I do not contend that is the only reason I am asking the testimony of this witness, I ask your Honor, too, to give consideration to the fact that anything that the jury considers by way of any testimony that builds up a corpus delicti is material to all defendants in the case. That we have
4229 not, I think, argued fairly enough to your Honor—perhaps you have given a little time——

The Court: You have covered——

Mr. Keenan: I never mentioned that point in the argument, that anything that is built, any testimony that builds up any part of the corpus delicti is material to any defendant in the case.

The Court: I have considered that phase, too. I adhere to my ruling. You may note your exception.

Mr. Keenan: Does that mean I can't ask Mr. Wallace any questions?

The Court: You can't ask him any questions along the line you have indicated. You are perfectly free to examine him as to the facts and circumstances of the statements made by the defendants whom you
4230 represent.

Mr. Keenan: I am not going to use him as my witness for that purpose.

I note an exception.

The Court: Very well.

All right, you may stand down.

(Witness excused.)

(The proceedings were resumed within the hearing of the jury as follows:)

The Court: Call the next witness.

Mr. Keenan: I want to ask him some other questions not connected with——

The Court: All right.

EDWARD C. WALLACE resumed.

*Direct examination by Mr. Keenan.*

Q. Mr. Wallace, you have testified in this case about three indictments that were brought against Samuel Bayer other than this indictment——

Mr. McGohey: I object to this, if your Honor please, as being immaterial in this case. 4232

The Court: Unless there is some reason which I don't know about, I am going to exclude any testimony about any other indictment. These defendants are on trial on this indictment.

Mr. Keenan: Your Honor, it is our claim in this case——

Mr. Gohey: If your Honor please, if we are going to have argument I suggest it be at the bench, on this question.

The Court: I beg your pardon.

Mr. McGohey: I suggest that any argument we are going to have——

The Court: If he makes it in the absence of the jury, if he wants to be heard at length——

Mr. Keenan: Your Honor wishes that we, ap- 4233
proach the bench and state the——

The Court: Any argument on——

Mr. Keenan: I don't want to argue it, your Honor. I want to present the theory under which we are offering the evidence.

The Court: All right, sir, come up?

(The following proceedings were had at the bench, not within the hearing of the jury:)

Mr. Keenan: The theory under which we offer this evidence is that the charges that are made in the indictment upon which these defendants Bayer are standing trial are tantamount to a charge of bribery, and that the real issue in the case as it is now presented, as we take it, is whether or not the defendants were guilty of bribery or subjects of extortion; that we are going to argue that the Government well recognizes that there wasn't bribery because it not alone could have but did indict on charges of bribery and dismiss the causes.

The Court: I sustain the objection and decline to allow any examination on that.

Mr. Keenan: You give us an exception on that, your Honor?

The Court: Yes.

Mr. Keenan: And upon that entire line of testimony that we so offer.

The Court: Yes.

Mr. Keenan: I note an exception.

(The proceedings were resumed within the hearing of the jury as follows:)

Mr. Keenan: We don't have any testimony of Mr. Wallace for the time being.

The Court: All right. Call your next witness.

(Witness excused.)" (R. pp. 813 to 817, incl., fols. 2437 to 2450, incl.)

33. The Court erred in refusing to compel the production of the defendant Radovich's statement of September 6, 1944 for examination by the defendants Bayer, to which refusal the defendants Bayer duly and legally excepted (R. p. 902, fol. 2705) as follows:

"Mr. Keenan: Now, I would like to read, your Honor—I understand the United States Attorney

wants to examine some papers and then cross-examine this witness later on, is that correct?

Mr. McGohey: Perhaps.

The Court: Maybe.

Mr. McGohey: I say perhaps, your Honor.

Mr. Keenan: All right, I am very glad to go forward and read this, if I may be permitted to.

The Court: Yes, very well.

Mr. Cohen: Pardon me for batting for Mr. Keenan.

(Mr. Cohen reads Defendants' Exhibit G to the jury.)

The Court: Have you further testimony, Mr. Keenan?

4238

Mr. Keenan: I call upon the United States Attorney to produce a statement made by Walter Radovich—

Mr. Robb: If the Court please, may we approach the bench for this?

The Court: All right, come up.

(The following took place at the bench:)

The Court: What have you to say about this document?

Mr. McGohey: Let me see what the first item is? I do not think they are entitled to that, your Honor. I have not offered that in evidence. I have offered a statement of March. It has no relation at all with the statement of September. It has been referred to, it is true, but it has no relationship to it at all. I do not know of any ground that the defendants are 4239 entitled to this statement.

Mr. Keenan: How do I know that Major Radovich is not going to take the witness stand?

Mr. McGohey: There is not anything shown here that will indicate that the statement of September 6th is different or contradicts in any way the statement of March.

The Court: What is your position, Mr. Robb?

Mr. Robb: If the Court please, our position is that we cannot see how anything Major Radovich may or may not have told some third person has any bearing upon Mr. Keenan's clients' guilt or innocence?

Mr. McGohey: Your Honor, you have admitted the March statement——

The Court: Do you object?

Mr. Robb: Yes, sir.

Mr. McGohey: The March statement was admitted under a very careful instruction to the jury which your Honor said you would repeat in your charge, that it was to be considered only as against the de-
4241 fendant Radovich. There is no suggestion made here that there is any contradiction. As a matter of fact, insofar as there is any testimony of the question of the relationship of the September statement to the March statement, it is this: that they are identical.

The Court: The ruling of the Court is that the Court will not require the production of the paper.

Mr. Keenan: Will the record show an objection upon the part of the United States Attorney to produce them?

The Court: The objection on the part of the United States Attorney and an objection on the part of the defendant Radovich.

Mr. Keenan: We believe that we are entitled to produce in the defense of Samuel Bayer and Elias
4242 Bayer any relevant testimony that in any manner within the principle of reasonable proximity is conducive to their innocence, and that we believe that the statements contained—that if we want to, we have the right to introduce them as made by Radovich, just as much as the Government has; that if it would in any manner show the innocence of the defendants that these statements against interests do not belong alone to the Government, it belongs to any party in the lawsuit.

We believe that we are being deprived of our right to produce before this Court and jury relative and pertinent testimony that might even be determinative of the entire issue in the prosecution, and that a failure to do so prevents us from in turn presenting other evidence upon which such information would be based.

Mr. McGohey: I have this to say: I will ask that your Honor take the September statement and read it. I think may be your Honor has already read it.

The Court: I have, but I am not very familiar with it.

Mr. McGohey: I will submit the statement to the 4244
Court so that the Court may examine it to determine whether or not there is any contradiction between the statements, and if there be no contradiction, then to seal it as an exhibit in this trial so that it can be available for the appellate court on review if there be an appeal.

Mr. Robb: If the Court please, might I say here that we called upon Mr. McGohey at the time we were cross-examining the agent, Flynn, to produce the September statement, and Mr. McGohey refused to do it. I do not think this is a time to put this statement under seal and have it submitted to your Honor for some rather strange proceeding.

Mr. McGohey: It is not a strange proceeding.

Mr. Ansell: I furthermore think that it would lead, 4245
if I understand what is in the motion, to a trial of collateral matters, and prolong this trial and actually elucidate nothing.

Mr. Robb: If the Court please, our position is simply that we called upon Mr. McGohey at the time we thought was the proper time to produce that statement, and you refused to do it. Now, I do not think

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Mr. Keenan should be given that statement, perhaps to be used against our client. I do not know why he wants it. By the same token, I do not think it should be made available to your Honor under seal. We thought we were entitled to have it at the time we asked for it. Mr. McGohey did not give it to us. That was for a specific purpose.

Mr. McGohey: For what specific purpose?

Mr. Ansell: Even so, you are going to get into a long and almost interminable trial of collateral matters, and it will serve no useful purpose.

Mr. McGohey: I do not think it will take your

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Honor too long to read that statement.

The Court: I am going to take this situation under advisement and let us go ahead with something else.

Mr. Keenan: I would want to have this decided before I decide what else I want to go ahead with.

The Court: What about those other statements?

Mr. McGohey: There is a statement there from some man named Smith, I believe. I never heard of that statement before and I never saw it, and I have no copy of it.

The Court: What about the other one?

Mr. McGohey: The other one I have, or I have what purports to be a copy of that. I never saw the original. I cannot for the life of me see what relevance that would have, your Honor, here. It is not

4248

mine. I have a carbon copy. I think we have a carbon copy of it, but the other one I never saw, the Smith statement.

Mr. Wallace, you never saw that either, did you?

Mr. Wallace: No.

The Court: You say you have a copy of this second statement?

Mr. McGohey: Yes, sir, I have. On the same theory, there is no objection to either one of these.

except, your Honor, that I do not know the purpose of them. I cannot understand it. If it is claimed that they were going to contradict the statements that were put in, I am going to submit them to your Honor under the rule of the Krulewitch case and the Cohen case in this circuit.

The Court: I think I will let the jury go until 2 o'clock. The jury is excused until 2 o'clock.

(Jury retired from the courtroom.)

The Court: Let me have the statement referred to in paragraph 1, and anything you have pertaining to the statement referred to in paragraph 2. I understood you to say you had a copy of that? 4250

Mr. McGohey: Yes. May I get that, so that the record will show what I am giving to the Court?

The Court: Yes.

Mr. McGohey: I do not believe, your Honor, that there is any rule that anybody can just demand anything that they may think is in the possession of the Government unless there is some showing made or some reason——

The Court: They can demand all right.

Mr. McGohey: I mean, properly demand and get.

The Court: I did not say get. I say he can demand. This one is in evidence, is it not?

Mr. McGohey: This one is Exhibit 25.

The Court: Make yourselves at ease for a few moments. 4251

Mr. Keenan: May the record show that your Honor has been given the September statement, the March statement which is in evidence, and a typewritten paper which purports to be a statement of Major Radovich given to Colonel Snyder on the 14th of August, 1944.

The Court: All right.

4252

Gentlemen of counsel, I have not re-read the statement of March 15th which was introduced in evidence, because I had previously read it and heard it read in evidence and am familiar with its contents. I had already previously read the statement of September 6th and I have re-read that at this time, and I have read fully the carbon copy of the statement of the defendant Radovich to Colonel Snyder.

I am going to overrule the motion made of me that the United States Attorney be required to produce the documents which are not introduced, principally upon the basis of the fact that I have carefully ex-

4253

amined them, and I find no conflict in any matter of materiality in the two documents not admitted and the document which has been admitted, therefore I shall not require them to be produced.

I do think that the papers should be made a matter of record in the event that there should be a review of my decision.

Mr. McGohey: I suggest in that connection, your Honor, that you order them sealed and the sealed envelope marked as an exhibit. That practice has been followed in other cases in this Court.

The Court: All right, I will follow that suggestion and direct——

Mr. Ansell: That means they will not be spread upon the record?

4254

Mr. McGohey: No. They will be sealed and marked "Court's Exhibits".

The Court: They shall not go into the record in this case at all, but I do think it only fair that they be made available should anyone desire to review the ruling which has been made, which could not intelligently be made unless the papers were available.

Mr. McGohey: Do I understand your Honor to mean that they are to be made available to counsel for the defendants?

The Court: No, sir.

Mr. McGohey: Made available for the Court in the event of appeal?

The Court: Exactly.

Mr. McGohey: And may they be marked Court's Exhibits A, B and C?

The Court: They may be, but we haven't got a clerk here now to do it.

Mr. Ansell: Mark them exhibits in this case A, B and C.

Mr. McGohey: Mark them Court's Exhibits A, B and C and sealed.

The Court: This (indicating) was in. 4256

Mr. McGohey: I mean the two statements, A and B, Court's Exhibits A and B; and that they will then be sealed.

The Court: And available——

Mr. Keenan: The Court will grant us an exception to his Honor's ruling on that?

The Court: Yes, sir" (R. pp. 896 to 902, incl., fols. 2687 to 2795, incl.).

34. The Court erred in refusing to receive in evidence, on behalf of the defendants Bayer, a certain portion of HR 7528, passed by the United States Senate on October 24, 1942, to which the defendants Bayer duly and legally excepted (R. p. 903, fol. 2707) as follows:

4257

"Mr. Keenan: Can we say this, that the defendants Bayer offer that part of HR 7528, passed by the United States Senate on October 24, 1942, by a vote of 58 to 5, which was as follows:

'Section 7: No person under twenty years of age inducted under this Act shall be placed in actual combat duty beyond the territorial boundaries of

the Continental United States until after he has had at least one year's military training following his induction.'

From the Congressional Record of the 24th day of October, 1942, on page 8934.

This tender is not objected to by the United States Attorney because of the failure to present adequate formal proof, but is objected to on the ground of its claimed irrelevancy.

Mr. McGohey: The Government objects to it on the ground that it is irrelevant and immaterial.

The Court: Which objection the Court sustains.

4259 Mr. Keenan: And an exception is noted.

Mr. McGohey: May the record also show, your Honor, that this resoultion which was passed by the Senate never became law?

Mr. Keenan: It is so conceded.

The Court: Very well" (R. pp. 902, 903, fols. 2705 to 2708, incl.).

35. The Court erred in receiving in evidence Government's Exhibits 23 and 23(a), to which the defendants Bayer duly and legally objected (R. pp. 520, 521, fols. 1559, 1561) as follows:

"Mr. Wallace: I offer in evidence Government's Exhibits 23 and 23-A.

4260 Mr. Robb: We object, if your Honor please.

The Court: Is there objection, gentlemen?

Mr. Robb: Yes, sir, we object to it.

The Court: Let me see them, please, I will overrule the objection and admit the exhibits.

Mr. Robb: Exception, if your Honor please.

The Court: Very well.

Mr. Robb: Would your Honor like me to make a statement as to the grounds of my objection?

The Court: If you wish to.

Mr. Robb: There is no connection shown between that check and this case.

The Court: I assumed that would be your ground, but I will overrule the objection.

You wish to withdraw the original and leave the copy?

Mr. Wallace: That is correct, your Honor.

The Court: Well, in addition to that, I think it may be better to keep both in the court file for the present, and if you wish to do that later you may take it up with me.

Mr. Wallace: All right, your Honor. 4262

Mr. Keenan: Well, I think it can go back. We may want to ask some questions about it, but I think there can be a substitution.

The Court: I would prefer to have the original remain in the case for the present, and if you wish to withdraw it later I will entertain a motion. Have you any further questions for the Government?

Mr. Wallace: Yes, I have, your Honor. I wanted to read the exhibit to the jury at this time.

(Government's Exhibits 23 and 23-A for Identification received in evidence.)

Mr. Keenan: I object to it on the additional grounds, your Honor, that it can't be, if I understand the testimony correctly, can't be the check that was described 4263
by Captain Pepper, who was a Government witness, because if my memory serves me correctly he said he tore that check up.

The Court: The witness has testified it is not the original but it is the bank's duplicate and that the original has never been presented to the bank. That is what this gentleman has testified to, so the objection is overruled" (R. pp. 520, 521, fols. 1558 to 1562, incl.).

4264 *Assignment of Errors by Defendants Bayer.*

36. The Court erred in receiving in evidence Government's Exhibit 24, to which the defendants Bayer duly and legally objected and excepted (R. pp. 525, 526, 527, fols. 1575, 1578, 1581) as follows:

"Mr. Keenan: We object to it on behalf of the Bayers. Obviously, in the first place, the mere fact that if otherwise admissible it would be admitted in the manner and fashion approved under the statute quoted, it does not cure the vice of inadmissibility on other grounds, and it is obvious from the date that whatever happened the Radovich letter happened after he was under arrest, as we think the evidence
4265 has and will show, and that it took place not in furtherance of any conspiracy on its own face; and, secondly, after any alleged conspiracy had terminated.

The Court: What has the Government to say as to the last objection?

Mr. Wallace: On the question as to whether the alleged conspiracy has ended, it is the Government's position that it had not ended. As far as Radovich's participation in the conspiracy is concerned, the Government does not claim that this particular act was in furtherance of the conspiracy and is therefore not admissible against all of the defendants, but only as against the defendant Radovich.

The Court: Objection overruled. And the letter
4266 will be admitted as to Radovich, and I will so inform the jury.

Mr. Robb: Might I say one further thing, if your Honor please?

The Court: Yes.

Mr. Robb: In connection with the second ground of my objection, which was that we should have an opportunity to show the circumstances which induced or produced this letter by Radovich, we offer to prove,

if we are permitted, that he was induced to write this letter by promises and coercion held out and imposed upon him by the investigating officers at Mitchel Field, that that is why he wrote this letter which is now being offered in evidence.

Mr. Keenan: I want to add our objection. While I understand the Court will instruct the jury that it is not binding upon the defendant Bayer, nevertheless I think if it is improperly admitted even against Radovich, still it is to the Bayers' disadvantage, and I will add that to my objection.

The Court: What have you to say about the inducement and promises? 4268

Mr. McGohey: There is nothing in that letter to indicate that it was made on any promises.

Mr. Wallace: The letter itself appears to be in the handwriting of the defendant, the entire letter.

Mr. Keenan: Nobody has so stated.

Mr. Wallace: That is for the jury to determine. The jury has before them Exhibit 1, which contains the signature of Walter Radovich. The jury is in a position to determine whether or not that is the signature and writing of Walter Radovich. They ultimately must decide that fact.

Mr. Ansell: We want to press the objection, your Honor, that inasmuch as this serves the purpose of a confession, that this man Radovich was being subjected to investigation, that he was being promised 4269 that he would be let out if he did certain things, that he had been there unlawfully for a certain period of time, and we think that all of those circumstances, that question of inducement and coercion ought to be considered before it is admitted.

Mr. Wallace: The letter is in no sense a confession. It is the Government's position, your Honor—

The Court: I will admit the letter.

Mr. Robb: May we have an exception?

The Court: You may have.

(The following proceedings took place in open court:)

The Court: The objections are overruled and the letter is admitted. Exceptions noted.

(Marked Government's Exhibit 24.)" (R. pp. 525 to 527, incl., fols. 1575 to 1581, incl.)

37. The Court erred in ruling that there was no inducement offered as to render the statements of the defendants
4271 Bayer inadmissible, to which the defendants Bayer duly and legally excepted (fols. 1046, 1047).

38. The Court erred in ruling that it would permit the witness Gerald J. Flynn to testify as to statements made by the defendants Bayer in his presence, to which the defendants Bayer duly and legally excepted (fols. 1073, 1074, 1240, 1241).

39. The Court erred in sealing two statements made by the defendant Radovich, referred to as Court's Exhibits A and B, to which the defendants Bayer duly and legally excepted (R. p. 902, fol. 2705).

40. The Court erred in refusing the following request
4272 to charge:

"In this connection, I charge you, as a matter of law, that fraud is never presumed. On the contrary, the presumption in law is that parties, in their business relations, are prompted by honest motives, and this presumption is so well established in law that before you are justified in abandoning that theory of the conduct of the defendants in this case, you must

be satisfied, beyond a reasonable doubt, and not by mere conjecture or suspicion, that the defendants intentionally, wilfully and knowingly embarked upon a course of dealings with fraudulent purpose and intent" (R. p. 1088, fol. 3262)

to which refusal to charge, as requested, the defendants duly and legally excepted (R. p. 1144, fols. 3431, 3432).

41. The Court erred in refusing the following request to charge:

"While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths and as a matter of law, that each of you has the duty of arriving at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants, for the purpose of preventing a disagreement or arriving at a compromise" (R. p. 191, fols. 3272, 3273) 4274

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1144, fol. 3432).

42. The Court erred in refusing the following request to charge: 4275

"I charge you that in the opening statement in setting forth the Government's theory of the prosecution, the United States Attorney stated that evidence would be presented to you, that arrangements were made through the intercession of the Bayers with Major Radovich and other of the officers to have these two boys, Martin Bayer and Melvin Usdan, transferred from the Headquarters of the Base to the Head-

4276 quarters of the First Fighter Command, the Headquarters Squadron of which Major Radovich was the Commander; there is no evidence in the case to prove this statement made by the United States Attorney and, therefore, you will conclude that the Government has failed to prove that part of its case" (R. p. 1092, fols. 3275, 3276)

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1145, fol. 3433).

43. The Court erred in refusing the following request to charge:

4277 "I instruct you that the defendants are entitled to have this Court charge to you their theory of defense against the charges set forth in this indictment and I, therefore, charge you that the defendants Samuel Bayer and Elias Bayer assert as their defense that they at no time attempted to induce any officer of the United States to do any act in violation of the said officers' obligations and duties to the United States and that any gratuities other than sums of money were extended to any officers for no motive and without in any manner being a part of an agreement or plan or combination or conspiracy to induce any officer to in any manner be unfaithful to his obligations to the United States Government and that any payments
4278 of money made by him to the defendant Radovich were made involuntarily through coercion, expressed or implied, and I charge you that in the event that you do not find to the contrary, beyond a reasonable doubt, your verdict must be in favor of Samuel Bayer and Elias Bayer" (R. p. 1093, fols. 3277, 3278).

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3436, 3437).

44. The Court erred in refusing the following request to charge:

"I charge you that the uncontradicted evidence in this case, from government witnesses, establishes the fact that regulations require that the first three months of a man's service be devoted entirely to basic training. I charge you that the undisputed evidence in this case shows that neither of the two enlisted men, Bayer or Usdan, received more than two weeks' basic training and a failure to provide such basic training for the said enlisted men would constitute a violation of the Army regulations and, therefore, any officer who for any other purpose, prevents the shipment overseas of enlisted men, including Martin Bayer and Melvin Usdan, who did not receive the required amount of basic training, would not be found by you on such account to be unfaithful in the performance of his duties as such officer, nor would any agreement or plan or conspiracy to prevent such individuals from being shipped overseas or being retained in camp until such basic training had been received, as provided for by regulation, would not constitute defrauding the United States Government and would, therefore, not constitute the basis of an offense against the United States. (See testimony of Capt. Pepper, page 114, October, 4, 1945 and testimony of Melvin Usdan and testimony of Colonel Boebel.)" (R. pp. 1093, 1094, fols. 3278 to 3281, incl.), 4280 4281

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1145, fol. 3434).

45. The Court erred in refusing the following request to charge:

"I charge you that the theory of the defense is that the enlisted men, Martin Bayer and Melvin Usdan,

were not properly or adequately trained to justify their being shipped overseas. I charge you that the defense theory is that the two enlisted men were being shippd to a commando unit for which they were not properly trained and I charge you that the undisputed evidence in this case shows that to be a fact, and, therefore, any effort on the part of Samuel Bayer to prevent such action against his son and nephew, even by the payment of money, would not constitute defrauding the United States" (R. p. 1094, fol. 3281),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. pp. 1145, 1146, fols.
4283 3435, 3436).

46. The Court erred in refusing the following request to charge:

"I charge you that the evidence shows that the commando unit was a voluntary organization and that any payment of any money for the purpose of preventing the transfer of either enlisted man or both to said organization to which they had not consented to be transferred or any agreement to prevent such transfer without their consent, would not be in fraud of the United States and, therefore, if said transfers were made without the consent of said enlisted men or either of them and I charge you that all the evi-
4281 dence herein shows that they did not so consent, I therefore charge you that you cannot find that the government was defrauded by reason of their being transferred from Westover Field and in that respect you must find the defendants Bayer not guilty" (R. p. 1094, 1095, fols. 3281 to 3283, incl.),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. pp. 1145, 1146, fols. 3434, 3435).

47. The Court erred in refusing the following request to charge:

"You are instructed that the Government cannot be defrauded merely by transferring one soldier from one company or field to another at the request of any individual including such soldier's parents. If you find that if such transfer, if carried out, would not constitute a fraud against the United States Government, then you are instructed that any such agreement or concerted plan would not be in violation of the laws of the United States and your verdict herein must be one of not guilty for all of the defendants. If such agreement consisted of an understanding that 4286
the soldiers, Martin Bayer and Melvin Usdan, would receive the same treatment and consideration as any other soldier, in such event you would not find that the United States was defrauded and your verdict would therefore be not guilty as to all defendants.

You are instructed that before you can find the defendants or any of them guilty as charged in this indictment, you must find beyond a reasonable doubt that there was a conspiracy to defraud the United States and I further charge you that that of which the United States is intended in said agreement of conspiracy to be deprived of must be something of substance or value and cannot consist of some vague or fanciful or insignificant matter of no practical con- 4287
sideration and trivial in nature" (R. pp. 1103, 1104, fols. 3309, 3310, 3311),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3436, 3437).

4288 *Assignment of Errors by Defendants Bayer.*

48. The Court erred in refusing the following request to charge:

> "You are instructed that since this is a charge of conspiracy, the Government must prove to you beyond a reasonable doubt first, what the agreement of conspiracy was; secondly, by whom it was entered into; and third, in what manner and at what time; and if at the end of your deliberation, you are confused as to the claim of the Government in any of these respects to the extent that it is not clear to you beyond a reasonable doubt what the agreement the Government charges consists of, or by whom it was entered into
4289 or when, then, and in such event, it will be your duty to bring in a verdict of not guilty for all three defendants" (R. p. 1098, fol. 3294),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

49. The Court erred in refusing the following request to charge:

> "You are instructed that for you to convict the defendants, it is not sufficient for you to find even beyond a reasonable doubt that some agreement between the defendants did take place or that some conspiracy was entered into but that you must find that
4290 the conspiracy alleged by the Government in the indictment to have occurred and no other, and in the event that you are not liable to so find by clear and convincing proof, leaving you free from reasonable doubt on this subject, you must acquit all defendants" (R. p. 1099, fol. 3295),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

50. The Court erred in refusing the following request to charge:

> "You are instructed that the Government charges a conspiracy on the part of three persons, Samuel Bayer, Elias Bayer and Walter V. Radovich, and unless you do find that there was a conspiracy entered into between all three defendants named herein to defraud the United States Government in the manner and fashion alleged in the indictment, then you must bring in a verdict of acquittal for all three defendants" (R. p. 1099, fol. 3295),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437). 4292

51. The Court erred in refusing the following request to charge:

> "You are instructed that this indictment does not describe a devisable offense and that unless you find all three defendants to have engaged in this conspiracy and in the identical conspiracy described in the indictment, you must acquit all defendants" (R. p. 1099, fol. 3296),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

52. The Court erred in refusing the following request 4293
to charge:

> "I charge you that said statements contain many questions and answers which are totally immaterial to the issues in this prosecution; that there is no evidence against either of the Bayers that there was any misconduct on their part with reference to any uniforms ordered or purchased by the defendant Radovich from Mervin Levine; that there is no evidence

that either the Plymouth Thread and Yarn Company or Samuel Bayer or Elias Bayer paid any money therefor and I, therefore, instruct you to disregard this transaction entirely; that there is no evidence that the defendant Elias Bayer purchased anything for Radovich; that there is no evidence of any violation of the law on the part of Samuel Bayer or Elias Bayer in reference to any conduct with any person at any night club or wrongdoing in accompanying any officers named throughout this trial to any night club.

I charge you that there is no evidence that Elias Bayer had any knowledge or any participation in the
4295 alteration of any records.

I further charge you that you can disregard anything in the record concerning a Colonel Clarke or Colonel Dykemeyers or Lieutenant John Gimbel, Jr., or Ed. A. Martin or Charles Deninberg, all of whose names were used in questions propounded to Elias Bayer by Assistant United States Attorney Wallace without any evidence being introduced in this hearing to in any manner connect or concern any such individuals with any relevant matter in these proceedings and you are, therefore, instructed to disregard such questions and answers and the names of such individuals.

I charge you that you will likewise disregard any
4296 questions and answers of the Assistant United States Attorney Wallace concernnig Sergeant Gross, Colonel Johnson or Purden for like reasons" (R. pp. 1100, 1101, fols. 3299 to 3302, incl.),

to which refusal to charge as requested the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3437 to 3439, incl.).

53. The Court erred in refusing the following request to charge:

> "You are instructed that the Government attempted to introduce evidence through questions asked and answered by Elias Bayer about his purchasing insurance. I instruct you that the Government has offered no proof of any kind whatsoever in respect thereto, and by reason of such failure you will disregard any such questions or any such subject matter in this proceeding.
>
> You are further instructed that Elias Bayer was asked about various individuals including Feldman and Greenfield and that the Government has offered 4298 no proof of any matters concerned with such names and, therefore, you will entirely disregard any such questions and answers" (R. p. 1101, fols. 3301, 3302),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fols. 3437 to 3439).

54. The Court erred in refusing the following request to charge:

> "You are instructed that the Government has the burden of proof beyond a reasonable doubt of showing what the conspiracy consisted of and when it was entered into. Such conspiracies need not be entered into formally or in writing or by the employment of 4299 any particular phraseology but this does not relieve the Government from its obligation of proving to you clearly and unequivocally what the agreement was and between whom and by whom it was entered into. This obligation is the same as any other that the Government assumes in any criminal prosecution" (R. pp. 1104, 1105, fols. 3312, 3313),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1146, fol. 3437).

4300 *Assignment of Errors by Defendants Bayer.*

55. The Court erred in refusing the following request to charge:

> "I charge you that there is no evidence in this case that the transfers of Martin Bayer and Melvin Usdan from Westover Field to the Commando Unit at Goldsboro was effected in any manner other than that described by Samuel Bayer and Elias Bayer as far as said defendants Bayers are concerned and in considering the Government's charges against the said defendants Samuel and Elias Bayer in regard to such alleged conspiracy, you are obliged to accept their statements as true in this regard, in which event you
4301 will find that Samuel Bayer was the victim of extortion and that his action in regard to the payment of $5,000 to Radovich would not justify your returning a verdict of guilty against him" (R. p. 1108, fols. 3322, 3323),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3442).

56. The Court erred in refusing the following request to charge:

> "You are instructed that no statement made by the defendant Radovich can in any manner or fashion be considered by you in arriving at a conclusion of guilt
4302 on the part of Samuel Bayer and if you are not able to carefully and clearly beyond a reasonable doubt separate in your mind such testimony from any other testimony in this case so that your mind remains unconfused on this subject, you must return a verdict of not guilty as to the defendant Samuel Bayer" (R. p. 1101),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3443).

57. The Court erred in refusing the following request to charge:

"I charge you that you have had read to you Exhibits 19 and 22, inclusive, containing a long statement purported to have been made by Elias Bayer in answer to questions propounded by Assistant United States Attorney Wallace. I charge you that no statement therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Samuel Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Samuel Bayer from those contained in the said statement so that your 4304
mind does not remain free from reasonable doubt as to from what source evidence considered by you as to the guilt or innocence of Samuel Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to do so that you are in no manner or fashion influenced in your conclusion by said statements which I have charged you already are not binding upon Samuel Bayer, then and in that event you must bring in a verdict of not guilty for Samuel Bayer" (R. pp. 1101, 1102),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fols. 3303, 3304, 3305). 4305

58. The Court erred in refusing the following request to charge:

"I charge you that you have had read to you Exhibits 8 to 18, inclusive, containing a long statement purported to have been made by Samuel Bayer in answer to questions propounded by Assistant United States Attorney Wallace. I charge you that no state-

ment therein contained can be in any manner or fashion considered by you in determining the guilt or innocence of Elias Bayer and in the event that you are unable to separate in your own mind matters of proof by way of admissions of Elias Bayer from those contained in the said statement so that your mind does not remain free from reasonable doubt as to from which source evidence considered by you as to the guilt or innocence of Elias Bayer emanated, in such event you will disregard it utterly in consideration of such facts and unless you are able to so do so that you are in no manner or fashion influenced
4307 in your conclusion by said statements which I have charged you already are not binding upon Elias Bayer, then and in that event you must bring in a verdict of not guilty for Elias Bayer" (R. p. 1102, fols. 3205, 3206),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3443).

59. The Court erred in refusing the following request to charge:

"You are instructed that it is particularly important in a case of this nature to keep clear in your mind who made the alleged admissions contended for by the Government. You have had read to you three
4308 statements. None of these statements may in any manner or fashion influence you in determining the guilt of any of the three defendants other than the single defendant whom you find beyond a reasonable doubt to have made the statement you are considering, and it is particularly important that you keep free from confusion on this vital matter and if upon a careful and matured consideration of all of the evidence you are not free from a reasonable doubt

that there has been confusion in your mind as to which of the three defendants made the admission concerning the fact under consideration, then and in such event I charge you that you will have such a doubt as will require you to return a verdict of not guilty as to such defendant" (R. p. 1103, fols. 3307, 3308),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3443).

60. The Court erred in refusing to include the following in the request to charge:

"• • • If the jury finds that the facts establish that the defendants Bayer made various gifts to the defendant Radovich for the purpose of obtaining his conscientious, faithful, disinterested and unbiased service and judgment in determining whether to transfer Martin Bayer and Melvin Usdan, both soldiers in the United States Army, from units stationed in continental United States to units about to be sent out of the continental United States, then the defendants Bayer must be acquitted. 4310

If the jury finds that the defendants made various gifts to the defendant Radovich to have the said defendant Radovich perform his lawful duty, then the defendants Bayer must be acquitted.

If you find from the facts that the defendants Bayer made the gifts without the intent to defraud the United States but to obtain the disinterested and unbiased judgment of officers of the United States Army free from corruption, partiality, improper influence, bias, dishonesty and fraud, then you must acquit the defendants Bayer" (R. pp. 1109, 1110). 4311

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fols. 3443, 3444).

4312 *Assignment of Errors by Defendants Bayer.*

61. The Court erred in refusing to include the following in the requests to charge:

> "* * * The fact that the defendants Bayer cannot call or compel the defendant Radovich to testify is a circumstance that the jury may take into consideration in weighing the evidence offered on behalf of said defendants Bayer" (R. p. 1110, fol. 3329),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1148, fol. 3444).

62. The Court erred in refusing the following request to charge:

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> "Mr. Keenan: 'The greatest danger to justice from a jury is through the confusion of the real issues in the case. This is peculiarly true when the times or circumstances or character of crime are such as to make jurymen lose sight of the questions of fact actually involved. It is natural in time of war, when patriotic sentiment is high, that it is particularly difficult to secure a fair trial for men accused of crimes connected with the war. At such times the task of the Court becomes especially difficult and requires great care to prevent miscarriage of justice. These are practical considerations which must be constantly borne in mind or the verdicts of juries in such
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> 4314
>
> cases will mistakenly become expressions of their hatred for unpatriotic acts in general instead of their careful judgment on the facts shown by the evidence in a particular case. Patriotism must not become even innocently a cloak for injustice. The right of an accused in the Courts of this nation to a fair trial must not vary with the character of the crime. The variation permitted is in the punishment but that comes only after a fair trial'" (quoted from Wolf v.

United States (C. C. A., 8th Cir.), 259 Fed. Rep. 388, 394) (R. pp. 1151, 1152, fols. 3452, 3453, 3454),

to which refusal to charge, as requested, the defendants Bayer duly and legally excepted (R. p. 1152, fols. 3454, 3455).

63. The Court erred in instructing the jury as follows:

"Certain witnesses have testified that the defendants Bayer bore a good reputation in business and in their home communities. Also, you have heard certain citations awarded to the defendant Radovich which you may, if you wish, consider as evidence of good character. 4316

In your consideration of the cases of each defendant you may consider this testimony and attach to it such weight as you think proper. You should consider such evidence along with all the other evidence in the case, and if considered along with all the other facts and circumstances of the case such evidence should raise in your minds a reasonable doubt of the guilt of any defendant, you should find such defendant not guilty. However, the fact that a person bears a good reputation is no justification for the commission of crime, and if you are satisfied beyond a reasonable doubt that any defendant is guilty, then the fact that such defendant bears a good reputation or has been awarded citations would be no reason or 4317 excuse whatever for a finding of not guilty as to such defendant" (R. p. 1132, fols. 3395, 3396, 3397),

to which portion of the Court's charge the defendants Bayer duly and legally excepted (R. p. 1147, fols. 3439, 3440).

4318 *Assignment of Errors by Defendants Bayer.*

64. The Court erred in instructing the jury as follows:

"• • • • These statements, considered alone, do not constitute sufficient evidence of the existence of a conspiracy, but if you are satisfied beyond a reasonable doubt from the other evidence in the case that a conspiracy between any two of the defendants did exist, then you may consider the statement of each defendant in your consideration of whether or not that defendant was a party to the conspiracy" (R. p. 1140, fols. 3419, 3420),

to which portion of the Court's charge the defendants
4319 Bayer duly and legally excepted (R. p. 1150, fol. 3448).

65. The Court erred in having re-read to the jury its charge relating to the elements of conspiracy without re-reading the balance of the charge (R. pp. 1156 to 1162, incl.), to which re-reading of said portion of the charge the defendants Bayer duly and legally excepted (R. p. 1165).

66. The Court erred in refusing to state to the jury that the records with regard to the telephone call of November 24, 1943 had been in the Government's possession, to which the defendants Bayer duly and legally excepted (R. p. 1128, fol. 3384) as follows:

4320 "Mr. Keenan: We claim in our defense that we got a telephone call from Major Radovich from Washington in the morning, and that is shown, and also it is some evidence in my opinion of the unlikelihood of Radovich being in Goldsboro that day. It would be conclusive. But I also would like to have the Government produce its record as to the movements of Major Radovich on that day because I feel certain that they do have that information.

Mr. Wallace: We have no such record.

The Court: The Government has stated that it has no such record.

Now, Mr. Keenan, do you wish me to state to the jury what I said I would state to them?

Mr. Keenan: Yes, I do, and that you would state that you are making that at our request.

The Court: All right, sir.

Mr. Robb: Do I understand that you are going to tell the jury that the records don't show who called, either way?

The Court: Yes, sir. You only wish me to mention the collect call?

4322

Mr. Keenan: Yes.

Mr. McGohey: I think both calls ought to be stated.

Mr. Robb: If your Honor does not mention them both, we object.

Mr. Keenan: But it is not probative of any of the issues in this case.

Mr. McGohey: I think it is.

Mr. Keenan: I don't know, but there is no claim made for it.

Mr. McGohey: You claim——

Mr. Keenan: There is no claim that the call was or was not made or that anything—the Government makes no claim with reference to any call to Washington on that day, but we do make a claim that there was a call from Washington to us and we think it would be confusing to the jury to put anything other than the collect call that we received.

4323

Mr. McGohey: I think that we ought to have both calls, and I think that the Court should state that those two calls appear on a bill for the period stated, totalling one hundred seventy some odd dollars for out-of-town calls to various places.

The Court: What would be the materiality of the amount of the bill?

Mr. Keenan: I think, your Honor, that when that is read it ought to be stated that the Government has claimed that no such call took place.

Mr. McGohey: Oh, no.

Mr. Wallace: We never made any such claim.

Mr. Keenan: That is the——

Mr. McGohey: The Government never made any such claim and there is nothing in the record to substantiate that statement.

Mr. Ansell: I possibly do not understand the relevancy of this statement, but, of course, if any statement of fact is to go into the record, and if it is a circumstance that might operate to the disadvantage of Major Radovich, why, of course, we become interested at that moment. I probably have not been able to follow——

4325

Mr. Keenan: Might it be stated that these records have been in the possession of the Government by subpoena for more than a year ago, and not in the possession of the defendants Bayer or the Plymouth Thread Company?

The Court: In the absence of any showing that they have been denied to you, I don't think that would be material. It might create an inference——

Mr. Keenan: They had our records, they subpoenaed them, kept them, and never returned them.

4326

The Court: I am not going into that.

Mr. Keenan: I want to except to the failure of the Court to mention that" (R. pp. 1126 to 1128, incl., fols. 3378 to 3384, incl.).

67. The Trial Court erred in refusing permission to the defendants Bayer to place in evidence the slip of the telephone company showing that a "collect" call was made

by Radovich from Arlington, Virginia, to the office of defendants Bayer at Chelsea 3-2872 in New York City on November 24, 1943, and further in denying the motion of the defendants Bayer for a new trial after refusing to receive the slip in evidence or the withdrawal of a juror and for a mistrial, to all of which exception was duly taken (R. p. 1173, fol. 3519), this being the telephone slip which Mr. Cohen, associate counsel for defendants Bayer, produced and concerning which there was discussion with the Court and the District Attorney as follows:

"Mr. Cohen: Your Honor will recall that after the jury first was sent out by you, at the request of Mr. 4328
Keenan they were recalled and you spoke to them about the telephone calls, and you stated to them that while there was evidence that a telephone call was made to Washington and one came in from Washington, there was no evidence as to who made the call from Washington. Your Honor will recall that.

The Court: I recall saying that there was no evidence on the record.

Mr. Cohen: Yes. Now, since that time, of course, we were unable to get the evidence together because we did not know that Mr. McGohey was going to make a point of it on the trial, and he made it only in his summation, we have gotten the record of the telephone company, showing that the call from Washington to New York was made by Captain Radovich. 4329
And we ask for leave to put in that evidence in the light of Mr. McGohey's statement to the jury and in view, further, of the statement made by the jury to your Honor for further information concerning those dates. This is highly important and of great importance to the defendants here.

The Court: What is that you have in your hand?

Mr. Cohen: This is the telephone company slip which we only got after the matter was submitted to the jury. I think it is highly important in view of the statements made by the jury to your Honor.

The Court: Have you seen this, Mr. McGohey?

Mr. McGohey: No, I have not, your Honor.

Mr. Robb: We haven't either.

Mr. Ansell: Would your Honor hear us one moment, please?

The Court: Yes.

Mr. Ansell: We think the whole idea of putting evidence in the record by the method pursued this
4331 morning is irregular and prejudicial to the defendant Radovich, and we think to go further with it by means of stipulation between the United States and Mr. Keenan's clients would be highly prejudicial to Radovich and could not be done by stipulation, and would involve the opening up of that question and permitting us to cross-examine upon everything that is brought out. We don't believe, your Honor, that there should be an injection of facts into this record in any such way.

Mr. Cohen: Evidently, your Honor——

The Court: I want to hear from the Government first.

Mr. McGohey: Your Honor, may I see that? Have
4332 we got those telephone calls that were in here this morning?

The Court: I gave them back to Mr. Flynn or Mr. Wallace this morning.

Mr. McGohey: Because it is my recollection that there was an Arlington call, and that is what this appears to be as distinguished from Washington.

Mr. Cohen: Arlington is Washington.

4333

Mr. McGohey: We talked this morning about two calls, one from Washington and one to Washington.

The Court: That is right.

Mr. McGohey: Until I see the records, I don't know whether that is so or not.

The Court: I do recall very distinctly that the record which was produced this morning, that is, the telephone bill, referred to the two calls, New York to Washington and Washington to New York, a collect call from Washington, Col. parenthesis New York.

Mr. McGohey: Your Honor, but this is not Washington. This says on its face, Arlington, Virginia, and that undoubtedly is the way that would be reported on a telephone company bill. 4334

Mr. Cohen: No, it would not.

Mr. McGohey: Well, wait until we see, when the bill comes in. That is the first point. The second point, your Honor, is that I don't understand on this argument that they didn't have any time to get it. They had three weeks since this trial started and they certainly had the time since Miss Goertz testified about the dates to get it. And the evidence that Miss Goertz gave, and the argument that I made from that, your Honor, isn't going to be disproved by this or any part of it at all. All this is going to prove is that a telephone call was made from Washington. It is not going to prove that Radovich didn't make that telephone call from Goldsboro, and it is not going to prove that Radovich didn't on that day, the 24th, ask to have those orders made. It is not going to disprove that on the 25th the letter was sent from the Army Air Forces in Washington to Seymour Johnson Field to have the boys transferred out. It is entirely collateral, and certainly at this time, when the jury has 4335

been considering the case now since 11 o'clock, I certainly don't think there is any justification for opening the case to go into such a collateral matter, and I will oppose it.

Mr. Cohen: Evidently the matter is of great moment to the jurors, as your Honor could see from the question asked by Juror No. 6, and the matter—the whole thing was engendered by Mr. McGohey's argument in his summation before the jury.

Mr. McGohey: Based on the evidence, of course, your Honor.

Mr. Cohen: But you raised the point, on the question of doubt, as to whether or not this thing took 4337
place at all. There never was any question up to that time.

Mr. McGohey: That doesn't——

Mr. Cohen: Evidently it created a doubt in the minds of the jury.

Mr. McGohey: This evidence would not disprove it because all this evidence would show that he made a call from Arlington, Virginia, to New York, some time that day.

The Court: Gentlemen, I am not going to admit the evidence for a number of reasons. In the first place, there is no witness called to prove anything. In the second place, this memorandum refers to an Arlington call; a call about which I made a statement this morn- 4338
ing was a Washington call. I know that Arlington and Washington are near each other. Conceivably it may be the same call, but it is not conclusive.

Mr. Cohen: But——

The Court: Sir, I have ruled, and I am just explaining. But the most cogent reason in my mind is that the case has long since been closed. As Gen-

eral Ansell very aptly remarked, my procedure at the beginning of this morning was irregular, to say the least, and I am not going to make it more irregular by calling in the jury at twenty-five minutes to five, when they have been considering the case since approximately 11 o'clock, and made some statements by way of evidence to them, or permit the statement of counsel, or the handing to them of an unverified memorandum from the telephone company. In my opinion, to inject any evidence or bit of evidence at this time would unduly emphasize it and give other counsel the right to put in other evidence, and call for somebody to cross-examine, and I just am not going to permit 4340
that.

Mr. Cohen: May I with all due respect, then, besides taking my exception to your Honor's ruling, now make a motion for the withdrawal of a juror and for the declaration of a mistrial and for a new trial on this evidence which we have found since the close of the trial or submission to the jury, and which we were unable to obtain prior to the opening of this trial?

The Court: Very well. The motion will be overruled.

Mr. Cohen: Exception" (R. pp. 1170 to 1173, incl., fols. 3508 to 3519, incl.).

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68. The charge of the Court to the jury is argumentative and unfair and was biased in favor of the prosecution.

WHEREFORE, the defendants Samuel Bayer and Elias Bayer pray that the judgment of conviction and sentence herein be, in all respects, reversed, and that such other and

4342 *Assignment of Errors by Defendants Bayer.*

further relief be granted as may be deemed just and proper.

Respectfully submitted,

ARCHIBALD PALMER,
Attorney for Defendant Samuel Bayer.

MAX E. SANDERS,
Attorney for Defendant Elias Bayer.

CHARLES H. TUTTLE
and
4343 MAURICE I. WORMSER,
Of Counsel with Archibald Palmer
and Max E. Sanders.

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**Assignment of Errors by Defendant Walter V. Radovich.**

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

| | |
|---|---|
| THE UNITED STATES<br>v.<br>SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH. | Criminal No. 120-468 |

The defendant Walter V. Radovich alleges that the following errors have intervened to his prejudice and he presents the following assignment of errors: 4346

1. The District Court erred to the prejudice of the defendant in sustaining the demurrer interposed by the Government to the plea in bar filed by the defendant. The defendant duly excepted to such ruling of the Court as follows (at folio 254):

> (The Court): It is therefore my conclusion to sustain the Government's demurrer to the plea or former double jeopardy filed by defendant Radovich.
>
> Mr. Ansell: I assume we may have an exception to that, sir?
>
> The Court: Exception may be noted. 4347

2. The District Court erred to the prejudice of the defendant in overruling the motion of the defendant at the close of the Government's case, to direct a verdict in his favor by reason of his plea in bar. The defendant duly excepted to such ruling of the Court as follows (at folio 2081):

Mr. Ansell: If your Honor please, at his time at the close of the Government's case I wish to renew defendant Radovich's plea in bar on the ground if the prosecution has proved anything here, assuming that it has proved something, it is either a conspiracy to bribe or bribery. Without entering into any argument, because I could add nothing to that, I would say to your Honor that it is my view that such was the charge before the court martial of which this accused was convicted.

The Court: All right, sir. I would take it that the effect of what you said is a motion for a directed verdict by reason of the plea in bar.

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Mr. Ansell: If it is not technically that, your Honor, as to which I have some doubt, I will couple with it a motion for a directed verdict at this time. That, it seems to me, would be the proper procedure covering all the rights which I hope to save here.

The Court: I should think that would be the proper procedure.

Mr. Ansell: I thought myself, without knowing that I had better protect my rights here by making a formal renewal of the plea in bar, but I think your Honor's suggestion is quite correct and I couple with it, therefore, a motion for a directed verdict. Your Honor has heard all the evidence and he is familiar with this case and I do not care to consume time in the

4350

argument.

The Court: All right. The motion will be overruled and an exception may be noted.

3. The District Court erred to the prejudice of the defendant in overruling the motion of the defendant, made at the close of all of the evidence, to direct a verdict in his favor upon the ground that the evidence revealed that the defendant had been tried twice for the same offense.

The proceedings in this respect were as follows (at folio 2845):

Mr. Robb: The defendant Radovich renews the motions made at the close of the Government's case to dismiss the case and to direct a verdict in his favor upon the ground of the insufficiency of the evidence and upon the ground that the evidence now reveals that the defendant Radovich has been tried twice for the same offense.

* * * * * *

The Court: Motions of the defendant Radovich by counsel are overruled. 4352

4. The District Court erred to the prejudice of the defendant in admitting in evidence against the defendant, over his objection and exception, Government's Exhibit 25, a written statement allegedly made by the defendant to Special Agent Gerald J. Flynn. Government's Exhibit 25 was in the words and figures following (at folio 3916):

March 15th, 1945
New York, N. Y.

I, Major Walter V. Radovich, Air Corps Serial number 0-416891 make the following voluntary supplementary statement to Special Agents E. J. McCabe and G. J. Flynn who have identified themselves to me and whom I know to be Special Agents of the Federal Bureau of Investigation. I make this statement of my own volition. No threats of force, promise of favors or duress of any type has been offered to me to induce me to make this statement and I know that anything I say may be used in a criminal proceeding. I have been told that I do not have to make this statement unless I desire to do so. 4353

Some time about April, 1943 I was introduced to Elias Bayer by a Lt. Roser. The introduction took place in the apartment of Elias Bayer which was located on Central Park So. At this time I was (end of p. 1) Hq. Squadron Commander of the First Fighter Command stationed at Mitchel Field. About a week later Col. Felix Vidal, Lt. Col. Alfred H. Jacobson, Lt. Ferdinand D. Roeser and I went to the I. Buss Uniform Co. where we were introduced by Elias Bayer. Major Englehardt was also with us at this time. Englehardt and I were fitted for uniforms. I recall that at the time we were unable to obtain a
4355 definite price on th uniforms. The other officers had apparently been th e before inasmuch as their uniforms were already being tailored.

After leaving I. Buss Uniform Co. we went to the office of the Plymouth Thread & Yarn Co. where I was introduced to Sam Bayer and where we were treated to several drinks. I became very friendly with Sam Bayer and saw him on numerous occasions (end of p. 2) after this. Sam Bayer took my wife and myself to dinner at the Waldorf Astoria Hotel. His wife Blanche Bayer and his secretary were with us at the time. Sam introduced me to the headwaiter and gave me permission to sign his name to the checks at the Waldorf Astoria whenever I wanted to go there. I never made use of this privilege. I recall that my
4356 wife wanted a piece of the silverware as a souvenir and that Sam Bayer called the waiter and ordered a full set which he gave to my wife.

Sam Bayer's son Martin Bayer and his nephew, Melvin Usdan were in my organization at Mitchel Field. They had been transferred to my organization at the request of Lt. Col. Jacobson before I had been introduced to Sam Bayer. Sam often spoke to me

about the boys and on many occasions asked me (end of p. 3) to assign them to special jobs such as moving them to the "line" from the file room. I refused to do this and told him that I intended to leave them where they were.

Some time during July, 1943 I received a phone call at Mitchel Field from Sam Bayer. He asked me to meet him at his office at 30 W. 21st St., N. Y. C. I did so. Sam asked me why his boys (Martin Bayer and Melvin Usdan) had to be transferred from Mitchel Field. I told Sam Bayer that the boys had to go because I had learned that they had been held at Mitchel Field because he, Sam Bayer had furnished 4358 entertainment and had given gifts and uniforms to different officers at the field. I told him that a Lt. Pepper knew the names of the officers who had received uniforms and where the uniforms were purchased. I told him that I would have nothing (end of p. 4) to do with any arrangement of this nature. Sam said "What's the difference, the boys don't ask for any special favors". I told Sam that the boys had to go and that I intended to ship them out. He asked me to wait for a week before doing anything and I agreed to do so.

Prior to the above conversation with Sam Bayer I had refused to accept the uniform which had been made for me at the I. Buss Uniform Co. When I refused to accept the uniform because it did not fit 4359 properly Phil Busch asked me what I was kicking about and told me that I was not going to have to pay for the uniform. About his time Sam Bayer sent Elias Bayer and myself to Rogers Peet at 5th Ave. and 41st St. and told Elias to buy me an officer's cap. Elias bought me a summer peak cap. I believe the cap cost about twelve and one half (end of p. 5) dollars.

I recall telling Sam Bayer that I had refused to accept the uniform which had been made at the I. Buss Uniform Co. Sam Bayer told me that he did not blame me for refusing to take the uniform, and said that he did not intend to pay I. Buss for the uniform as long as I had not taken it. He sent me down with Elias Bayer to the shop of Mervin Levine & Co. where I was fitted for two uniforms. My adjutant Lt. Irving Zarowsky was with us at the time and he also was fitted for a uniform. Eljas Bayer told Mervin Levine, "These are two friends of mine; I want you to fix them up with uniforms and do a good job." Although
4361 I understood that a deposit was required to the best of my recollection no money was paid for the uniforms that day. I returned for several fitings as I had ordered both (end of p. 6) a winter and a summer uniform. A short time later I stopped in to see Sam Bayer at his office. He asked me if I was going to pick up my uniform and when I told him that I was he gave me the money to pay for both my uniform and that of Lt. Zarowsky. I don't remember the amount of money which Sam Bayer gave me that day but I do recall that he knew what the uniforms would cost and that he gave me the exact amount of money. I picked up the summer uniform and paid Mervin Levine the money which I had received from Sam Bayer. I never returned to pick up the winter uniform.

4362 About a week after I had told Sam Bayer that I intended to transfer the boys, I met him in his office. He told me that he had made arrangements with an adjutant at the Base Hospital, by the name of Fabbricatore and a "full chicken" colonel (end of p. 7) of the First Air Force to have the boys transferred to the medical corps at Mitchel Field. He told me that he had made this contact with the "full chicken"

colonel through an insurance agent whom he either knew or had done business with. He said he had been obliged to purchase a $50,000 insurance policy in order to make the above contact. I asked Sam Bayer to tell me the name of the colonel but he said he would rather not do this. Sam Bayer then told me that he would give me $2,500 for each of the boys if I would approve the transfer of the boys to the Medical Corps. He told me that the transfers would mean a lot to him and that he made a lot of money and that money did not mean anything to him. I told Sam that I would approve the transfers but that I could not guarantee the results. I recall that at this meeting he spoke to me about my desire to go overseas (end of p. 8) and told me that he thought I was very foolish.

Shortly affer the above meeting with Sam Bayer, the transfer requests of Pvt. Martin Bayer and Pvt. Melvin Usdan came across my desk and I approved them.

Thereafter Sam Bayer and I were in frequent contact with each other. At times he was very emotionally upset and would cry and kiss my hand and tell me that I did not realize what a good thing I was doing for him. He told me that he had worried so much about the boys being sent overseas that he had suffered a heart attack and had been forced to go to a sanitarium. Upon these occasions his secretary Anne Solomon would usually comfort him. Anne Solomon often expressed great concern as to whether the transfers would be approved and expressed fear that the boys might be stuck. She told me that they were counting on me (end of p. 9) and that I was the only one who could help them.

About July, 1943 a short time after I had approved the transfers of the boys Sam Bayer gave me a roll of bills containing about $800.00. I recall that we

were riding in a cab at the time. About four days later I met Sam Bayer in front of Radio City. We both sat in my car and he gave me another roll of bills containing about $700.00. He asked me if there was a chance of anything going wrong. I told him that the matter was out of my hands. About a day or so later I met Sam Bayer in the Hotel St. Moritz. He gave me another wad of bills amounting to about $450.00.

A short time later Sam Bayer called me up and told me that something had gone wrong, that the boys had been shipped to Westover and Bradley Field. I
4367 told him that I knew nothing about it and had nothing to do with those transfers. I (end of p. 10) offered to return the money to him but he refused.

About September, 1943 I met Sam Bayer and had breakfast with him on a Sunday morning. He asked me if there was any way I could have the boys transferred out of Westover and Bradley Fields or if I knew anyone who could arrange this. I told him I would look into the matter. When I returned to Mitchel Field I spoke to Capt. Jack Pepper and asked him what he could do to arrange a transfer for the boys. He told me he would look into the matter.

During this time I had been transferred to the First Air Commando Unit which was scheduled for immediate
4368 overseas duty. I decided to transfer the boys to my outfit and then to transfer them out as "overstrength" before our unit went overseas. I completed all the necessary arrangements and asked Capt. Pepper if he would keep an eye on (end of p. 11) things to see that everything went according to schedule. I told him that I would give him $500.00.

About Oct. 1943 I called Sam Bayer from Washington, D. C. and told him that everything was arranged.

He agreed to have Elias Bayer meet me at Goldsboro, North Carolina, about midnight on about the 27th or 28th of November, 1943. It had previously been agreed that Sam Bayer would give me $5,000 and an extra $1,000 for arranging these transfers. The extra $1,000 was for "other people" whom I told Sam Bayer I had to work with. By "other people" I mean Pepper. Before I left New York I gave the name of Capt. Pepper to Anne Solomon in order that she could contact him if anything went wrong.

On about the 27th or 28th of November, 1943 I met Elias Bayer and a man whom Elias introduced to me as the older brother of Pvt. Melvin Usdan who had 4870
come along (end of p. 12) because Pvt. Usdan's father was dead. This man asked me if I was sure that everything would be "OK" and appeared greatly concerned less the plan slip up. Elias Bayer gave me a white envelope containing $5,000. They also gave me three bottles of bourbon whiskey. The orders transferring the boys had already gone through.

I left Elias Bayer and the older brother of Pvt. Usdan at the railroad station. Elias told me that they intended to catch a train for the south.

I recall that the last time I had seen Sam Bayer in New York, he had cautioned me against displaying the money and that he said "the F. B. I. is looking for things like this".

About December 5th, 1943 while at Morrison Field, 4871
West Palm Beach, Fla., I purchased a cashier's check for $500.00 at the First National Bank to the order (end of p. 13) of Capt. Jack K. Pepper. I put this in an envelope and mailed it to Pepper at Mitchel Field. I did not enclose a note because I knew that all the mail was being censored.

I have read the above statement consisting of thirteen pages and this page and it is true.

WALTER V. RADOVICH

March 17, 1945

Witnesses:

E. J. McCABE & GERALD J. FLYNN, Special Agents, F. B. I., N. Y. C., 3/17/45.

The defendant duly excepted to the ruling of the Court in this respect, as follows (at folio 1976):

The Court: So the ruling of the Court is to overrule
4373 the objection of the defendants and admit the statement.

Mr. Robb: May we have exceptions, if your Honor please?

The Court: You may.

5. The District Court erred to the prejudice of the defendant in instructing the jury that the Court had ruled as a matter of law that the written statement made by the defendant to Special Agent Gerald J. Flynn was voluntary, and that the jury might consider the circumstances surrounding the making of such statement only for the purpose of determining whether or not the statement was true. The Court's charge in this respect was as follows (at folio 3420):

4374

Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants which has been introduced in evidence was admissible because not coerced nor induced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.

I have also admitted for your consideration testimony in regard to the circumstances existing at the time

and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such baring as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evi- 4376
dence in the case.

The defendant duly excepted to the Court's charge in this respect as follows (at folio 3427):

Mr. Robb: We respectfully except to your Honor's statement to the jury that your Honor held as a matter of law that the statement made by defendant Radovich to Agent Flynn was not coerced. We respectfully submit that that is a question which should now be decided by the jury and they should not be told that your Honor has decided that question.

And, in that connection, we respectfully except to your Honor's failure to give prayer No. 6 and 6-A, requested by the defendant Radovich. 4377

We further except in that connection to your Honor's statement to the jury that their only function is to determined whether or not the statement, if any made, by the defendant Radovich, was true. We respectfully suggest that they should also determine whether or not it was coerced, and if it was in any degree coerced, whether it was true or not, they should reject it.

* * * * * *

At folio 3431:

The Court: The Court declines to amend or add to its charge as suggested or requested by counsel for the defendant Radovich, and exceptions may be noted as stated.

6. The District Court erred to the prejudice of the defendant in refusing to charge the jury as requested by the defendant in his Prayer No. 6 and Prayer No. 6-A. Such prayers were as follows (at folio 3338):

Defendant Radovich's Prayer No. 6.

4379 You are instructed that if the statements claimed to have been made by the defendant Radovich to the government investigators were induced or coerced in any degree by the circumstances of his confinement at Mitchel Field, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to prove beyond a reasonable doubt that the statements claimed to have been made were not so induced or coerced.

Defendant Radovich's Prayer No. 6-A.

You are instructed that if the statements claimed to have been made to the government investigators by the defendant Radovich were induced by any promise 4380 or hope of immunity, leniency, benefit, or favor, held out to Radovich by the investigators either directly or by implication, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to show beyond a reasonable doubt that the statements claimed to have been made by Radovich were not induced by promises or hopes held out by the investigators.

4381

The defendant duly excepted to the Court's refusal to charge as requested, as follows (at folio 3427):

> Mr. Robb: • • • we respectfully except to your Honor's failure to give prayer No. 6 and 6-A requested by the defendant Radovich.
>
> • • • • • •

At folio 3431:

> The Court: The Court declines to amend or add to its charge as suggested or requested by counsel for the defendant Radovich, and exceptions may be noted as stated.

4382

7. The District Court erred to the prejudice of the defendant in admitting in evidence against the defendant, over his objection and exception, a paper marked "Government's Exhibit 24", which was in the words and figures following (at folio 3914):

> Dear Sir
>
> I am writing to inquire as to the necessary steps that I should take to obtain $500.00 which I gave your bank for a cashier's check on Dec. 6, 1943.
>
> It was made out to a Capt. Jack Pepper and the check No. is #49896—the reason for the claim is that the check was destroyed and never cashed.
>
> Will you kindly inform me as to the procedure by the 1st of Sept.

4383

> Thank you
>
> WALTER RADOVICH
>
> Address
> Major Walter Radovich
> Ward 15
> New Cantonement Hospital
> Mitchel Field, N. Y.

The defendant duly excepted to the ruling of the Court in this respect, as follows (at folio 1580):

The Court: I will admit the letter.

Mr. Robb: May we have an exception?

The Court: You may have.

(The following proceedings took place in open court:)

The Court: The objections are overruled and the letter is admitted. Exceptions noted. (Marked "Government's Exhibit 24".)

8. The District Court erred to the prejudice of the
4385 defendant in refusing to require the United States Attorney to make available to the defendant and his counsel a written statement, in the possession of the United States Attorney, which had been made by the defendant to Special Agent Gerald J. Flynn in September, 1945. This statement was thereafter marked for identification "Court's Exhibit A" and sealed (folios 2704, 2705, 2706). The defendant duly excepted to this ruling of the Court as follows (at folio 1652):

Q. [Mr. Robb] Now, Mr. Flynn, getting back for a moment to your interview with the major on March 15th, you told us you read his statement which he had made in the hospital in September; did you read it aloud? A. I don't recall whether I read it aloud.
4386 I recall that I read it and that I gave it to Major Radovich, and that he read it.

Q. You read it first? A. Well, I can't be positive whether I read it first or whether he read it.

Q. How many pages were in that statement?

Mr. McGohey: Pardon me. Which statement?

Q. The statement that you had taken in September and which you read. A. Maybe five or six.

Q. Did you have a copy of it with you? A. No.
Q. Is there a copy here? A. I don't know.

Mr. Robb: Mr. McGohey, do you have a copy?

Mr. McGohey: Yes, I have.

Mr. Robb: May I have it, sir?

Mr. McGohey: It is in the office. I answered the question that I have it. That is true. I have possession of that statement, your Honor, but I certainly am going to resist producing it now unless directed, because I am not offering that statement in evidence.

The Court: I will not require you to produce it.

Mr. Robb: If the Court please, may we formally 4388
ask the Court to require Mr. McGohey to produce it, and take an exception to your Hon[illegible]'s ruling?

The Court: Very well.

At folio 2040:

Q. [Mr. Robb] By the way, do you have that statement that you took from Major Radovich in the hospital? A. No, sir.

Q. Where is it? A. I think Mr. McGohey has that statement.

Mr. Robb: May I see it, Mr. McGohey? That is the statement I asked Mr. McGohey to give me the other day and I did not get it from him. 4389

Mr. McGohey: I object to all this speech before the jury. The statement has not been offered by the Government. All this examination goes to the statement of March 19th or March 15th, which is in evidence, and I again make my objection to the line of examination.

The Court: What is your position?

4390 *Assignment of Errors by Defendant Radovich.*

Mr. Robb: Well, if the Court pleases, I think it is perfectly obvious, if the two statements are tied up together——

The Court: I am merely asking you what your position is and what you are asking for?

Mr. Robb: I am asking for the statement which was made in the hospital ward. Your Honor ruled on it the other day but I would like your Honor to rule on it again today. I think I have a right to ask for it again.

The Court: Do you want to be heard on it?

Mr. McGohey: Yes, your Honor, I do.

4391 The Court: We will excuse the jury.

Mr. Robb: If the Court please, to save time, if Mr. McGohey still takes the same position, I will withdraw my request.

The Court: All right, go ahead.

Mr. Keenan: May the record show that we join in the request for that statement of September and that it is refused, to which we take exception?

The Court: Yes.

Wherefore the defendant Walter V. Radovich respectfully prays that the judgment herein be reversed and the sentence imposed upon him be set aside and that he have such other and further relief as may be proper.

4392

WALTER V. RADOVICH,
By: SAMUEL T. ANSELL,
ROGER ROBB,
Attorneys for Defendant
Walter V. Radovich,
Tower Building,
Washington, D. C.

4393

## Stipulation as to Record.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA

against

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,
Defendants-Appellants.

4394

IT IS HEREBY STIPULATED AND AGREED that the foregoing is a true and correct transcript of the record of the said District Court in the above-entitled cause, as agreed on by the parties.

Dated, New York, April 15, 1946.

JOHN F. X. MCGOHEY,
United States Attorney for the Southern District of New York.

ARCHIBALD PALMER,
Attorney for Defendant Samuel Bayer.

MAX E. SANDERS,
Attorney for Defendant Elias Bayer.

4395

SAMUEL T. ANSELL,
ROGER ROBB,
Attorneys for Defendant Walter V. Radovich.

4396

## Clerk's Certificate.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

| |
|---|
| UNITED STATES OF AMERICA<br>against<br>SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,<br>Defendants-Appellants. |

4397 I, WILLIAM V. CONNELL, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct copy of the printed transcript of record of the said District Court in the above-entitled cause, as agreed on by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York in the Southern District of New York on the 15th day of April in the year of our Lord one thousand nine hundred and forty-six, and the independence of the United States the one hundred and seventieth.

4398 (Seal)

WILLIAM V. CONNELL,
Clerk.

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE SECOND CIRCUIT

No 305—October Term, 1945

(Argued June 4, 1946—Decided August 14, 1946)

Docket No. 20229

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH,

DEFENDANTS-APPELLANTS

Before: L. HAND, AUGUSTUS N. HAND, and CLARK, Circuit Judges

Appeal from the District Court of the United States for the Southern District of New York

Samuel Bayer, Elias Bayer, and Walter V. Radovich were convicted of conspiring to defraud the United States in violation of 18 U. S. C. A. § 88, and they appeal. Reversed and remanded.

Charles H. Tuttle, of New York City (Archibald Palmer and I. Maurice Wormser, both of New York City, on the brief), for defendant-appellant Samuel Bayer.

I. Maurice Wormser, of New York City (Max E. Sanders, of New York City, on the brief), for defendant-appellant Elias Bayer.

Rober Robb, of Washington, D. C. (Samuel T. Ansell, of Washington, D. C., on the brief), for defendant-appellant Radovich.

John F. X. McGohey, U. S. Attorney, of New York City (Samuel Rudykoff and Edward C. Wallace, Assistant U. S. Attorneys, both of New York City, on the brief), for appellee.

CLARK, Circuit Judge:

This appeal presents some important problems in the administration of criminal justice. The indictment, based upon 18 U. S. C. A. § 88, charged all three of the defendants with conspiring to defraud the United States of the faithful and unbiased services of

United States army officers, especially defendant Radovich. The conspiracy which it alleged was in substance that defendants Samuel and Elias Bayer arranged to become acquainted with, and to lavish gifts upon, various army officers in order to secure special noncombatant service for two soldiers closely related to them and in particular to give defendant Radovich some $7,000 to induce him to keep these men within the United States. After a verdict of guilt, with recommendation of clemency, the three defendants were given sentences of imprisonment ranging from a year and a day for Radovich and eighteen months for Elias Bayer to two years for Samuel Bayer, with additional substantial fines for the two Bayers. All appeal.

Samuel and Elias Bayer are two brothers engaged in the manufacture of yarn and thread in a corporation under the name of Plymouth Thread & Rayon Corporation, and in the conversion of thread in another corporation under the name of Thread Converters, Inc. The servicemen whose assignments they are alleged to have influenced are Martin Bayer, son of Samuel, and Melvin Usdan, nephew to both of them. War Department records introduced at the trial show a series of transfers by which these soldiers were moved, sometimes with extreme rapidity, from unit to unit throughout Eastern United States. On December 15, 1942, both Martin and Melvin enlisted in the United States Army Air Corps and within a week both were assigned, as filing clerks, to Base Headquarters at Mitchel Field, New York. April 15, 1943, they were transferred to the First Fighter Command at Mitchel Field. August 20, 1943, they became clerks to the Medical Detachment at the same field. August 28, 1943, they were transferred to separate airborne engineering units, both designated for overseas duty. November 24, 1943, they were assigned to Major Radovich's First Air Commando Group. And four days thereafter, they were transferred to the Air Transport Command, then scheduled for duty in continental United States. The case for the prosecution rested upon evidence of the methods by which these transfers were effected.

The record showed that in January, 1943, the month following the enlistment of the two soldiers, Elias Bayer became acquainted at a New York night club with two army officers stationed at Mitchel Field. The relationship immediately took on considerable warmth, for at this very meeting, Elias agreed to assist the officers in obtaining uniforms at wholesale prices. Through these two officers, Elias became acquainted with one Lt. Col. Jacobson of the First Fighter Command; and all three officers became regular callers at the Plymouth Thread office and frequent companions of either or both Bayers on social occasions. In the spring of 1943, members of the Women's Army Auxiliary Corps were re-

placing the male clerical help at Base Headquarters and the two soldiers were assigned to a pool of men scheduled to be shipped to other fields. Col. Jacobson, however, procured their transfer to the First Fighter Command at Mitchel Field. Jacobson testified that the Bayers had not asked him to do "anything improper." The transfer, however, was not displeasing to them; and a few days thereafter, Samuel gave Jacobson a birthday party at the Waldorf-Astoria, presenting him with four new tires.

The transfer to the First Fighter Command put the boys directly under the supervision of Major Radovich, who was immediately introduced to Elias by one of the officers mentioned above. Of the entire group, he soon became the most frequent caller at the Bayer's office and the most constant recipient of their gratuities. In addition to uniforms, which, like those of the other officers, were paid for by Plymouth Thread, he received golf clubs, travelling bags, theatre tickets, and other amenities. In July 1943, however, he decided to transfer the boys to another field. Radovich attributed his decision to the fact that rumors of the Bayers' generosity were circulating at Mitchel Field; the Bayers asserted that Radovich's object was to extort money. Whatever the motivation, there is no dispute that he did announce his intention to make this transfer, and that, dissuaded by Samuel Bayer, he finally transferred the boys only to the Medical Unit at the same field. It is likewise undisputed that over a period of about two weeks at the time of the transfer he received from Samuel Bayer a total of $1,900 or $1,950.

The assignment to airborne engineering units bound for overseas duty came just eight days later. The Bayers' attempts to obtain the intercession of two of their original army friends failed. In late August or early September 1943, Major Radovich left Mitchel Field to assist Col. Cochran in the organization of the First Air Commando Group, a unit being organied at Goldsboro, North Carolina, and designed to operate behind Japanese lines in Burma. In this capacity Radovich had authority to request orders for the immediate transfer of men from other units; and on November 22, he issued a special order commandeering the services of Martin Bayer and Melvin Usdan and requiring them to report not later than November 25. Within a few days of the original assignment, he requested and obtained their retransfer to the Air Transport Command, scheduled at this time for domestic duty. It was uncontested that at the time this transfer was effected, Samuel Bayer sent Elias and an unnamed indiyidual to deliver $5,000 to Radovich in the Goldsboro railroad station and that a few days after receiving the money Radovich mailed a bank cashier's check for $500 to the classification officer at Mitchel Field. The only question left in doubt was as to the motivating

force for these payments. Radovich's statement, introduced in evidence, was that, being pressed by the Bayers to take Martin and Melvin out of the airborne division, he devised the double transfer as a scheme for accomplishing that result. Statements of the Bayers, on the other hand, asserted that Radovich, entirely unbeknown to them, assigned the soldiers to his Commando Group and then demanded $5,000 for their release.

Of the many grounds for reversal urged by defendants Bayer, only two require extended discussion. As indicated in the statement of facts, the Bayers' defense was that they were the victims of a scheme of extortion on the part of Radovich. It was their contention that the boys had not received sufficient basic training to be sent overseas, that Radovich's true duty was therefore to keep them in this country, and that their own conduct was the result of his threats to violate that duty. Regardless of the trial court's opinion of the merits of this defense, defendants were entitled to have it clearly presented to the jury. *Bird* v. *United States*, 180 U. S. 356, 361; *Bollenbach* v. *United States*, 326 U. S. 607; *Thomas* v. *United States*, 6 Cir., 151 F. 2d 183. The first serious question is whether it was so presented.

The District Court in its charge told the jury that it was necessary for the prosecution to show an agreement to defraud, followed by one of the alleged overt acts. Then, in the passage objected to by defendants, it stated:

"Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer.

"The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.

"If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payment of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy

existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

"However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

There is no question but that this charge was an accurate, albeit brief, statement of the law. It set forth the position of both prosecution and defense. It warned the jury that involuntary payments could not themselves be taken as showing a conspiracy. And, since there was evidence before the jury as to gratuities other than money, it correctly stated that a conspiracy might have been proved even if the payments were involuntary. The only question is whether it was so concise and so technical as to be confusing. It is the opinion of the writer of this opinion that in spite of its brevity the charge was adequate in the light of the evidence and particularly in view of defendants' failure to make a proper request to charge or a specific objection to this portion of the charge as given. Moreover, the brevity is explainable and at least somewhat justified by the general concise and unembroidered charge—a welcome relief from much judicial verbosity. My colleagues feel, however, that the statement was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen. Of course, reversal should be ordered if the charge, although technically correct, is so equivocal as to be probably misleading in actual fact.

We are all agreed, however, though for somewhat differing reasons, that the ends of justice require a new trial in this case. A majority of the court, including the writer of this opinion, find ground for reversal in a ruling excluding important evidence. To support its theory of extortion, defense called as a witness Samuel Bayer's secretary, Anne Solomon. Miss Solomon stated that on November 24,[1] Radovich telephoned from Washington making an appointment to meet both Samuel Bayer and her for lunch in New York City. She also testified that it was at this meeting that Radovich informed them of the transfer of the servicemen to Goldsboro and demanded $5,000. A clerk in the Washington

[1] She did not actually specify the date, but placed it, as Samuel had in his statement, on the same day that Martin Bayer telephoned his father about the transfer. Melvin Uslan had already testified that Martin's phone call was made on November 24. And the United States Attorney told the jury that this date was accurate, drawing the inevitable conclusion.

office of the Army Air Forces, however, had already testified that on November 24, Radovich had telephoned her from Goldsboro, North Carolina, requesting the transfer of the soldiers to the Air Transport Command.

The United States Attorney at the very end of his summation pointed up the conflict in the testimony by referring to the Bayers' story as "just another of the falsehoods" and as showing "the absurdity of Samuel Bayer's claim of extortion." Defense counsel, surprised by the turn of events, started a check of the records of the Bayers and of the telephone company and found in the Bayer file a bill showing a collect call from Washington on November 24. While the court at the outset of its charge did state that it would not allow the case to be reopened for evidence, it achieved the same result by stating the existence of the bill and what it showed; but then it added quite pointedly that "the record does not show from whom the call came." After the jury retired, defense counsel obtained from the telephone company a memorandum slip showing a call on November 24, to the Bayers by a "Capt. Ravish" from Arlington, Virginia, the location of the War Department where Radovich had been working with the Military Personnel Division. The trial judge refused to place it before the jury, however, stating that it was not shown as coming from Washington and that the proceedings were already irregular and he would not make them more irregular by calling the jury back for the further evidence.

Under the circumstances which had developed, the court's refusal to allow the correction of the evidence, made necessary by the convincing showing of the telephone slip, was error in the view of a majority of this court. There was no real doubt that the slip, although designating the call as from Arlington, just outside Washington, was descriptive of the call in question. The issue as to the fact of the call or Radovich's actual whereabouts on a particular day was, of course, not determinative; and the introduction of the slip at this time undoubtedly would have somewhat overemphasized its significance. But the summation of the United States Attorney and the charges of the court had already given the issue an entirely undeserved importance in the eyes of the jury. How important the matter had become was unmistakably shown by the jury itself. After four hours of deliberation, it returned to ask further instructions, one juror stating that several of them desired to hear again this part of government counsel's summation. And when recalled by the court eight minutes later, another juror had asked for references to pertinent parts of the testimony. Obviously the jury—however erroneously or for whatever reason—was vitally concerned with the question. While ordinarily a trial judge has a large area of discretion as to

the reopening of a case for additional evidence, we think that in view of the importance which this issue had assumed the jury should not have been left with a partial and a misleading picture of the facts.

Other assignments of error on behalf of the Bayers are without merit. It has been often held that an indictment based on this statute alone is valid without charging breach of any other federal statute. See *United States* v. *Keitel*, 211 U. S. 370, 393; *United States* v. *Antonelli Fireworks Co.*, 2 Cir., May 2, 1946. There was ample evidence to convict and to show Elias Bayer's participation, notwithstanding his vigorous contention to the contrary. And the summation for the prosecution was restrained and decorous.

In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich. In addition he makes two claims of error which require discussion. The first is in the admission of a confession which he made to a Special Agent of the Federal Bureau of Investigation on March 15 and 17, 1945. The confession was a written statement reciting in some detail that Radovich had effected transfers for the two servicemen for a consideration of $7,000 received from the Bayers. His counsel strenuously opposed its admission at trial, on the ground that the circumstances under which it was given made it involuntary under *McNabb* v. *United States*, 318 U. S. 332, and *Anderson* v. *United States*, 318 U. S. 350. The court on *voir dire* held the confession voluntary and admissible. We think this was error.

Immediately upon his return from the Chinese-Burma theatre, Radovich was ordered to report to Mitchel Field, New York, where, on August 9, 1944, the Commanding General directed his confinement pending trial by general court martial. Although charges were preferred on August 10, they were not served on the defendant or referred for trial until May 29 or 30, 1945. Meanwhile, until September 16, 1944, or for approximately five weeks, he was confined to a heavily guarded ward for the insane at the Mitchel Field hospital. Neither the prosecution nor the defense offered any professional evidence as to his mental condition at this time, though a lay attendant stated that, while fretful and crying at the time of entry, he showed no signs of abnormality or need for restraint while there. There was ample testimony, however, that he was deprived of his regular clothing and forced to eat under supervision, at first with a fork and spoon, later with only a spoon. The regular attendant stated that he was denied all use of the telephone, even for Mitchel Field calls, for approximately ten days and that, although he expressed his desire to consult an attorney, he was not allowed to do so during that period. He did, however, see counsel sometime in the first half of Septem-

ber; and one attendant stated that he believed it was prior to the initial confession on September 5 or 6. After September 16, he was under only administrative restriction at Mitchel Field, and after January 2, 1945, he was allowed greater freedom at the Field and permitted to go off it with the permission of the Base Commander. The confession in evidence was made at the United States Court House in New York City on March 15 and 17.

Article 70 of the Articles of War, 10 U. S. C. A. § 1542, provides that when any person subject to military law is placed in arrest or confinement "immediate steps" will be taken to try him or to dismiss the charge and release him. And it specifies that "when a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court martial jurisdiction and furnish the accused a copy of such charges." The trial court construed the words "if practicable" as giving the miliary authorities peculiarly broad discretion and concluded that there was no illegal detention within the meaning of the *McNabb* principle sufficient to vitiate even the September confession. But these words, given a natural interpretation, would appear to have been inserted to provide for unusual situations arising out of the peculiar exigencies of military life. The article is mandatory in tone and expressly provides for the punishment of any officer responsible for unnecessary delay in investigating or carrying a case to conclusion. It does not seem significantly different in purpose from the various statutes cited in the *McNabb* case. Hence it ought not to be so construed as to make the *McNabb* principle applicable only where detention is by civil authorities and not where it is by military authorities. The taint of illegality found in that case seems decidedly present here where detention had existed not for two days, but for more than a month, prior to confession.

The government contends that the admissibility of the September confession is a hypothetical question having no bearing upon the March statement introduced at trial. But this argument ignores the practical realities of the situation. It is true that Radovich was not confined on March 15 or 17, 1945, and an original and independent confession made at this time would obviously have been admissible. But the present statement was not such a confession. The agent to whom it was given sent for the defendant to come to the FBI office to make a statement, and he testified that his purpose in doing so was to record certain bits of information that he had meanwhile remembered and to incorporate the two statements into one. He was not positive at whose suggestion the September confession was brought out, but he knew that it was on his desk during the entire interview and that both he and

Radovich read it before Radovich made his second statement. Government counsel refused to produce the September confession at the trial, but the court, who examined both, stated that there was no conflict between the confessions on any material matter. On these facts, we think the second statement was patently the fruit of the earlier one and that it was equally inadmissible. *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338.

Secondly, Radovich also urges that the District Court should have sustained his plea in bar to the indictment on the ground of double jeopardy. He had previously been tried by general court martial for conduct unbecoming an officer and gentleman under the 95th Article of War, 10 U. S. C. A. § 1567, and for violation of the 96th or general article, 10 U. S. C. A. § 1568. The specifications on both charges were identical, namely the receipt of $7,000 for effecting the above-discussed transfers of Martin Bayer and Melvin Usdan; and the defendant was found guilty and sentenced on both charges. There is no question but that the principle of double jeopardy applies as between military and federal civil courts, *Grafton* v. *United States*, 206 U. S. 333, 11 Ann. Cas. 640; Note, *Double Jeopardy and Courts Martial*, 3 Minn. L. Rev. 181; and if the conviction were a final one, we should have little doubt but that it should be held to bar the present prosecution. The fact that the indictment charges a conspiracy to defraud under 18 U. S. C. A. § 88 does not obscure the fact that, from any realistic viewpoint, the offenses are identical. It is of course true that cases have held a conspiracy to do an act and the act itself to be separate offenses. *Carter* v. *McClaughry*, 183 U. S. 365; *Fall* v. *United States*, App. D. C., 49 F. 2d 506, certiorari denied 283 U. S. 867. But here we have a conviction on each of the two broadest and most inclusive of military charges, where the act involved required, and was alleged to include, the participation of the other defendants. *Cf. United States* v. *Zeuli*, 2 Cir., 137 F. 2d 845. Although the evidence before the court martial is not before us, it is hard to believe that a careful distinction was made, or could have been made, between the actual giving and receiving of the money for the purpose involved and the arrangement made to that end. But the record leaves the present status of the military judgment in doubt. The United States Attorney stated to the trial court that the conviction had been reversed upon the review provided by Article 50½, 10 U. S. C. A. § 1522; and by the terms of Article 40, 10 U. S. C. A. § 1511, no proceeding in which an accused is found guilty by court martial shall be held to be a trial to bar a further trial for the same offense "until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case." But defense counsel had no notice

of the reversal, the reversing judgment was not introduced, and there was no showing as to why or with what directions the conviction had been set aside. Determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial.

Reversed and remanded.

United States Circuit Court of Appeals, Second Circuit

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of August one thousand nine hundred and forty-six.

Present: Hon. LEARNED HAND, Hon. AUGUSTUS N. HAND, Hon. CHARLES E. CLARK, *Circuit Judges.*

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*v.*

SAMUEL BAYER, ET AL., DEFENDANTS-APPELLANTS

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and hereby are reversed and cause remanded for further proceedings in accordance with the opinion of this court.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

ALEXANDER M. BELL,
*Clerk.*

By A. DANIEL FUSARO,
*Deputy Clerk.*

United States Circuit Court of Appeals, Second Circuit

UNITED STATES OF AMERICA

*v.*

SAMUEL BAYER, ET AL.

*Judgment*

United States Circuit Court of Appeals, Second Circuit. Filed August 14th, 1946. Alexander M. Bell, Clerk.

United States of America, Southern District of New York

I, Alexander M. Bell, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 1483, inclusive, in two volumes, contain a true and complete transcript of record and proceedings had in said Court, in the case of

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

*against*

SAMUEL BAYER, ALIAS SAMUEL BOYARSKY, ELIAS BAYER, ALIAS ELIAS BOYARSKY, AND WALTER V. RADCVICH, DEFENDANTS-APPELLANTS

as the same remain of record and on file in my office.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 11th day of September, in the year of our Lord one thousand nine hundred and forty-six, and of the Independence of the said United States the one hundred and seventy-first.

[SEAL]

ALEXANDER M. BELL,
*Clerk.*

U. S. GOVERNMENT PRINTING OFFICE 1946

# In the Supreme Court of the United States

OCTOBER TERM, 1946

---

No. —

UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER, AND WALTER V. RADOVICH

---

## ORDER ENLARGING TIME WITHIN WHICH TO PETITION FOR A WRIT OF CERTIORARI

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On consideration of the motion of the Solicitor General in the above case, and good cause therefor having been shown, it is ORDERED that the time within which a petition for a writ of certiorari may be filed herein on behalf of the United States be and the same is hereby extended to and including October 12, 1946.

Dated this 13th day of September 1946.

FRED M. VINSON,
*Chief Justice of the Supreme Court of the United States.*

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U. S. GOVERNMENT PRINTING OFFICE: 1946

Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

*Order allowing certiorari*

Filed December 9, 1946

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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Sup. Ct.

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CHARLES ELMORE CROPLEY
CLERK

No. 606

# In the Supreme Court of the United States

October Term, 1946

United States of America, petitioner

*v.*

Samuel Bayer, Elias Bayer and Walter V. Radovich

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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# In the Supreme Court of the United States

OCTOBER TERM, 1946

No. ——

UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit reversing the convictions of respondents for conspiracy to defraud the United States.

### OPINION BELOW

The opinion of the circuit court of appeals (R. 1467–1476) has not yet been reported.

### JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1946 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition for a writ of

certiorari was extended to October 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether a voluntary confession by an officer of the Army held in military custody was rendered inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 332, where such officer, though duly served with a copy of the charges against him in the course of the investigation prescribed by the 70th Article of War, was not served, within eight days after his arrest, with the charges that were referred for trial after that period; and if so, whether a second confession, voluntarily made when the accused was free from restraint, was rendered inadmissible through the circumstance that the accused, at his own request, reread his earlier confession at the time he made his second statement.

2. Whether a claim of double jeopardy may properly be based on a conviction by court-martial which was disapproved because of failure of the tribunal to afford accused an opportunity to present evidence in support of his plea to the jurisdiction; and if so, whether a trial by court-martial for conduct unbecoming an officer and a gentleman and for conduct to the prejudice of good order and military discipline and of a

nature tending to bring discredit upon the military service, by accepting money for arranging the transfers of certain enlisted men to prevent their going overseas, bars a trial in a federal district court for conspiracy to defraud the United States of its right to the honest performance of the officer's duty.

3. Whether the district court committed an abuse of discretion in refusing to reopen the case, four hours after the jury had retired, to allow the defense to introduce additional evidence.

4. Whether the court below correctly held that the trial judge's concededly proper statement of the law in his instructions concerning the defense of extortion constituted reversible error because the statement was too cryptic.

## STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Article of War 70, 10 U. S. C. 1542, provides in part:

No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable,

forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had; and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him.

## STATEMENT

Respondents were convicted in the United States District Court for the Southern District of New York on a one count indictment charging conspiracy to defraud the United States of its right to the faithful and disinterested services and judgment of officers of the United States Army (R. 8–11, 1176). The indictment specified that it was part of the conspiracy that respondent Samuel Bayer, father of Martin Bayer and uncle of Melvin Usdan, both of them soldiers in the United States Army, and respondent Elias Bayer, uncle of the two boys, would give respondent Radovich, an officer of the United States Army, $7,000 in order to induce Radovich to transfer the boys to various units for

the purpose of keeping them from being sent out of the United States for duty overseas. Samuel Bayer was sentenced to imprisonment for two years and to pay a fine of $10,000; Elias Bayer to imprisonment for eighteen months and to pay a fine of $5,000; and Radovich to imprisonment for a year and a day (R. 1211–1212). On appeal, the judgments of conviction were reversed (R. 1476).

**The evidence for the Government**

A short time before December 15, 1942, Samuel Bayer learned that boys enlisting in the Army before December 15 would be allowed to select the branch of service in which they wished to serve (R. 184, 276–277). Martin Bayer, Samuel's son, and Melvin Usdan, his nephew, both enlisted in the Air Corps and were assigned as clerks to base headquarters at Mitchel Field, Long Island (Gov. Ex. 27, R. 907, 1312; Gov. Ex. 11, R. 496, 1233). In the period following this assignment, Elias Bayer met and introduced to Samuel various officers attached to the First Fighter Command at Mitchel Field (R. 133, 187, 363, 395; Ex. 8, R. 491, 1225). Samuel and Elias Bayer entertained these officers extensively (R. 149, 395; Gov. Ex. 11, R. 496, 1241–1242; Gov. Ex. 19, R. 505, 1274; Gov. Ex. 20, R. 505, 1285–1287), and Samuel Bayer, through his company, the Plymouth Thread Company, paid for uniforms made for the officers by a firm owned by Samuel's brothers-in-

law (R. 134–135, 152, 166–167, 186–188, 201, 366–367; Gov. Ex. 13, R. 498, 1246).[1]

In April 1943, members of the Women's Army Corps began to replace male clerical personnel at Mitchel Field with the result that male personnel were pooled for transfer to other fields (R. 369, 397). One Colonel Jacobson requested the transfer of Martin and Melvin from base headquarters to the First Fighter Command (R. 397–398). Samuel Bayer told another officer that he understood that the effect of this transfer was to assure the assignment of the boys to Mitchel Field for approximately one year (R. 278). A few days after the transfers were effected, Samuel Bayer tendered a dinner to Colonel Jacobson at the Waldorf-Astoria Hotel and presented him with four new automobile tires (R. 370–372).

The April transfer placed Melvin and Marvin under the command of Radovich (R. 835). In July 1943, there were rumors current at Mitchel Field that the Bayers were making gifts to officers of the First Fighter Command (R. 207–208, 280–281). Radovich informed Samuel Bayer that the boys would have to be transferred (R. 924; Gov. Ex. 25, R. 661, 1309). At Samuel's request to

[1] In the summer of 1944, at Samuel Bayer's request, the books of the uniform company were altered to indicate that payment had been made by the officers themselves rather than the Plymouth Thread Company (R. 190–195). Prior to this, both of the Bayers, when interviewed by an Army investigating officer, had denied paying for the uniforms and had denied making payments to Radovich (R. 507–513).

have the boys kept at Mitchel Field, Radovich approved a transfer of the boys from his own unit to the medical corps at the field (R. 115–118; Gov. Ex. 25, R. 661, 1309–1310). While this transfer was pending, Samuel and Elias went to Mitchel Field and asked Colonel Vidal to facilitate the transfer (R. 137–139). After the transfer was effected, Samuel paid Radovich approximately $2,000 (Gov. Ex. 25, R. 661, 1310).

A short time later, the boys were transferred to an airborne engineer unit scheduled for duty overseas (R. 140). Samuel and Elias requested Colonel Vidal to prevent the transfer, but were informed that nothing could be done (R. 140–141). Samuel also communicated with various Army officers whom he had previously met and attempted to induce them to arrange to have the boys transferred out of the engineering unit, but these officers declined to intercede (R. 160, 176–177, 374). Samuel told one officer he would do anything in his power to keep his boys from going overseas (R. 176).

In the meantime, Radovich had left Mitchel Field and joined the First Air Commando Group (R. 253). This organization was given highest priority on personnel, and its officers' requests for transfer of personnel were regularly and quickly honored (R. 231–232, 254). In August and September 1943, Radovich, on three occasions, discussed with Captain Pepper, a personnel offi-

cer at Mitchel Field, the possibility of arranging a transfer of Marvin and Melvin out of the airborne engineers to the Air Transport Command, a unit set up for service in the continental United States (R. 208–211). Pepper told Radovich that the boys could be transferred only at the request of an organization having a higher priority than the airborne engineers (R. 209). Radovich suggested to Pepper that it might be possible to have the boys transferred to the First Air Commando Group and subsequently have them dropped as surplus and transferred to the Air Transport Command (R. 211). Pepper agreed that in this way a transfer might be arranged (R. 211). Radovich told Pepper that if he could effect such a transfer, it would be "worth his while," and he would see that it would be worth Pepper's while (R. 211–212).

In September 1943, Samuel Bayer asked an Army officer whether he thought there would be any trouble if his boys were transferred out of the alerted unit. When the officer said that he thought the consequences would be serious, Bayer cried and said that he wanted his son out of the unit. (R. 283–284.)

On November 22, 1943, at the request of Radovich, a special order was issued from Headquarters Army Air Forces in Washington directing the transfer of Melvin and Marvin to the First Air Commando Group at Goldsboro, North

Carolina, and ordering them to report not later than November 25 (Gov. Ex. 3, R. 119–120; R. 256). On November 24, Radovich called a clerk in the office of the Army Air Forces in Washington and requested that the boys be transferred from the Air Commando Group to the Air Transport Command (R. 256–257). This request was honored by a letter dated November 25, 1943, from Headquarters Army Air Forces in Washington (R. 123). The transfer was effected on November 29, 1943 (Gov. Ex. 4, R. 121–122). Shortly thereafter, Elias Bayer and an unidentified man met Radovich outside the railroad station at Goldsboro and gave him an envelope containing $5,000 (Gov. Ex. 15, R. 500, 1254–1256; Gov. Ex. 20, R. 505, 1279, 1281; Gov. Ex. 25, R. 661, 1311). Thereafter Radovich sent Captain Pepper a bank draft in the sum of $500 (R. 212; Gov. Ex. 25, R. 661, 1311).

**The Bayers' defense**

The Bayers sought to defend themselves against the charge of conspiracy on the ground that the payment of money to Radovich was not made pursuant to agreement but was extorted by Radovich. In statements given to the United States Attorney before trial, which were introduced in evidence by the Government, the Bayers said that after Radovich had transferred the boys to the medical unit in August 1943 he asked for money (Gov. Ex. 8, R. 491, 1226–1228; Gov. Ex. 13, R. 498,

1249–1250; Gov. Ex. 20, R. 505, 1277, 1278), and that after the boys had been transferred to the Air Commando Group, Radovich came to New York and told Samuel Bayer that he would take the boys overseas to Burma unless he received $5,000 (R. 1229–1231, 1279). In their defense, the Bayers called as a witness Samuel Bayer's secretary, Ann Solomon (R. 915). She testified that on the same morning that Martin Bayer telephoned his father that he was being transferred to Goldsboro, North Carolina (R. 929–930), a date fixed by Melvin Usdan as November 24, 1943 (R. 862), Radovich called from Washington and asked Samuel Bayer to meet him for lunch that day; that at lunch Radovich in her presence said that he was taking the boys with him to Burma unless Bayer paid him $5,000 (R. 928–929). A clerk in the office of the Army Air Forces Headquarters in Washington, D. C., had previously testified for the Government that on November 24, Radovich called her from Goldsboro, North Carolina, and asked her to transfer Marvin and Melvin to the Air Transport Command (R. 256–257), and it had also been shown that the request was acknowledged by a letter dated November 25, 1943 (R. 123).

In discussing the Bayers' defense of extortion, the United States Attorney pointed out to the jury that Samuel Bayer had approached other officers seeking to have his son transferred out of

the airborne engineers (R. 1069) and further argued that the Bayers' denials that they made any gifts to Radovich when they were first questioned by military authorities was inconsistent with their defense that they were the victims of extortion (R. 1070). Then, after noting that the luncheon meeting to which Miss Solomon testified must have occurred on November 24th, the United States Attorney stated (R. 1072):

> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.
>
> Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command [*sic*] on the very day that, according to Sam Bayer, he, Radovich, is threaten-

> ing to take the boys on a dangerous mission that he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived at Goldsboro. Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando.

The next day, before the judge charged the jury, counsel for the Bayers stated that they had been surprised by the Government's questioning of the meeting on November 24 and that a check of the records had shown a collect call from Washington to the Bayers on that date (R. 1116–1117). The court stated that, if counsel so desired, he would tell the jury that the records showed such a collect call, and counsel requested the court to tell the jury that the statement was being made at their request (R. 1125–1126). At the suggestion of counsel for Radovich, the court also stated that he would tell the jury that the records did not show who made the call (R. 1127). The judge made such a statement to the jury at the opening of his charge (R. 1129).

After the jury had been out about four hours (R. 1154) they asked for a rereading of the judge's charge on conspiracy and of the United States Attorney's summation (R. 1155). The

judge declined to read the summation of one counsel without reading the summations of all (R. 1155). Some of the jurors stated that they were particularly interested in the United States Attorney's summary of the telephone messages and meetings from November 22 to November 25, 1943 (R. 1163, 1166–1167). Thereafter, counsel for the Bayers asked leave to put in evidence records he had obtained from the telephone company showing a collect call from Arlington, Va., by one "Ravish" on November 24, 1943 (R. 1170–1171, 1472). The United States Attorney objected, pointing out that even if Radovich had made such a telephone call from Washington, that fact would not tend to disprove that the request to transfer the boys to the Air Transport Command had been given on the same day as the alleged threat to take the boys to Burma, and would not detract from the fact that a letter ordering the transfer had been sent from Washington on the very next day, November 25 (R. 1172).[2] The judge declined to reopen the case at that point (R. 1173). On appeal, a majority of the circuit court of appeals held that, in view of the jury's question, this action by the trial judge was an abuse of discretion which constituted reversible error (R. 1470–1471).

[2] Miss Solomon had testified that Radovich was in New York and had again asked for money on the day following the luncheon meeting, i. e., on November 25 (R. 930).

In instructing the jury with respect to the Bayers' defense of extortion, the trial judge charged as follows (R. 1157–1158):

> Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for [an] immediate dangerous overseas mission, which would be a violation of his duty as an officer.
>
> The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.
>
> If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not

satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

The opinion of the circuit court of appeals indicates that a majority of the court thought this charge too cryptic, although it does not appear from the opinion whether reversal of the judgments would have been predicated on such ground alone (R. 1471).

**Radovich's confession.**

In the course of the trial, the Government offered in evidence a statement by Radovich given to an agent of the F. B. I. on March 15 and 17, 1945, in which Radovich admitted accepting $7,000 from the Bayers for arranging the transfers of Marvin and Melvin (R. 531–533; Gov. Ex. 25, R. 661, 1306–1312). When counsel for Radovich ob-

jected to the admission of this statement, a hearing was had outside the presence of the jury on the question of its admissibility (R. 533–536). The facts adduced at that hearing are as follows:

On August 9, 1944, Radovich was placed under arrest at Mitchel Field pending a trial by general court martial for violation of the 95th and 96th Articles of War (R. 591). He was confined to a separate room in the psychopathic ward of the hospital at the field (R. 561–563). On August 10, 1944, charges were preferred against him (R. 584–585), and on August 25 the report of the investigation of those charges was sent to headquarters (R. 606). In the meantime, on August 21, 1944, Radovich had submitted his resignation for the good of the service, stating therein that he had been informed that charges were pending against him for violation of the 95th and 96th Articles of War (R. 596–597).[3]

[3] The resignation was forwarded to headquarters, Army Air Forces, with a favorable recommendation on January 27, 1945. The indorsement forwarding the application stated that the reason for delay was that, at the request of the United States Attorney, all action in the case had been suspended pending completion of an investigation of the civilians involved. (R. 596–598.) The resignation was "not favorably considered" by the War Department in March 1945 (R. 598–601), i. e., it was rejected. The charges were referred for trial by court-martial in May, 1945, and Radovich was formally served with the charges on which he was to be tried on May 29, 1945 (R. 586–587). The reason given for the delay in the trial by court-martial was the request of the United States Attorney that no action be taken pending completion of the investigation of the civilians involved (R. 606–607).

For the first eight or ten days of his confinement in the psychopathic ward, Radovich was not allowed out of the room and was deprived of all articles which might be used to inflict injury (R. 561, 566). Thereafter, he was taken for a walk each day (R. 573). In the course of his daily exercise, Radovich mentioned to the guard who accompanied him that he would like to consult with Warrant Officer Bradspies, his counsel. The guard transmitted this request to his superior officer, and Bradspies was directed to interview Radovich. (R. 576, 578–579.) Some time thereafter (see R. 579), on September 5 or 6, 1944, a colonel introduced two F. B. I. agents to Radovich, told him that the agents wanted to talk to him about the case, and that it was up to Radovich whether he wanted to say anything to the agents (R. 541–542). During the interview with the F. B. I. agents, Radovich made or received some telephone calls, and the name of Bradspies was mentioned (R. 543, 549). Also, during the course of that interview, an officer delivered to Radovich an order instructing him not to wear his decorations, but Radovich refused to remove them (R. 553, 577–578). Radovich signed a written statement at that time (R. 538).

On September 16, 1944, Radovich was released from the hospital and subjected to administrative restriction allowing him the freedom of the base except for the officers' club, base operations, flying field and flying lines (R. 593–595). On January

2, 1945, the restrictions imposed on September 16 were removed, except as to the officers' club, and Radovich was required merely to secure permission from the base commander prior to any departure from the limits of the base (R. 595).

Between September 16, 1944, and March 15, 1945, Radovich had a number of conversations with F. B. I. agents, sometimes on his own initiative and sometimes by appointment (R. 537–538). In the course of these interviews, he recounted some facts not covered in the statement given to the F. B. I. in September 1944, and the F. B. I. arranged a meeting with Radovich to incorporate the entire story into one statement (R. 536–539). At the request of Radovich, the agent produced the original statement given in September 1944, and Radovich read over that statement before making his second statement in March (R. 539, 540, 551). Only the March statement was offered in evidence.

The trial judge ruled that the statement of September 5, 1944, was voluntary, that Radovich's confinement at that time was not illegal, and that, in any event, any infirmity in the September statement did not apply to the March statement (R. 657–658). He accordingly admitted the March statement, but only as against Radovich (R. 660). On appeal, the circuit court of appeals held that this was error; it said that since Radovich had not been served with copies of charges within eight days after his arrest, as

required by Article of War 70, his custody was analogous to that of a person held on a criminal charge without preliminary arraignment, and, hence, that any confession obtained during such period was inadmissible under the rule enunciated by this Court in *McNabb* v. *United States*, 318 U. S. 332; and that since the first confession was used at the time the second was given, the irregularity of the custody tainted the second as well as the first.

**Radovich's plea of double jeopardy**

On June 29, 1945, Radovich was convicted by court martial on charges of violating Articles of War 95 and 96 (10 U. S. C. 1567, 1568), Appendix, *infra*, p. 38, i. e., of conduct unbecoming an officer and gentleman, and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service. As to each offense, the specification alleged that in August 1943 Radovich received from Samuel Bayer $2,000 to effect the transfer of Marvin Bayer and Melvin Usdan from the First Fighter Command to the medical detail at Mitchel Field, and that on or about December 1, 1943, he accepted and received from Elias Bayer $5,000 for effecting the transfer of the boys from an organization alerted for duty overseas to the Air Transport Command. (R. 14–17).[4]

[4] The conviction of an officer for the same acts under both Article of War 95 and Article of War 96 was held proper in *McRae* v. *Henkes*, 273 Fed. 108 (C. C. A. 8), certiorari denied, 258 U. S. 624.

The indictment in the instant case was returned on July 12, 1945 (R. 3). On September 26, 1945, Radovich filed a plea in bar alleging that his conviction by court-martial precluded his trial under the present indictment (R. 4, 13–14). The Government demurred to the plea (R. 20–21).

On the argument of a motion for a continuance before argument on the plea, counsel for Radovich stated that he thought the court-martial conviction had been disapproved (R. 27), but that he had not been officially so informed (R. 30). The United States Attorney stated that he had seen the decision of the Board of Review disapproving the conviction (R. 41). In ruling on the plea and the demurrer thereto, however, the court accepted the allegation in the plea that Radovich had been convicted by court-martial (R. 55). The judge sustained the government's demurrer on the ground that the offense charged in the indictment was not the same as the charges on which Radovich had been tried by court-martial (R. 83–85).

On appeal, the circuit court of appeals ruled that the plea of double jeopardy should have been sustained if Radovich's conviction by court-martial was final. However, inasmuch as the record left the status of the military judgment in doubt, and a new trial was being ordered for other reasons, the circuit court of appeals left open the question of double jeopardy for determination on the new trial.

We have been informed by the Office of the Judge Advocate General that on August 17, 1945, the Board of Review disapproved the conviction of Radovich on the ground that the court-martial had erred in failing to give him an opportunity to offer evidence in support of his plea to the jurisdiction in which he alleged that his real accuser was the person who convened the court-martial. See Article of War 8, 10 U. S. C. 1479. The Judge Advocate General concurred in that holding, and an order disapproving the conviction was promulgated by the War Department on July 26, 1946 (General Court-Martial Order No. 240). No rehearing by court-martial under Article of War 50½ (10 U. S. C. 1522) was ordered.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In reversing the judgments of conviction.

2. In holding that the confession made by Radovich in March 1945 was inadmissible in evidence.

3. In holding that a confession, made by Radovich in September 1944, while he was in military custody, after investigation of charges against him but before the charges were referred to a court-martial for trial, was illegally obtained.

4. In holding that the confession made by Radovich in March 1945, when he was free of restraint, was inadmissible because at the time

he made that statement he reread his earlier confession at his own request.

5. In holding that Radovich's conviction by court-martial on charges of conduct unbecoming an officer and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service would sustain a plea of double jeopardy to an indictment charging conspiracy to defraud the United States.

6. In holding that the district judge abused his discretion in refusing to reopen the case after the jury had retired in order to permit the Bayers to introduce evidence.

7. In holding that the charge to the jury explaining the law relative to the Bayers' defense of extortion was too cryptic.

## REASONS FOR GRANTING THE WRIT

1. In holding Radovich's March 1945 confession inadmissible in evidence, the court below has decided questions of importance in both military and civil law in a manner inconsistent with decisions of this Court and contrary to the interests of justice.

(a) The decision of the court below, construing the provision of Article of War 70 for forwarding and serving of charges within eight days after arrest, if practicable, as analogous to the requirement for prompt arraignment of persons charged with crime, is predicated upon a

complete misconception of military procedure. Article of War 70, so far as pertinent, provides:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.
>
> * * * * *
>
> When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is ar-

rested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him.

Implementing this article, the Manual for Courts-Martial (1928, corrected to 1943) specifically provides (par. 35*a*, p. 24):

> At the outset of the investigation the accused will be informed of the following: The offenses charged against him; the **names of the accuser and of the witnesses,** as far as then known to the investigating officer; the fact that the charges are about to be investigated; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation; his right to have the investigating officer examine available witnesses requested by him; and his right to make or

submit a statement in any form subject to the risk of having such statement used against him.

Thus, at the outset a person subject to military law who is charged with crime is informed of the nature of the complaint against him. We are informed that it is customary to do so by showing him the written charges. See TM 27–255, *Military Justice Procedure* (1945), p. 38. Thereafter an investigation is had which, Article 70 directs should be completed within eight days if practicable. After the investigation is completed the charges and a summary of the evidence with respect thereto are forwarded to the officer exercising appropriate court-martial jurisdiction, who decides whether a trial should be had. If a trial is ordered, the accused is then served with a copy of the charges actually referred for trial.

The only step in the entire process which is in any way similar to arraignment is the procedure for investigation of charges before they are forwarded to the officer exercising court-martial jurisdiction. Arraignment before a committing magistrate in criminal cases is designed to require the Government to show probable cause for holding the accused and it enables the accused to learn the charges against him (see *McNabb* v. *United States*, 318 U. S. 332, 343–344). These functions are served by the investigatory procedure prescribed by Article of War 70 and by par. 35 of the Manual.

Thus, before the results of the investigation are forwarded to the officer exercising general court-martial jurisdiction, the accused has already been informed of the charges against him and has already had an opportunity to learn the nature of the Government's evidence and offer evidence on his own behalf. The provision for completion of the investigation and forwarding of charges within eight days, if practicable, is designed primarily to insure prompt dispositon of the charges. In no way is it analogous to arraignment.

There is no showing in this case that the investigatory procedure prescribed by Article of War 70 and the Manual for Courts-Martial was not followed. While the record shows that the charges were forwarded on August 24, 1944, after completion of the investigation, 15 days after Radovich's arrest, it is silent as to when the investigation was commenced, at which time, in accordance with the procedure prescribed by the Manual, the accused is normally shown (i. e., served with) the charges. It must be presumed that the investigating officer acted in compliance with his plainly prescribed official duty. See *Stearns Co.* v. *United States*, 291 U. S. 54, 63; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15; *Town of Weyauwega* v. *Ayling*, 99 U. S. 112, 119. Moreover, the matter does not rest merely in presumption, since Radovich's resignation, dated August 21, 1944, shows

that he knew the nature of the charges against him which were then under investigation (see Statement, *supra*, p. 17).

The basic assumption of the decision below, that Radovich was not served with the charges under investigation within eight days after his arrest, is thus not supported by the record. The court failed to realize that Article of War 70 provides for service of charges on two different occasions, once when the charges are being investigated and again when they have actually been referred for trial. The evidence in this case that Radovich was served with charges on May 29, 1945, relates to the service of the charges which had been referred for trial, and not to service of charges during the course of the investigation preliminary to trial.

Under these circumstances, we submit that the situation of Radovich on September 5, 1944, when he made his first statement to the F. B. I., is not analogous to that of a person held without arraignment, but is similar to that of a defendant who has been properly arraigned and held for the district court. And in such a situation, an accused soldier is not, like a civilian charged with a noncapital offense, entitled to bail; he remains in custody. Nothing in the *McNabb* decision requires the exclusion of a voluntary confession made by a person so held. Certainly the mere fact that Radovich made his confession while he was in custody did not render it inadmissible. *United States* v. *Mitchell*, 322 U. S. 65.

There can be no doubt that the September 5 confession was, as the District Court found, a voluntary one. Radovich had previously consulted with counsel, and he may have talked with counsel while the agents were interviewing him (see Statement, *supra*, p. 18). He was so far from being intimidated, that he refused to obey an order directing him to remove his military decorations. Under such circumstances, we submit that the court below was in error in holding that the September 5 confession would have been inadmissible under the *McNabb* rule if it had been offered in evidence.

(b) However, even if for some reason not now apparent the September confession should be considered inadmissible, we submit that the court below went far beyond any decision of this Court in holding that such inadmissibility tainted the second confession made six months later when Radovich was free of all substantial restraint. During that six month period Radovich had full opportunity to consult such counsel as he chose. Had he desired to limit or repudiate his earlier confession in any respect, he had ample opportunity to do so. Instead, he freely and voluntarily reaffirmed and amplified his earlier statement. To hold a confession thus freely given unavailable as evidence merely because, at his own request, Radovich reread his previous statement, seems to us a disservice to the cause of criminal justice.

When the court below applied to the second confession the rule of *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, that the fruits of evidence improperly obtained are themselves inadmissible, it failed to give due consideration to the essential difference between a second confession and the fruits of an illegal search; it failed to take into account the fact that a second confession may well involve an exercise of the free will of the person confessing. In the *Silverthorne* case, the defendants never consented either to the original search or to the subsequent use of the evidence obtained from that search. Certainly in that case if, after the first illegal search, the defendants had voluntarily delivered to the Government the evidence illegally seized, such evidence would not have been inadmissible merely because the government agents happened to have knowledge of the existence of the records as a result of their illegal search. Here Radovich, when admittedly free of coercion, voluntarily reaffirmed his previous statement, thus voluntarily giving the Government the information previously obtained. It is therefore immaterial whether he did or did not reread his previous statement. The significant fact is that at a time when he was free to repudiate or reaffirm his earlier statement, he himself, in the exercise of his free will, voluntarily confessed his guilt. The second confession was not evidence obtained as the result of the first and independently of any intervening action by

Radovich; his voluntary decision to reaffirm his previous statement, which he himself asked to see, was the operational fact which brought the second confession into existence.

This Court, in *Lyons* v. *Oklahoma*, 322 U. S. 596, made it clear that the mental freedom of an accused at the time a second confession is given is the significant factor to be considered in determining the admissibility of the later statement. In failing to give due weight to the factor of free will involved in the making of the second confession, the court below disregarded the basic foundation of that decision.

The logical effect of the decision below would be that whenever a confession has been obtained under circumstances which would render it inadmissible under the *McNabb* rule, no future confession, however freely given, could be admitted into evidence. The decision below does not purport to go that far, but its reasoning, consistently followed, would require such a result. Any person who has once made a confession must be aware of that fact, and his later statement will almost always to some extent be influenced by what he has previously said. The circumstance that an accused rereads his earlier statement instead of relying on his memory does not seem to us a sound basis for distinguishing between the admissibility and inadmissibility of the later confession. The true test is whether the second confession is a voluntary one made under circum-

stances free of coercive influence. Since the decision below thus tends to cast doubt on the admissibility of a second confession following an inadmissible confession, it is directly contrary to the ruling of this Court in *Lyons* v. *Oklahoma, supra*, and it raises a problem of importance in the administration of the criminal law.

2. The decision below on Radovich's plea of double jeopardy seems to us so contrary to principles enunciated by this Court that we would urge this aspect of the case as a basis for certiorari were it not for the fact that, in our opinion, under the decision below and the actual facts as we have ascertained them, the defense would not be available to Radovich on a new trial. As we set forth in the Statement, *supra*, p. 22, Radovich's court-martial conviction was disapproved on the ground that the court-martial erred in failing to give him an opportunity to offer evidence in support of his plea to its jurisdiction. No rehearing was ordered. At military law, a direction for rehearing must be made at the same time as the action disapproving the sentence; it cannot be made later. Manual for Courts-Martial, par. 89; 2 Bull. JAG 97, sec. 408 (5); TM 27-255, *Military Justice Procedure* (1945) p. 128; see Dig. Op. JAG (1912-1940), sec. 396 (3). In view of the direction of Article of War 40 (10 U. S. C. 1511) that no proceeding in which an accused is found guilty by court-martial shall be held to be a trial constituting

jeopardy until the reviewing authority has taken final action, and in view of the circumstance that the disapproval of the conviction was based on reasons not going to the merits, we think that the trial by court-martial cannot now support a plea of double jeopardy. See *Sanford* v. *Robbins*, 115 F. 2d 435, 438–439 (C. C. A. 5), certiorari denied, 312 U. S. 697, and cases there cited. The opinion of the court below recognizes that if the record had shown that the conviction by court-martial had been disapproved, the plea of double jeopardy would not have been available. Since the facts as to the disapproval are matters of official record, we submit that, on review of the other aspects of this case, this Court may properly consider the actual situation, and if it finds the trial otherwise free from error, may reinstate the judgment as to Radovich.

On the other hand, if the disapproval of the court-martial conviction does not render the question of double jeopardy moot, then review of this issue is warranted. This Court, in its recent decision in *Pinkerton* v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946, reaffirmed its earlier rulings to the effect that, in deciding questions of double jeopardy, it is the elements of the offenses charged, and not the evidence offered in support thereof, which are determinative. And in *Glasser* v. *United States*, 315 U. S. 60, 66–67, this Court made it clear that a charge of conspiracy to deprive the United States of its

governmental functions by accepting payments to influence official action is a different offense from conspiracy to take or give a bribe. These decisions were disregarded by the court below when it ruled that a trial for conduct unbecoming an officer and a gentleman and for conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the service by accepting a bribe was a trial for the same offense as conspiracy to defraud the United States.

3. In reversing the judgment as to the Bayers because of the failure of the trial judge to reopen the case for the admission of evidence after the jury had retired (see Statement *supra*, pp. 13–14), the court below reversed as to Radovich as well because the charge was conspiracy (R. 1473). Hence, a review of Radovich's conviction necessarily raises the question of the validity of the reversal on such ground as to all three respondents.

Independently of this consideration, we submit that the decision below constitutes such an unwarranted substitution of the judgment of the circuit court of appeals for the discretion of the trial judge as to require review by this Court. The circuit court of appeals, we submit, misconstrued the purport of the United States Attorney's argument and the significance of the excluded evidence in relation thereto. The gist of the argument was that the defense of extortion was

untenable for the reason that, at the very time when, according to the defense, Radovich was making threats to send Marvin and Melvin overseas unless he received $5,000, he had already arranged for the transfer of the boys to a command scheduled for duty in the United States. Whether Radovich did or did not call Samuel Bayer from Washington, whether he did or did not see him in New York, the Government was still in a position to argue that Radovich could not have made the alleged threats because he had already put it beyond his power to carry the threats into effect. The United States Attorney did not directly question the alleged meeting in New York; he did strongly question the claim that threats had been made in order to extort money.

The evidence that the transfer had been arranged on November 24, 1943, and officially made on November 25 had been introduced as part of the Government's case long before Miss Solomon testified to threats by Radovich on November 24 and 25. The fact that the defense failed to appreciate that the Government's evidence tended to undermine their claim of extortion certainly does not constitute such surprise as would necessitate the reopening of the trial. And since, as we have shown, the evidence offered by the Bayers in no way detracted from the substance of the Government's argument, we submit that the trial judge committed no abuse of discretion in re-

fusing to reopen the case four hours after the jury had retired. The matter was one for the discretion of the trial judge (*Crumpton* v. *United States,* 138 U. S. 361, 364; *Safford* v. *United States,* 252 Fed. 471, 474 (C. C. A. 2); *Hart* v. *United States,* 84 Fed. 799, 804 (C. C. A. 3)), and the circuit court of appeals exceeded its appellate function in finding an abuse of discretion on these facts. Cf. *United States* v. *Johnson,* 327 U. S. 106.

4. The court below admitted that the charge to the jury explaining the Bayers' defense of extortion, see *supra,* pp. 14–16, was an accurate statement of the law, but a majority thought that it was too cryptic. There is no showing that the jury failed to understand it. To us it seems to have stated in clear terms that, if the jury found that the payments by the Bayers were made as a result of threats by Radovich, the payments could not be the result of a criminal agreement, and hence would not establish conspiracy. Insofar, therefore, as the reversal of the convictions of the Bayers was predicated on this portion of the judge's charge, we submit that the ruling of the court below was erroneous, and contrary to the decisions of this Court.

The history of the harmless error statute set forth by this Court in *Kotteakos* v. *United States,* Nos. 457, 458, Oct. T. 1945, decided June 10, 1946, makes it clear that prejudice is not to be presumed from the mere finding of error, and

that any alleged error must be judged in the light of the whole case. Here there is not even a finding of error, and there is no showing of prejudice. The evidence in the case is strong and convincing. The mere circumstance that a majority of the court below might have worded the charge in somewhat more elaborate phraseology does not seem to us a proper ground for the reversal of a well merited conviction. The decisions of this Court in *Bollenbach* v. *United States*, 326 U. S. 607, and *Bihn* v. *United States*, No. 675, Oct. T. 1945, decided June 10, 1946, require that a charge be accurate, not that it be verbose.

## CONCLUSION

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

J. HOWARD MCGRATH,
*Solicitor General.*

OCTOBER 1946.

# APPENDIX

Article of War 95, 10 U. S. C. 1567, provides:

> Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Article of War 96, 10 U. S. C. 1568, provides:

> Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring *discredit upon the* military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

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No. 606

# In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE UNITED STATES

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No. 606

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## BRIEF FOR THE UNITED STATES

### OPINION BELOW

The opinion of the circuit court of appeals (R. 1467–1476) is reported at 156 F. 2d 964.

### JURISDICTION

The judgment of the circuit court of appeals was entered August 14, 1946 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition for a writ of certiorari was extended to October 12, 1946 (R. 1478). The petition for a writ of certiorari was filed October 11, 1946, and was granted December 9, 1946 (R. 1479). The jurisdiction of this Court

rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

**QUESTION PRESENTED**

1. Whether a voluntary confession by an officer of the Army held in military custody was rendered inadmissible under the rule of *McNabb* v. *United States,* 318 U. S. 332, where such officer, though duly informed of the charges against him in the course of the investigation prescribed by the 70th Article of War, was not served, within eight days after his arrest, with the charges that were referred for trial after that period; and if so, whether a second confession, voluntarily made when the accused was free from restraint, was rendered inadmissible through the circumstance that the accused, at his own request, reread his earlier confession at the time he made his second statement.

2. Whether a claim of double jeopardy may properly be based on a conviction by court-martial which was disapproved because of failure of the tribunal to afford accused an opportunity to present evidence in support of his plea to the jurisdiction; and if so, whether a trial by court-martial for conduct unbecoming an officer and a gentleman and for conduct to the prejudice of good order and military discipline and of a nature tending to bring discredit upon the military service, by accepting money for arranging the transfers of

certain enlisted men to prevent their going overseas, bars a trial in a federal district court for conspiracy to defraud the United States of its right to the honest performance of the officer's duty.

3. Whether the district court committed an abuse of discretion in refusing to reopen the case, four hours after the jury had retired, to allow the defense to introduce additional evidence.

4. Whether the court below correctly held that the trial judge's concededly proper statement of the law in his instructions concerning the defense of extortion constituted reversible error because the statement was too cryptic.

## STATUTES INVOLVED

The pertinent statutes involved are set out in Appendix A, *infra*, pp. 96–104.

## STATEMENT

Respondents were convicted in the United States District Court for the Southern District of New York on a one count indictment charging conspiracy to defraud the United States of its right to the faithful and disinterested services and judgment of officers of the United States Army (R. 8–11, 1176). The indictment specified that it was part of the conspiracy that respondent Samuel Bayer, father of Martin Bayer and uncle of Melvin Usdan, both of them soldiers in the United States Army, and respondent Elias Bayer,

uncle of the two boys, would give respondent Radovich, an officer of the United States Army, $7,000 in order to induce Radovich to transfer the boys to various units for the purpose of keeping them from being sent out of the United States for duty overseas. Samuel Bayer was sentenced to imprisonment for two years and to pay a fine of $10,000; Elias Bayer to imprisonment for eighteen months and to pay a fine of $5,000; and Radovich to imprisonment for a year and a day (R. 1211–1212). On appeal, the judgments of conviction were reversed (R. 1476).

A. THE EVIDENCE FOR THE GOVERNMENT

A short time before December 15, 1942, Samuel Bayer learned that men enlisting in the Army before December 15 would be allowed to select the branch of service in which they wished to serve and that men subsequently drafted would in all likelihood be assigned to the infantry (R. 184, 276–277). Martin Bayer, Samuel's son, and Melvin Usdan, his nephew, both enlisted in the Air Corps on December 15 and were assigned as clerks to base headquarters at Mitchel Field, Long Island (Govt. Ex. 27, R. 907, 1312; Govt. Ex. 11, R. 496, 1233; Govt. Exs. 28, 29, R. 908, 909, 1313, 1319). In the period following this assignment, Elias Bayer met and introduced to Samuel various officers attached to the First Fighter Command at Mitchel Field (R. 133, 187, 363, 395; Ex. 8, R. 491, 1225). Samuel and Elias Bayer enter-

tained these officers extensively (R. 149, 395; Govt. Ex. 11, R. 496, 1241–1242; Govt. Ex. 19, R. 505, 1274; Govt. Ex. 20, R. 505, 1285–1287), and Samuel Bayer, through his company, the Plymouth Thread Company, paid for uniforms made for the officers by a firm owned by Samuel's brothers-in-law (R. 134–135, 152, 166–167, 186–188, 201, 366–367; Govt. Ex. 13, R. 498, 1246).[1]

In April 1943, members of the Women's Army Corps began to replace male clerical personnel at Mitchel Field with the result that male personnel were pooled for transfer to other fields (R. 369, 397). One Colonel Jacobson requested the transfer of Martin and Melvin from base headquarters to the First Fighter Command (R. 397–398). Samuel Bayer told another officer that he understood that the effect of this transfer was to assure the assignment of the boys to Mitchel Field for approximately one year (R. 278). A few days after the transfers were effected, Samuel Bayer tendered a dinner to Colonel Jacobson at the Waldorf-Astoria Hotel and presented him with four new automobile tires (R. 370–372).

The April transfer placed Melvin and Martin under the command of Radovich (R. 141, 835).

[1] In the summer of 1944, at Samuel Bayer's request, the books of the uniform company were altered to indicate that payment had been made by the officers themselves rather than the Plymouth Thread Company (R. 190–195). Prior to this, both of the Bayers, when interviewed by an Army investigating officer, had denied paying for the uniforms and had denied making payments to Radovich (R. 507–513).

In July 1943, there were rumors current at Mitchel Field that the Bayers were making gifts to officers of the First Fighter Command (R. 207–208, 280–281). Radovich informed Samuel Bayer that the boys would have to be transferred (R. 924; Govt. Ex. 25, R. 661, 1309). At Samuel's request to have the boys kept at Mitchel Field, Radovich approved a transfer of the boys from his own unit to the medical detachment at the field (R. 115–118; Govt. Ex. 25, R. 661, 1309–1310). The transfer was originally disapproved because of the shortage of clerks, but was effected by an exchange of personnel between the two units. (Bayer's Ex. D., R. 889, 1334, 1337–1338). While this transfer was pending, Samuel and Elias went to Mitchel Field and asked Colonel Vidal to facilitate the transfer (R. 137–139). After the transfer was effected, Samuel paid Radovich approximately $2,000 (Govt. Ex. 25, R. 661, 1310).

A short time later, in August 1943, the boys were transferred to an airborne engineer unit scheduled for duty overseas (R. 140, Govt. Ex. 27, R. 907, 1312). Samuel and Elias called Colonel Vidal several times and requested him to prevent the transfer, but were informed that nothing could be done (R. 140–141). Samuel also communicated with various Army officers whom he had previously met and attempted to induce them to arrange to have the boys transferred out of the engineer unit, but these officers declined

to intercede (R. 160, 176–177, 374). Samuel said to one officer, "I would do anything in my power to keep my boy from going overseas" (R. 176).

In the meantime, Radovich had left Mitchel Field and joined the First Air Commando Group (R. 253). This organization was given highest priority on personnel, and its officers' requests for transfer of personnel were regularly and quickly honored (R. 231–232, 254). In August and September 1943, Radovich, on three occasions, discussed with Captain Pepper, a personnel officer at Mitchel Field, the possibility of arranging a transfer of Martin and Melvin out of the airborne engineers to the Air Transport Command, a unit set up for service in the continental United States (R. 208–211). Pepper told Radovich that the boys could be transferred only at the request of an organization having a higher priority than the airborne engineers (R. 209). Radovich suggested to Pepper that it might be possible to have the boys transferred to the First Air Commando Group and subsequently have them dropped as surplus and transferred to the Air Transport Command (R. 211). Pepper agreed that in this way a transfer might be arranged (R. 211). Radovich told Pepper that if he could effect such a transfer, it would be "worth his while," and he would see that it would be worth Pepper's while (R. 211–212).

In September 1943, Samuel Bayer asked an Army officer whether he thought there would be

any trouble if his boys were transferred out of the alerted unit. When the officer said that he thought the consequences would be serious, Bayer cried and said that he wanted his son out of the unit. (R. 283–284.)

On November 22, 1943, at the request of Radovich, a teletype message was sent from Headquarters Army Air Forces in Washington directing the transfer of Melvin and Martin from the Airborne Engineers to the First Air Commando Group at Goldsboro, North Carolina, and ordering them to report not later than November 25 (Govt. Ex. 3, R. 118–121, 1217–1218; R. 256). On November 24, Radovich called a clerk in the office of the Army Air Forces in Washington and requested that the boys be transferred from the Air Commando Group to the Air Transport Command (R. 256–257). This request was honored by a letter dated November 25, 1943, from Headquarters Army Air Forces in Washington (R. 123; see Govt. Ex. 4, R. 121, 1218). Meanwhile, when Melvin and Martin arrived at Goldsboro on November 25, they were seen by Lieutenant Colonel Boebel who had previously been at Mitchel Field (R. 262–263). He asked the boys whether they knew that the new organization was made up of volunteers and they replied that they did (R. 265). Subsequently, Colonel Boebel told Radovich that he did not think the boys were the type of men desired in the organization and Radovich said they

would be transferred out (R. 264). The transfer from the Air Commando Group to the Air Transport Command was effected on November 29, 1943, pursuant to authority contained in the letter from Headquarters Army Air Forces dated November 25 (Govt. Ex. 4, R. 121–123, 1218). Shortly thereafter, Elias Bayer and an unidentified man met Radovich outside the railroad station at Goldsboro and gave him an envelope containing $5,000 (Govt. Ex. 15, R. 500, 1254–1256; Govt. Ex. 20, R. 505, 1279, 1281; Govt. Ex. 25, R. 661, 1311). Some time thereafter, Radovich sent Captain Pepper a bank draft in the sum of $500 (R. 212; Govt. Ex. 25, R. 661, 1311).

In September 1944, while Radovich was in military custody at the hospital at Mitchel Field, he called upon Colonel Jacobson who was then in the hospital. When asked how he came to be involved Radovich said: "I was going overseas on a very hot job and didn't expect to come back, had the wife and the baby, figured I might just as well take care of them" (R. 376).

B. RADOVICH'S CONFESSION

In the course of the trial, the Government offered in evidence a statement by Radovich given to an agent of the F. B. I. on March 15 and 17, 1945, in which Radovich admitted accepting $7,000 from the Bayers for arranging the transfers of Martin and Melvin (R. 531–533; Govt. Ex. 25, R. 661, 1306–1312). When counsel for Radovich

objected to the admission of this statement, a hearing was had outside the presence of the jury on the question of its admissibility (R. 533–536). The facts adduced at the hearing are as follows:

On August 9, 1944, Radovich was placed in confinement at Mitchel Field pending a trial by general court-martial for violation of the 95th and 96th Articles of War (R. 591). He was confined in a separate room in the psychopathic ward of the hospital at the field (R. 561–563). On August 10, 1944, charges were preferred against him (R. 584–585), and on August 25 the report of the investigation of those charges was sent to headquarters (R. 606). In the meantime, on August 21, 1944, Radovich had submitted his resignation for the good of the service, stating therein that he had been informed that charges were pending against him for violation of the 95th and 96th Articles of War (R. 596–597).[2]

[2] The resignation was forwarded to Headquarters Army Air Forces, with a favorable recommendation on January 27, 1945. The indorsement forwarding the application stated that the reason for delay was that, at the request of the United States Attorney, all action in the case had been suspended pending completion of an investigation of the civilians involved. (R. 596–598.) The resignation was "not favorably considered" by the War Department in March 1945 (R. 598–601), i. e., it was rejected. The charges were referred for trial by court-martial in May 1945, and Radovich was formally served with the charges on which he was to be tried on May 29, 1945 (R. 585–587). The reason given for the delay in the trial by court-martial was the request of the United States Attorney that no action be taken pending completion of the investigation of the civilians involved (R. 606–607).

For the first eight or ten days of his confinement in the psychopathic ward, Radovich was not allowed out of the room and was deprived of all articles which might be used to inflict injury (R. 561, 566). Thereafter, he was taken for a walk each day (R. 573). In the course of his daily exercise, Radovich mentioned to the guard who accompanied him that he would like to consult with Warrant Officer Bradspies, his counsel. The guard transmitted this request to his superior officer, and Bradspies was directed to interview Radovich. (R. 576, 578–579.) Some time thereafter (see R. 579), on September 5 or 6, 1944, a colonel introduced two F. B. I. agents to Radovich, told him that the agents wanted to talk to him about the case, and that it was up to Radovich whether he wanted to say anything to the agents (R. 541–542). During the interview with the F. B. I. agents, Radovich made or received some telephone calls, and the name of Bradspies was mentioned (R. 543, 549). Also, during the course of that interview, an officer delivered to Radovich an order instructing him not to wear his decorations, but Radovich refused to remove them (R. 553, 577–578). The F. B. I. agents told Radovich they were investigating the matter and had come to get his story (R. 548). He gave his version of the transactions without hesitation (R. 542–543). Radovich did not appear to be worried; he said he regretted the whole affair and wanted to get

it all straightened out (R. 549). Radovich signed a written statement at that time (R. 538).

On September 16, 1944, Radovich was released from confinement and subjected to administrative restriction allowing him the freedom of the base except for the officers' club, base operations, flying field and flying lines (R. 593–595). On January 2, 1945, the restrictions imposed on September 16 were removed, except as to the officers' club, and Radovich was required merely to secure permission from the base commander prior to any departure from the limits of the base (R. 595).

Between September 16, 1944, and March 15, 1945, Radovich had a number of conversations with F. B. I. agents, sometimes on his own initiative and sometimes by appointment (R. 537–538). In the course of these interviews, he recounted some facts not covered in the statement given to the F. B. I. in September 1944, and the F. B. I. arranged a meeting with Radovich to incorporate the entire story into one statement (R. 536–539). At the request of Radovich, the agent produced the original statement given in September 1944, and Radovich read over that statement before making his second statement in March (R. 539, 540, 551). Only the March statement, made in the F. B. I. office in New York (R. 531–533), was offered in evidence.

The trial judge ruled that the statement of September 5, 1944, was voluntary, that Radovich's

confinement at that time was not illegal, and that, in any event, any infirmity in the September statement did not apply to the March statement (R. 657–658). He accordingly admitted the March statement, but only as against Radovich (R. 660). On appeal, the circuit court of appeals held that this was error; it said that since Radovich had not been served with a copy of the charges within eight days after his arrest, as required by the 70th Article of War, his custody was analogous to that of a person held on a criminal charge without preliminary arraignment, and, hence, that any confession obtained during such period was inadmissible under the rule enunciated by this Court in *McNabb* v. *United States*, 318 U. S. 332; and that since the first confession was used at the time the second was given, the irregularity of the custody tainted the second as well as the first. (R. 1473–1475.)

C. RADOVICH'S PLEA OF DOUBLE JEOPARDY

On June 29, 1945, Radovich was convicted by court-martial on charges of violating the 95th and 96th Articles of War (10 U. S. C. 1567, 1568, Appendix, *infra*, p. 104), i. e., of conduct unbecoming an officer and gentleman, and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service. As to each offense, the specifications alleged that in August 1943 Radovich received from Samuel Bayer $2,000

to effect the transfer of Martin Bayer and Melvin Usdan from the First Fighter Command to the medical detachment at Mitchel Field, and that on or about December 1, 1943, he accepted and received from Elias Bayer $5,000 for effecting the transfer of the boys from an organization alerted for duty overseas to the Air Transport Command (R. 14–17).

The indictment in the instant case was returned on July 12, 1945 (R. 3). On September 26, 1945, Radovich filed a plea in bar alleging that his conviction by court-martial precluded his trial under the present indictment (R. 4, 13–14). The Government demurred to the plea (R. 20–21).

On the argument of a motion for a continuance before argument on the plea, counsel for Radovich stated that he thought the court-martial conviction had been disapproved (R. 27), but that he had not been officially so informed (R. 30). The United States Attorney stated that he had seen the decision of the Board of Review disapproving the conviction (R. 41). In ruling on the plea and the demurrer thereto, however, the court accepted the allegation in the plea that Radovich had been convicted by court-martial (R. 55). The judge sustained the Government's demurrer on the ground that the offense charged in the indictment was not the same as the offenses for which Radovich had been tried by court-martial (R. 83–85).

On appeal, the circuit court of appeals ruled that the plea of double jeopardy should have been sustained if Radovich's conviction by court-martial was final. However, inasmuch as the record left the status of the military judgment in doubt, and a new trial was being ordered for other reasons, the circuit court of appeals left open the question of double jeopardy for determination on the new trial (R. 1475–1476).

We are advised that, pursuant to AW 50½ (10 U. S. C. 1522, *infra*, pp. 97–102), the Board of Review disapproved Radovich's conviction on the ground that the court-martial committed prejudicial error in failing to give him an opportunity to offer evidence in support of his plea to the jurisdiction, in which he had alleged that the authority convening the court-martial was in fact the real accuser. See AW 8 (10 U. S. C. 1479). The Judge Advocate General concurred in that holding; his views and those of the Board of Review are set forth in Appendix C, *infra*, pp. 110–121. Thereafter, no rehearing by court-martial under AW 50½ having been directed, the War Department published the disapproval in General Court-Martial Orders No. 240, July 26, 1946; Appendix D, *infra*, pp. 122–125.

D. THE BAYERS' DEFENSE

The Bayers sought to defend themselves against the charge of conspiracy on the ground that the payment of money to Radovich was not made

pursuant to agreement but was extorted by Radovich. In statements given to the United States Attorney before trial, which were introduced in evidence by the Government, the Bayers said that after Radovich had approved the transfer of the boys to the medical unit in August 1943 he asked for money (Govt. Ex. 8, R. 491, 1226–1228; Govt. Ex. 13, R. 498, 1249–1250; Govt. Ex. 20, R. 505, 1277, 1278), and that after the boys had been transferred to the Air Commando Group, Radovich came to New York and told Samuel Bayer that he would take the boys overseas to Burma unless he received $5,000 (R. 1229–1231, 1279). In their defense, the Bayers called as a witness Samuel Bayer's secretary, Anne Solomon (R. 915). She testified that, after the boys were transferred to the medical unit at the field, Radovich asked to speak with Samuel Bayer privately; that she listened outside the door and heard Radovich ask Bayer for $500 to send his wife to California (R. 925); that in two other conversations which she also overheard Radovich asked for additional funds (R. 926); and that subsequently, after the boys were transferred from Mitchel Field to the Airborne Engineers, she heard Radovich say that for $1,500 he could have the boys sent back (R. 927). She further testified that on the same morning that Martin Bayer telephoned his father that he was being transferred to Goldsboro, North Carolina (R. 929–930),

a date fixed by Melvin Usdan as November 24, 1943 (R. 862), Radovich called from Washington and asked Samuel Bayer to meet him for lunch that day; that at lunch Radovich in her presence said that he was taking the boys with him to Burma unless Bayer paid him $5,000 (R. 928–929); that the next day, i. e., November 25, 1943, Radovich again stated that if Bayer did not give him $5,000 he would take the boys with him to Burma (R. 930). Miss Goertz, a clerk in the office of Headquarters Army Air Forces, Washington, D. C., had previously testified for the Government that on November 24, 1943, Radovich called her from Goldsboro, North Carolina, and asked her to transfer Martin and Melvin to the Air Transport Command (R. 256–257), and it had also been shown that the transfer had been authorized by a letter from Headquarters Army Air Forces dated November 25, 1943 (R. 123; Govt. Ex. 4, R. 121, 1218). Counsel for the Bayers had taken particular note of the date of such letter (R. 123).

In discussing the Bayers' defense of extortion in his summing up, the United States Attorney pointed out to the jury that Samuel Bayer had approached other officers seeking to have his son transferred out of the airborne engineers (R. 1069) and further argued that the Bayers' denials, when they were first questioned by military authorities, that they made any gifts to Radovich, were

inconsistent with their defense that they were the victims of extortion (R. 1070). Then, after noting that the luncheon meeting to which Miss Solomon testified must have occurred on November 24th, the United States Attorney stated (R. 1072–1073):

> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.
>
> Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command [*sic*] on the very day that, according to Sam Bayer, he, Radovich, is threatening to take the boys on a dangerous mission that he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived

at Goldsboro. Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando. So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very little. Well, there is certainly no doubt that $5,000 was paid by Samuel Bayer and there is no doubt that Radovich got $5,000. Radovich says the Bayers offered him the money. The Bayers say the money was paid under threat. Well, I leave it to you ladies and gentlemen to decide on the basis of the undisputed testimony in this case and the records in this case where the truth lies.

The next day, before the judge charged the jury, counsel for the Bayers stated that they had been surprised by the Government's questioning of the meeting on November 24 and that a check of the records had shown a collect call from Washington to the Bayers on that date (R. 1116–1117). The court stated that, if counsel so desired, he would tell the jury that the records showed such a collect call, and counsel requested

the court to tell the jury that the statement was being made at their request (R. 1125–1126). At the suggestion of counsel for Radovich, the court also stated that he would tell the jury that the records did not show who made the call (R. 1127). The judge made such a statement to the jury at the opening of his charge (R. 1129).

After the jury had been out about four hours (R. 1154), they asked for a rereading of the judge's charge on conspiracy and of the United States Attorney's summing up (R. 1155). The judge declined to read the argument of one counsel without reading the arguments of all (R. 1155). Some of the jurors stated that they were particularly interested in the United States Attorney's summary of the telephone messages and meetings from November 22 to November 25, 1943 (R. 1163, 1166–1167). Thereafter, counsel for the Bayers asked leave to put in evidence records he had obtained from the telephone company showing a collect call from Arlington, Va., by one "Ravish" on November 24, 1943 (R. 1170–1171, 1472). The United States Attorney objected, pointing out that even if Radovich had made such a telephone call from Washington, the fact would not tend to disprove that the request to transfer the boys to the Air Transport Command had been given on the same day as the alleged threat to take the boys to Burma, and would not detract from the fact that a letter directing the transfer had been sent

from Washington on the very next day, November 25 (R. 1172), a day when, according to Miss Solomon's testimony, Radovich was making threats in New York (R. 930). The judge declined to reopen the case at that point (R. 1173). On appeal, a majority of the circuit court of appeals held that, in view of the jury's question, this action by the trial judge was an abuse of discretion which constituted reversible error (R. 1470–1471).

In instructing the jury with respect to the Bayers' defense of extortion, the trial judge charged as follows (R. 1157–1158):

> Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for [an] immediate dangerous overseas mission, which would be a violation of his duty as an officer.
>
> The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.
>
> If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did

some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

The opinion of the circuit court of appeals indicates that a majority of the court, while conceding the correctness of the charge, thought it too cryptic, but it does not appear from the

opinion whether reversal of the judgments would have been predicated on such ground alone (R. 1471).

**SPECIFICATION OF ERRORS TO BE URGED**

The circuit court of appeals erred:

1. In reversing the judgments of conviction.

2. In holding that the confession made by Radovich in March 1945 was inadmissible in evidence.

3. In holding that a confession, made by Radovich in September 1944, while he was in military custody, after investigation of charges against him but before the charges were referred to a court-martial for trial, was illegally obtained.

4. In holding that the confession made by Radovich in March 1945, when he was free of restraint, was inadmissible because at the time he made that statement he reread his earlier confession at his own request.

5. In holding that Radovich's conviction by court-martial on charges of conduct unbecoming an officer and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service would sustain a plea of double jeopardy to an indictment charging conspiracy to defraud the United States.

6. In holding that the district judge abused his discretion in refusing to reopen the case after the jury had retired in order to permit the Bayers to introduce evidence.

7. In holding that the charge to the jury explaining the law relative to the Bayers' defense of extortion was too cryptic.

## SUMMARY OF ARGUMENT

### I

The circuit court of appeals held that the September statement would have been inadmissible in evidence under *McNabb* v. *United States,* 318 U. S. 332, on the ground that Radovich was in illegal custody when such statement was made because he was not served with charges within eight days after his arrest as required by AW 70. It further held that, since Radovich reread his September statement when he made his second statement, the March statement was also inadmissible under *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385. We submit that the decision below is erroneous both in its premise and in its conclusion.

A. The court below failed to realize that at military law under the 70th Article of War notice of the charges is given on two separate occasions, once when they are being investigated, and later when they are referred for trial. On the first occasion there is normally no physical service of the charges in the sense that the accused retains a copy of them. It is only when trial is directed—and such trial may involve fewer or lesser charges than those which were investigated—that there is a physical delivery

of the charges actually referred for trial. This is the formal service of charges prescribed by AW 70.

Here there is no evidence that the investigatory procedure directed by AW 70 and the Manual for Courts-Martial was not followed; to the contrary, Radovich's proffered resignation shows that within at least eleven days he knew the nature of the charges against him which were then being investigated. The provision in AW 70 for the investigation and forwarding of charges within eight days, if practicable, is designed principally to insure prompt disposition of the charges. The AW 70 investigation is the only procedural step which is analogous to arraignment in a civil court; there is no such thing as bail at military law. Consequently, the situation of Radovich on September 5 was not analogous to that of a person held without arraignment, but was similar to that of a person who has been properly arraigned and held for the district court. Nothing in the *McNabb* decision requires the exclusion of a voluntary confession made by a person so held.

The successive legislative modifications of the 70th Article of War show that, in its present form, it was designed to allow a reasonable time, not measured by arbitrary time limits, for holding an accused in custody pending investigation and trial. Considering the nature of the offense here under consideration, which involved civilians and appeared to involve other officers as well, a period of a little more than two weeks from August 9 to

August 25 was obviously a reasonable time for investigation. And the period from August 25 to September 5 was a reasonable time to hold Radovich in custody pending a decision on whether to try him by court-martial, particularly since Radovich had theretofore submitted his resignation for the good of the service. It is unnecessary to consider whether or not his subsequent confinement and the subsequent delay of his trial by court-martial were illegal; the only significant point here, see *United States* v. *Mitchell*, 322 U. S. 65, is that he was legally in custody on September 5 when he made his first confession. Since, therefore, Radovich was legally in custody, since he had been properly informed of the charges, and since he had had an opportunity to consult with counsel, his voluntary confession on September 5 would have been admissible in evidence, if offered.

B. Even if the September 5 confession were, for any reason not now apparent, inadmissible, that circumstance would not taint the confession made six months later when Radovich was free from all substantial restraint. Had Radovich decided to limit or repudiate his earlier confession in any respect, he had ample opportunity to do so. Instead he freely and voluntarily reaffirmed and amplified his earlier statement.

In holding that the assumed illegality of the first confession tainted the second because Radovich at

his own request reread the first confession when he made the second, the court below misapplied the rule of *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, that fruits of evidence illegally obtained are themselves inadmissible. In that case, the defendants never consented either to the original search or to the subsequent use of the information obtained from that search; the secondary evidence, the fruits of the illegal search, were the direct results of the Government's own illegal action.

Here the second confession did not come into existence by virtue of action by the Government alone; there had to be an affirmative, independent, exercise of free will by Radovich. Hence, it is immaterial whether he did or did not reread his former statement. The second statement was not the direct result of the first; Radovich's decision to reaffirm his previous statement, which he himself asked to see, was the operational fact which brought the second confession into existence. The second statement was, therefore, properly admitted in evidence against him. See *Lyons* v. *Oklahoma,* 322 U. S. 596.

II

A. The disapproval of the court-martial conviction for reasons not going to the merits eliminates the question of double jeopardy from the case. Since no rehearing by court-martial was

ordered, the case is in the posture of a civil conviction, reversed on appeal, where a new indictment is returned against the defendant. In those circumstances a plea of double jeopardy is not available. See *Burton* v. *United States*, 202 U. S. 344, 380. Since Radovich could be retried for the offense for which he was originally convicted by court-martial after such conviction was disapproved, it does not matter for constitutional purposes whether that trial is by a civil or a military court. In the end he will have had only one real trial for the offense.

It is clear that, where a verdict is reversed on appeal, the judgment will not support a plea of double jeopardy. E. g., *Murphy* v. *Massachusetts*, 177 U. S. 155, 159. On this analysis it is immaterial that review under AW 50½ is automatic; the grounds for disapproval by the Board of Review and The Judge Advocate General were the grounds urged by the accused, and the result achieved was the result which he sought to attain at the trial. Moreover, the Board of Review in effect held that the trial by court-martial was illegal. To support a plea of double jeopardy, the trial on which the plea is based must have been a valid one. *United States* v. *Ball*, 163 U. S. 662, 669.

B. Even if the question of double jeopardy remains in the case, the plea is not available to Radovich for the reason that the court-martial speci-

fications and the present indictment charged different offenses. The indictment alleged conspiracy to defraud the United States by the giving and receiving of money to influence official action. The military specifications charged the completed act of receiving money by Radovich alone. The question here is controlled by *Burton* v. *United States*, 202 U. S. 344, 377, holding that the same individual could properly be punished for the separate acts of agreeing to receive and receiving a bribe, and by *Pinkerton* v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946, holding that conspiracy to commit a crime and the substantive crime are separate and distinct offenses.

This case does not fall within the rule that a conviction for both conspiracy and the substantive offense cannot be sustained where the agreement of two persons is necessary for the completion of the substantive crime. Agreement among Radovich and the Bayers did not necessarily have to be proved to sustain the court-martial charges. The sole question there was whether Radovich had received money from the Bayers to bring about the transfers. Whether he did so pursuant to agreement with the Bayers or had extorted money from the Bayers without their consent, he could nevertheless have properly been found guilty by the court-martial. Under the indictment, however, agreement was the essence of the offense and the jury was specifically instructed that the offense

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was not established if Radovich had obtained the money from the Bayers by extortion. Hence, the offenses before the court-martial were, both in fact and in law, different from the conspiracy charged in the indictment. *Fall* v. *United States*, 49 F. 2d 506, 511 (App. D. C.), certiorari denied, 283 U. S. 867.

## III

The ruling of the court below that the trial judge was guilty of an abuse of discretion in refusing to reopen the case for the further introduction of evidence four hours after the jury had retired is based on a misconstruction of the United States Attorney's argument and of the significance of the excluded evidence in relation thereto.

The gist of the prosecution's argument was that the defense of extortion was untenable for the reason that at the very time when, according to the Bayers, Radovich was making threats to take the boys with him to Burma, he had already arranged matters so that it was beyond his power to carry his threats into effect. The argument would have lost none of its force whether Radovich did or did not call Bayer from Washington, or whether he did or did not see him in New York. It would still be true, as the United States Attorney argued, that the transfer had been arranged and authorized before the alleged threats were made. Hence the fact that the jury was interested in this part of the United States Attorney's sum-

ming up did not, as the court below thought, make the question of the telephone call a matter of importance. Quite to the contrary, reopening of the case to have introduced evidence of the call would have attached to an inconclusive fact wholly unwarranted significance.

The evidence as to the dates on which the transfers were requested and authorized had been introduced as part of the Government's case long before Miss Solomon testified to threats by Radovich on November 24 and 25, and counsel for the Bayers had then taken particular note of the fact that the transfer had been authorized from Headquarters in Washington on November 25. The fact that the defense failed to appreciate the effect of the Government's evidence in undermining their defense of extortion certainly does not constitute such surprise as would justify the reopening of the trial. On this point, the decision below goes far towards putting a premium on lawyers' afterthoughts, to the prejudice of orderly judicial administration.

## IV

The trial judge's charge on the Bayers' defense of extortion was held by the court below to be an accurate statement of the law, though a majority of the court thought that it was too cryptic. There is no suggestion in the record that the jury failed to understand the charge; indeed, after they had requested a rereading of the charge on

conspiracy, the judge asked whether there was any point that was not clear or that the jury would like to have amplified, and no such request was made.

In those circumstances, reversal of the conviction on the basis of the judge's charge is wholly unwarranted. Even when error is shown at a trial, such error is not in itself grounds for reversal and its significance must be judged in the light of the whole case. *Kotteakos* v. *United States,* Nos. 457–458, Oct. T. 1945, decided June 10, 1946. Here there is no finding of error and no suggestion of prejudice. The mere circumstance that some other judge might have worded the charge in somewhat more elaborate phraseology is not ground for reversal of a conviction which, as in this case, rests on strong, clear, and convincing evidence of guilt.

V

There is no merit in the other contentions urged as independent grounds for affirmance of the judgment below. Evidence of gifts by the Bayers to Army officers other than Radovich was clearly relevant on the question of the Bayers' intent to defraud, and became particularly significant in view of their contention that they were innocent victims of extortion. The contention of reversible error in connection with the charge as to aliases falls since that issue was raised by the Bayers; the jury would not otherwise have learned

of the use of the alias designation; and the charge on this point was perfectly proper. The other alleged errors are quite without substance and do not call for extended discussion.

## ARGUMENT

### I

### RADOVICH'S CONFESSION WAS PROPERLY RECEIVED IN EVIDENCE

As we have already pointed out in the Statement, *supra*, pp. 9–13, the Government offered in evidence a confession made by Radovich in March 1945, the admissibility of which depends on the following facts, here briefly repeated in summary:

On August 9, 1944, Radovich was placed in confinement by the military authorities. Charges were preferred against him the next day, and a report of the investigation of such charges was forwarded to headquarters on August 25. In the meantime, on August 21, Radovich had submitted his resignation for the good of the service. He was kept in confinement until September 16, but he had talked with counsel some time before September 5. On September 5, he gave a signed statement to agents of the F. B. I., telling them his version of his transactions with the Bayers without hesitation. He was released from substantial restraint on September 16, but was not tried by court-martial until May 1945. Between September 1944 and March 1945, he talked with agents

of the F. B. I. on a number of occasions, and on March 15 and 17 gave them another signed statement incorporating the facts set forth in his statement of September 1944. At his own request, he reread the September statement when making the March statement.

A. *The Statement of September 1944 was legally obtained.*—Judging the September statement without reference to the rule laid down by this Court in *McNabb* v. *United States,* 318 U. S. 332, there can be no doubt that such confession was a voluntary one. It is evident that Radovich had decided that his best course was to make a clean breast of his activities, and that he was willing to cooperate with the authorities. He was asked for his version of the matter and he gave it without hesitation. He had previously consulted with counsel and he may have talked with counsel while the agents were interviewing him (*supra,* p. 11). He was so far from being intimidated that he refused to obey an order directing him to remove his military decorations (*supra,* p. 11). By any standard of voluntariness, the September 5th confession was a voluntary one.

(i) *Military practice under the 70th Article of War provides for the service of charges on two occasions, (1) in connection with the investigation and (2) after reference for trial.*

The court below thought, however, that the September confession, if offered in evidence, would

have been inadmissible under the *McNabb* rule because Radovich was not served with the charges on which he was to be tried within eight days of his arrest, a requirement which it deemed mandatory under AW 70. The opinion below is, however, predicated on a complete misconception of military procedure. The court failed to realize that at military law under AW 70 notice of charges is given on two different occasions, once when they are being investigated, and then later when they have actually been referred for trial.

The 70th Article of War, so far as here pertinent, provides that—

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the

substance of the testimony taken on both sides.

* * * * *

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him.

Normally, there is at the start of the investigation no physical service of the charges on the accused in the sense that he retains a copy of them.

He is given the charge sheet to read and examine, but in practice it accompanies the other papers which go forward to the staff judge advocate and the appointing authority pursuant to par. 35b, *Manual for Courts-Martial* (1928 ed., corrected to 1943).[3]

Successive editions of the *Manual for Courts-Martial* show clearly that the charge sheet is not required to be physically deposited with the accused in connection with the preliminary investigation prescribed by AW 70. The 1921 Manual, which represents the contemporaneous interpretation of the 1920 amendments of the Articles of War[4]—and the preliminary investigation was first included in the Articles at that time—does not require that, in connection with the investigation, a copy of the charges must be left with the accused. Par. 76b; *infra*, pp. 105–109. The 1928 edition, though it provided in more succinct language for a procedurally less cumbersome investigation,

[3] The 1928 edition of the Manual for Courts-Martial, corrected to 1943, will be referred to throughout this brief simply as MCM.

[4] "The present revision of the Manual for Courts-Martial has been prepared primarily to conform the manual to the changes in the Articles of War accomplished by the act of June 4, 1920, and to embody the results of decisions made by the Office of the Judge Advocate General and the War Department, and such other changes in the regulations for the government of courts-martial and courts of inquiry as have been approved by experience. * * * This Manual takes effect February 4, 1921, at the same time as the new Articles of War." *Manual for Courts-Martial* (1921), pp. x–xi.

did not change those substantive requirements. That edition of the Manual (as corrected to 1943) specifically provides (par. 35a, p. 24):

> At the outset of the investigation the accused will be informed of the following: The offenses charged against him; the names of the accuser and of the witnesses, as far as then known to the investigating officer; the fact that the charges are about to be investigated; his right to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf, either in defense or mitigation; his right to have the investigating officer examine available witnesses requested by him; and his right to make or submit a statement in any form subject to the risk of having such statement used against him.

And TM 27-255, *Military Justice Procedure* (1945), states, in somewhat less technical language (p. 38):

> At the outset, the accused should be advised that an impartial investigation of the charges is to be conducted. The nature of the charges, the name of the accuser, and the names and substance of the testimony of all witnesses should be made known to him. He should be shown the charge sheet and accompanying papers. He should then be advised that he has the right to cross-examine all witnesses against him if available, to call any available additional

witnesses in his own behalf, to introduce any other evidence, and to make any statement bearing on the case subject to the risk of having it used against him. He must be specifically warned that it is not necessary for him to make any statement. He should be made to understand that the investigating officer is seeking the truth, not playing the role of prosecutor.

Thus, at the moment when the investigation required by AW 70 commences, a person subject to military law who is charged with an offense under the Articles of War is informed, customarily by letting him read and examine the charge sheet, of the nature of the complaint against him. The investigation thus commenced must if practicable be completed within eight days, AW 70, and after completion of the investigation, the charges and the summaries of evidence are forwarded to the officer exercising appropriate court-martial jurisdiction. Par. 35a, MCM. Where, as here, the accused is an officer, so that only a general court-martial has jurisdiction (AW 12; MCM, par. 14), the papers must be submitted to the staff judge advocate of the appointing authority for a written recommendation as to whether trial shall be had. MCM, par. 35b. The officer exercising general court-martial jurisdiction decides whether trial shall be had, and upon which specifications. He has the power to direct that certain of the offenses charged shall not be re-

ferred for trial, or that the accused be tried only on a lesser charge. See MCM, par. 34. It is only then, when a trial is ordered, that the accused is served with a copy of the charges actually referred for trial. This time a copy is physically delivered. MCM, par. 41e.

There is no showing in this case that the investigatory procedure prescribed by AW 70 and the Manual for Courts-Martial was not followed. The charges were forwarded on August 24, 1944, after completion of the investigation, 15 days after Radovich's arrest, but the record is silent as to when the investigation was commenced, at which time the accused is normally shown (i. e., served with) the charges. There is, of course, a presumption that the investigating officer acted in compliance with his plainly prescribed official duty. See *Stearns Co.* v. *United States*, 291 U. S. 54, 63; *United States* v. *Chemical Foundation*, 272 U. S. 1, 14–15; *Town of Weyauwega* v. *Ayling*, 99 U. S. 112, 119. And this compliance does not rest merely in presumption. Radovich's resignation, dated August 21, 1944, shows that within at least eleven days he knew the nature of the charges against him which were then under investigation, and that they were laid under the 95th and 96th Articles of War (*supra*, p. 10). At this time, the Bayers were still denying having paid him any money (R. 506–518). The evidence in this case that Radovich was served with charges on May 29, 1945, relates to the formal service of the

charges which had been referred for trial, and not to service of charges during the course of the investigation preliminary to trial.

The basic assumption of the decision below, that Radovich was not informed of the charges under investigation within eight days after his arrest, is thus not supported by the record, and the reasoning of the opinion below falls with that assumption. For it is clear that it is only the investigatory procedure, not the formal service of charges on which the trial is to be had, which can be considered as analogous to the civil arraignment statute on which the *McNabb* decision was based. Arraignment before a committing magistrate in criminal cases is designed to require the Government to show probable cause for holding the accused, and it enables the accused to learn the charges against him (see *McNabb* v. *United States*, 318 U. S. 332, 343–344). These functions are served by the investigatory procedure prescribed by the AW 70 and by par. 35 of the Manual. Before the results of the investigation are forwarded to the officer exercising general court-martial jurisdiction, the accused has already been informed of the charges against him and has already had an opportunity to learn the nature of the Government's evidence and offer evidence on his own behalf. The provision for completion of the investigation and forwarding of charges within eight days, if prac-

ticable, is designed primarily to insure prompt disposition of the charges. In no way is it analogous to arraignment.[5]

Under these circumstances, we submit that the situation of Radovich on September 5, 1944, when he made his first statement to the F. B. I., is not analogous to that of a person held without arraignment, but is similar to that of a defendant who has been properly arraigned and held for the district court. And in such a situation, an accused soldier is not, like a civilian charged with a noncapital offense, entitled to bail; he remains in custody. There is, of course, no bail at military law. Dig. Op. JAG (1912), p. 481, par. IC. Consequently, nothing in the *McNabb* decision requires the exclusion of a voluntary confession made by a person so held.

(ii) *The 70th Article of War does not prescribe time limits beyond which the custody of an accused becomes automatically illegal.*

In opposition to the petition for certiorari, Radovich contended that, even though he was informed of the charges against him during the course of the investigation, his custody on September 5, 1944, was nevertheless illegal and

[5] At military law, arraignment does not take place until the trial on the merits, after the court is organized, when the charges and specifications are read to the accused and he is asked how he pleads. MCM, par. 62; 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *352–354; Davis, *Military Law of the United States* (3d ed. 1913) 96.

hence that the principle of the *McNabb* decision was applicable. He apparently interprets AW 70 as laying down an absolute requirement that service of charges on which trial is to be had be made within eight days after arrest, i. e., that a trial be ordered within such period; and he argues that since no trial was ordered in that time, he could not properly be held in custody. (Br. Opp. 22.)

Such a contention runs contrary both to the language and the legislative history of AW 70. That article clearly contemplates that service of charges for trial will be made some time after the investigation has closed, for it provides that—

> The trial judge advocate will cause to be served upon the accused a copy of the charges upon which the trial is to be had, and a failure so to serve such charges will be ground for a continuance *unless the trial be had on the charges furnished the accused as hereinbefore provided.* [Italics supplied.]

Obviously, therefore, formal service of charges referred for trial is a matter apart from and subsequent to the service of charges being investigated.

Moreover, the successive amendments made in what is now the 70th Article of War show conclusively that the changes were specifically designed to eliminate the absolute time limitations on the length of an accused's custody which

petitioner and the court below would now read into the statute.

From 1874 until 1916, the statutory provisions now in question were as follows (R. S. 1342):

> ART. 70.—No officer or soldier put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled.
>
> ART. 71.—When an officer is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested officer be not brought to trial, as herein required, the arrest shall cease. But officers released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest.*
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> * * * * * *

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* For the history of this article, originally Sec. 11 of the Act of July 17, 1862, c. 200, 12 Stat. 594, 595, see 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *166; Davis, *Military Law of the United States* (3d ed. 1913), p. 488.

ART. 93.—A court-martial shall, for reasonable cause, grant a continuance to either party, for such time, and as often as may appear to be just: *Provided,* That if the prisoner be in close confinement, the trial shall not be delayed for a period longer than sixty days.

These provisions proved unworkable after American forces were on foreign service, in the Philippines and elsewhere, and General Crowder, Judge Advocate General of the Army after 1911, pointed out their defects to Committees of Congress in hearings upon a projected revision of the Articles of War. He said in 1912 (S. Rep. No. 229, 63d Cong., 2d sess., p. 88):

> First, that they are all lacking in penal sanction; second, that the prescribed time limits are often impossible to observe, and, if observed, would in certain grave cases lead to escapes; and, third, they were enacted when foreign service was not particularly in view, and did not take into consideration delays which under present conditions are inseparable from the administration of military justice.

These views were elaborated by General Crowder in his testimony in 1916 before the Senate Committee on Military Affairs. See S. Rep. No. 130, 64th Cong., 1st sess., to accompany S. 3191. He said, commenting on old Article 93, *supra* (S. Rep. 130 at 44, 46):

> That was Civil War legislation. It is preserved in new article 20 except the proviso

which provides that in case of close confinement trial must not be delayed longer than 60 days. Trial must of necessity be delayed more than 60 days in certain cases or other distant possessions in order to secure evidence from Alaska or the Philippines for use in the United States, or the reverse. The right of the accused to a speedy trial has, however, been carefully guarded by proposed article 70, under the terms of which any officer who is responsible for unreasonable or unnecessary delay in carrying the proceedings against an accused to a final conclusion "shall be punished as a court-martial may direct."

* * * * * *

GEN. CROWDER. We found it absolutely impossible to comply with that proviso after the Philippines were acquired. We had to delay trial longer than 60 days, because we could not get mail out there and back and get depositions in his case in that time. Ordinarily, a man is not in arrest when he is before a court-martial for trial, except in the very gravest cases.

With respect to old Articles 70 and 71, General Crowder had this to say (pp. 50–51):

The existing articles (70 and 71), like the new article which replaces them (70), represent an attempt to extend by statute, to a military accused, the right to a speedy trial. The objections to the existing law (70 and 71) are: (*a*) That the articles are

lacking in penal sanctions; (*b*) that they prescribe time limits often impossible to observe and which, if observed, would in certain graver cases lead to escape; and (*c*) that they were enacted when foreign service was not in view, and, therefore, did not take into consideration evils which are now inseparable in the administration of justice. The General Staff, believing that it would be impossible to insert superior time limits which could be observed in emergent conditions of military service and at times under normal conditions, declined to insert any, and, in their article, which is the article before you, made no attempt of this character.

They limited the provision of the article to the requirement that charges should be investigated promptly and immediate steps taken to try and punish, and holding the officer responsible for unreasonable or unnecessary delay on trial by court.

The corresponding article of the bill, already twice passed by the Senate, was placed upon the existing English article, and reads as follows:

"*Investigation of and action upon charges.*—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him

from arrest or confinement. In every case where a person remains in military custody for more than five days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer, in the manner prescribed by regulations, and a similar report shall be forwarded every five days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to take such steps or to render such report who willfully or negligently fails to do so promptly and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided,* That in time of peace no person shall against his objection be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him."

The General Staff in considering this article, criticized the five-day periods established as too short, and wrote in, tentatively, a period of eight days. Further reflection convinced them that any prescribed periods

would prove embarrassing, and they therefore reported the article in the form in which it appears in the bill before you. Personally, I favor the article as already twice passed by the Senate and which, as passed, reads as follows, substituting eight-day periods for five:

"ART. 72. *Investigation of and action upon charges.*—The charge against any person placed in arrest or confinement shall be investigated promptly by the commanding officer or other proper military authority, and immediate steps shall be taken to try and punish the person accused or to dismiss the charges against him and release him from arrest and confinement. In every case where a person remains in military custody for more than eight days without being served with charges upon which he is to be tried a special report of the necessity for the delay shall be made by his commanding officer in the manner prescribed by regulations, and a similar report shall be forwarded every eight days thereafter until charges are served or until such person is released from custody; and if the person remains in military custody for more than thirty days without being brought before a court-martial for trial, the authority responsible for bringing him to trial shall render to superior authority a special report of the necessity for the delay. Any officer whose duty it is to make such investigation or to render such re-

port who willfully or negligently fails to do so promptly, and any officer who is responsible for unreasonable or unnecessary delay in carrying the case to a final conclusion shall be punished as a court-martial may direct: *Provided,* That in time of peace no person shall against his objection be brought to trial before a general court-martial within a period of eight days subsequent to the service of charges upon him."

I see no other way to establish that rigid accountability to superior authority for expedition in trial than by incorporating time limits as they are proposed in this article, which, as I say, the Senate has already passed twice.

In a "Comparative Print showing S. 3191 * * * with the Present Articles of War" (64th Cong., 1st sess.), it was said, commenting on the old provision (pp. 41–42)—

> The fact that the officer has committed some grave crime may be definitely known, but the preparation and service of charges in such case, which will charge the particular crime he has committed, may have to await an investigation which would protract itself over a considerable period.

After pointing out that the proposed revision provided for punishment of officers responsible for delay, the comment continues, "The accused should not, it is believed, be the beneficiary of their failure."

But new Article 70 as actually enacted in 1916 merely combined old Articles 70 and 71, while making them applicable to all persons subject to military law, instead of simply to officers. Only the proviso to old Article 93 was eliminated. Here is AW 70 of 1916 (Act of August 29, 1916, c. 418, 39 Stat. 619, 650, 661):

> ART. 70. INVESTIGATION OF AND ACTION UPON CHARGES.—No person put in arrest shall be continued in confinement more than eight days, or until such time as a court-martial can be assembled. When any person is put in arrest for the purpose of trial, except at remote military posts or stations, the officer by whose order he is arrested shall see that a copy of the charges on which he is to be tried is served upon him within eight days after his arrest, and that he is brought to trial within ten days thereafter, unless the necessities of the service prevent such trial; and then he shall be brought to trial within thirty days after the expiration of said ten days. If a copy of the charges be not served, or the arrested person be not brought to trial, as herein required, the arrest shall cease. But persons released from arrest, under the provisions of this article, may be tried, whenever the exigencies of the service shall permit, within twelve months after such release from arrest: *Provided*, That in time of peace no person shall, against his objection, be brought to trial before a general

court-martial within a period of five days subsequent to the service of charges upon him.

The defects which General Crowder had pointed out in 1912 and 1916 and which Congress failed to remedy in the latter year became once more apparent in World War I, and by 1919 a War Department Board headed by General Kernan recommended a new Article 70 reading in part as follows (*Proceedings and Report of a Special War Department Board on Courts-Martial and their Procedure*, July 17, 1919, pp. 33–34):

> When any person subject to military law is arrested or confined for the purpose of trial the officer by whose order this is done shall see that a copy of the charges on which the arrest or confinement is based is served upon the accused party within eight days after his arrest or confinement, and it is the duty of the officer ordering such arrest or confinement to expedite, in so far as in him lies, the speedy trial of the case. It is the like duty of all other officers having to do with the trial of the case to expedite it in every practicable way. If the trial can not, for good and sufficient reasons, be begun within a period of 30 days from the date of arrest or confinement the immediate commanding officer, unless otherwise ordered by superior authority, shall release the accused from arrest or confinement.

In commenting on the proposed change the report stated (p. 34):

> The present article 70 calls upon local commanders to do the impossible. The changes proposed are intended to make the law conform to good practice which has never been possible under old article 70.

Article 70 as enacted in 1920, *infra*, pp. 102–103, went farther; it eliminated all provisions for release of a prisoner held in custody beyond a fixed period, and substituted a criminal sanction against "any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion." It is therefore perfectly clear that under existing law the naked fact that an accused is held in military custody without trial for a period of more than eight days after his arrest does not in any sense render his custody illegal.

In this case, an examination of the circumstances under which Radovich was held establishes that he was not illegally in custody on September 5, 1944. He was confined on August 9, and the investigation of the charges against him was not completed until August 25. While AW 70 does, of course, contemplate that, ordinarily, an investigation will be completed in eight days, it is plain that the addition of the words "if practicable" establishes that the time limitation was not intended to be absolute. Nor is there any justifica-

tion for the suggestion in the opinion below that the words "if practicable" were inserted only to provide "for unusual situations arising out of the peculiar exigencies of military life" (R. 1474). The legislative history quoted above shows that the revision of AW 70 was definitely designed to cover a situation such as this where an investigation of a serious offense might take more than eight days. As is shown by a comparative print on H. R. 12775, 66th Cong., 2d sess., the bill which became the present Articles of War, the provisions for investigation of charges were inserted in AW 70 to make certain that charges were fully examined before being forwarded for trial. That document states (p. 3):

> It has been deemed advisable also that the more essential existing regulations, prescribing the procedure to be followed to secure a thorough investigation of charges before reference for trial, with a view to diminishing the number of trials by the superior general court * * * be given statutory sanction.

The offense here under investigation was not an ordinary military offense. It involved civilians who, as the record shows, were attempting to conceal facts from the military investigators when they were interviewed on August 15, 1944, six days after Radovich was arrested (R. 507–513)—i. e., while the charges against him were being

investigated.[1] The evidence also shows that the Army authorities might well have believed that other officers may have been involved in the transactions. Under such circumstances, the period of a little more than two weeks that was actually used for an investigation of charges was, we submit, reasonable and proper under AW 70. It is important to recall in this connection that the evidence shows that Radovich was informed of the charges against him during that period.

Nor does the time from August 25 to September 5 seem to us an unreasonable period to hold in custody an officer who, after investigation, has been found to be implicated in the type of offense here charged. Manifestly, some time would be required in a case of this character to examine the results of the investigation. Moreover, in the meantime, Radovich had submitted his resignation for the good of the service, and it would be reasonable to withhold decision as to trial until that request had been acted upon. We are advised that such is the normal practice.

It is not necessary to consider whether it was reasonable to hold Radovich in confinement from September 5 until September 16, nor whether it was proper to delay his trial by court-martial

[1] Examination of Radovich's record of trial by court-martial (CM 283142) shows that the charges against him were investigated pursuant to AW 70 by Lieut. Col. George Snyder. Cf. R. 506, 517.

until May 1945. Any subsequent illegality in his confinement or any unreasonable delay in his trial would not affect the validity of his September 5 statement if on September 5 he was legally in custody. *United States* v. *Mitchell*, 322 U. S. 65. The significant facts here are that, as of September 5, 1944, Radovich was legally in custody; he had been informed of the charges against him and had had an opportunity to consult with counsel; and his statement to the F. B. I. was freely and voluntarily given. Since the mere fact that he was in custody when he made the confession would not in itself render the confession inadmissible (*United States* v. *Mitchell*, and *McNabb* v. *United States*, *supra*), the court below was in error in holding that the September 5 confession would have been inadmissible in evidence if it had been offered.

B. *Any possible illegality in the September 1944 statement did not vitiate the statement of March 1945 voluntarily made by Radovich at a time when he was free of all substantial restraint.*—Even if for some reason not now apparent the September confession should be considered inadmissible, we submit that the court below was clearly wrong in holding that such inadmissibility tainted the second confession made six months later when Radovich was free of all substantial restraint. During that six month period Radovich had full opportunity to consult

such counsel as he chose. Had he desired to limit or repudiate his earlier confession in any respect, he had ample opportunity to do so. Instead, he freely and voluntarily reaffirmed and amplified his earlier statement. To hold a confession thus freely given unavailable as evidence merely because, at his own request, Radovich reread his previous statement, seems to us a disservice to the cause of criminal justice.

The decision below, we submit, misconstrues the decisions of this Court in *Silverthorne Lumber Co.* v. *United States,* 251 U. S. 385, and *Nardone* v. *United States,* 308 U. S. 338, which held that the fruits of evidence improperly obtained are themselves inadmissible. There, after having obtained evidence as a result of an illegal search, the Government, from such evidence alone and without any action by the defendants, obtained other evidence which it sought to use at the trial. The defendants never consented either to the original search or to the subsequent use of the information obtained from that search to secure other evidence. Surely, in those cases, if after the first illegal search the defendants had voluntarily delivered to the Government the evidence illegally seized or had made a voluntary confession setting forth the information illegally obtained, such evidence would not have been inadmissible merely because the Government happened to have prior knowledge thereof as a result of the illegal

search. The important circumstance in those cases was the fact that there was no intervening independent exercise of free will on the part of the defendants; the secondary evidence obtained was the direct result of the Government's own illegal action.

Here, the second confession by Radovich could not come into existence by virtue of action by the Government alone; there had to be affirmative action by Radovich. He did the talking; he made the statement. The evidence establishes that his decision to take such action was freely and voluntarily made, without coercion, and at a time when he was free of restraint and had had ample opportunity to consult with counsel. It is therefore immaterial whether he did or did not reread his previous statement. The significant fact is that, at a time when he was free to repudiate or reaffirm his earlier statement, he himself, in the exercise of his free will, voluntarily confessed his guilt. The second confession was not evidence obtained as the result of the first independently of any intervening action by Radovich; his voluntary decision to reaffirm his previous statement, which he himself asked to see, was the operational fact which brought the second confession into existence.

In *Lyons* v. *Oklahoma*, 322 U. S. 596, this Court held that, even after a confession had been obtained by duress, a later voluntary confession could properly be received in evidence, and that the

mental freedom of the accused at the time of the later confession was the significant factor to be considered in determining the admissibility of such later confession. This Court there said (p. 603):

> The Fourteenth Amendment does not protect one who has admitted his guilt because of forbidden inducements against the use at trial of his subsequent confessions under all possible circumstances.

Although this Court exercises greater control over the admissibility of evidence in federal prosecutions than it does over state court decisions, the same rule must necessarily obtain as to federal prosecutions, viz., that one illegal confession cannot thereafter bar all subsequent confessions, no matter how freely and voluntarily made. Here, the first confession, if inadmissible at all, could have been rendered so only by virtue of the illegality of custody; no coercive influences rendering the first confession involuntarily were shown. Whatever illegality was originally present had been removed by the time the second confession was made, and the second confession was wholly voluntary. Under such circumstances, we submit, there is no basis for excluding the second confession.

The fact that Radovich at his own request reread his earlier statement at the time he made his second statement seems to us to present no grounds for holding that the second statement was in-

admissible in evidence. Even though the first confession was reread, the second confession was not the result of the first; it was the result of an exercise of free will on the part of Radovich to reaffirm his earlier statement. As such, it was proper evidence.

The logical effect of the decision below would be that whenever a confession has been obtained under circumstances which would render it inadmissible under the *McNabb* rule, no future confession, however freely given, could be admitted into evidence. The decision below does not purport to go that far, but its reasoning, consistently followed, would require such a result. Any person who has once made a confession must be aware of that fact, and his later statement will almost always to some extent be influenced by what he has previously said. The circumstance that an accused rereads his earlier statement instead of relying on his memory does not seem to us a sound basis for distinguishing between the admissibility and inadmissibility of the later confession. The true test is whether the second confession is a voluntary one made under circumstances free of coercive influence or illegal restraint. Since the second confession here clearly met that test, it was properly admitted in evidence.

## II

### THE PLEA OF DOUBLE JEOPARDY IS NOT AVAILABLE TO RADOVICH

As we have pointed out, *supra*, pp. 13–15, Radovich was tried by court-martial on charges of conduct unbecoming an officer and a gentleman in violation of the 95th Article of War and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service in violation of the 96th Article. The specifications under each charge alleged that he received money from the Bayers to effect the transfers of Melvin and Martin to various units in the Army. Radovich's conviction by court-martial was disapproved by the Board of Review and The Judge Advocate General, acting under AW 50½, on the ground that the court-martial had committed prejudicial error in failing to give him an opportunity to offer evidence in support of his plea to the jurisdiction. The opinion of the Board of Review is set out, for the convenience of the Court, in Appendix C, *infra*, pp. 110–121. No rehearing under AW 50½ was ordered, and the disapproval was published in War Department General Court-Martial Orders No. 240, July 26, 1946; Appendix D, *infra*, pp. 122–125.

Neither the fact nor the circumstances of the disapproval were before the district court when

it ruled on Radovich's plea of double jeopardy. The district court overruled the plea on the sole ground that the military charges did not allege the same offense as the conspiracy to defraud set out in the indictment (R. 83–85). The circuit court of appeals held that such ruling was error, but left the question of the effect of the disapproval to be determined on a new trial (R. 1475–1476).

Our position here is that the question of double jeopardy has been rendered moot by reason of the disapproval of the military conviction for reasons not going to the merits, but that, if the question is still in the case, the district court properly ruled that there was no identity between the military and the civil defenses.

A. *The disapproval of Radovich's conviction by court-martial on grounds not going to the merits eliminates the question of double jeopardy from the case.*—Since it is always the duty of one of the litigants to call the attention of the Court to facts which render a question before it moot,[8] we have set forth the facts as to the reversal of Radovich's conviction, for, in our opinion, those facts eliminate the question of double jeopardy as an issue in the case. Radovich's court-martial conviction was disapproved

[8] See Robertson and Kirkham, *Jurisdiction of the Supreme Court* (1936), pp. 440 *et seq.*, and cases there cited.

on the ground that the court-martial erred in failing to give him an opportunity to offer evidence in support of his plea to its jurisdiction, namely, that the officer who appointed the court was in fact the accuser. See pp. 112–119, *infra*. If Radovich had been able to establish this contention, the court-martial would have been without jurisdiction, AW 8 (10 U. S. C. 1479); MCM, pars. 5a, 60, and he would never have been in jeopardy. Dig. Op. JAG (1912–1940), pars. 397 (1) (1) and 397 (1) (4), pp. 241, 242; 4 Bull. JAG 3, par. 371 (1).

Since the record of trial was legally insufficient, it was not submitted to the Secretary of War for the action of the President, even though it was a case for presidential confirmation under AW 48 (10 U. S. C. 1519); instead, following the established practice under AW 50½ (see MCM, pp. 216–217), it was returned to the reviewing authority for rehearing or such other action as might be proper. No rehearing was ordered.* At military law, a direction for rehearing (i. e., a new trial, see AW 50½) must be made at the same time as the action disapproving the sentence; it cannot be made later.

* We are advised by the Office of the Judge Advocate General that this was a consequence of the fact that, by the time the record was returned, the officer who had been president of the court-martial which tried Radovich had succeeded to the command of the First Air Force and thus had become the reviewing authority.

MCM, par. 89; TM 27–255, *Military Justice Procedure,* p. 128; 2 Bull. JAG 97, par. 408 (5); see Dig. Op. JAG (1912–1940), par. 396 (3). Consequently, Radovich can not now be retried on the original charges; and, even if he were still in the service,[10] new charges would be barred by limitations. AW 39 (10 U. S. C. 1510).

The circumstance that here Radovich was not ordered retried by the same authority that reviewed the original conviction, so that the disapproval was probably a final one within the meaning of the 40th Article of War (10 U. S. C. 1511, *infra,* pp. 96–97),[11] does not mean that the disapproved conviction by court-martial will support a plea of double jeopardy. The contrary is indicated by a very precise analogy from the civilian criminal law. Where an indictment is dismissed on appeal, a new indictment may be returned against the defendant (*United States* v. *Ball,* 163 U. S. 662, 672), which, manifestly, need not follow the terms of the old indictment. If a jury should be discharged for some reason, or the judgment reversed on some ground not invalidating the indictment, there is nothing to pre-

[10] We are advised that he was recently separated from the service.

[11] It may well be, of course, that since there was a confirming authority, and since under the practice already adverted to (MCM, pp. 216–217) the confirming authority never acted, there was no final judgment within the first paragraph of AW 40. But we prefer to rest our argument on the grounds stated in the text.

vent a prosecutor, if he deems such course desirable, from procuring a new indictment charging the same offense in a different manner, and then proceeding on the new rather than the old indictment. See *Burton* v. *United States*, 202 U. S. 344, 380, where this Court said:

> * * * As the effect of the reversal of the judgment in the former case was to set aside the judgment of conviction on the first and second counts of the original indictment, the way was opened for another trial on those counts. But the Government elected not to proceed under that indictment, but to have a new one embodying the same charge as to the $500 that was made in the former case. Its right to adopt that course cannot be questioned. * * *

The civil prosecutor's option is at military law exercised by the reviewing authority after a conviction has been set aside under AW 50½. The significant fact in each instance is that the first trial is not a valid trial for the purpose of a plea of double jeopardy.

Essentially, the court-martial conviction is in the same posture as that of a verdict in a civil trial which has been reversed on appeal; there it is well established that, under such circumstances, the verdict will not sustain a plea of double jeopardy. *Murphy* v. *Massachusetts*, 177 U. S. 155, 159; *Brantley* v. *Georgia*, 217 U. S. 284;

*Stroud* v. *United States*, 251 U. S. 15, 18. The circumstance that under AW 50½ the appeal in court-martial convictions is automatic and does not, as in a civil trial, require affirmative action by the accused, does not in our view affect this conclusion. The grounds for reversal by the Board of Review and The Judge Advocate General were the grounds urged by the accused, and the result achieved was the result which he sought to attain at the trial. Hence we submit that the principle of the cases cited, that an accused may not base a claim of double jeopardy on a judgment which he himself has caused to be set aside, is controlling here.

Even if it be held that, by virtue of the automatic nature of an appeal in court-martial proceedings, the theory of waiver cannot be applied in this case, the trial by court-martial nevertheless will not sustain the plea of double jeopardy. In disapproving the conviction for failure to allow the accused to offer evidence in support of his plea to the jurisdiction of the court-martial, the Board of Review in effect held that all subsequent proceedings by the court-martial were invalid. The decisions of this Court on the issue of double jeopardy establish that, to serve as a basis for such a plea, the prior proceeding relied upon must have been a valid one. Where a jury is discharged because of misconduct of the juror, even without the consent of the accused, the proceed-

ings up to the point of discharge will not sustain a plea of double jeopardy. *Thompson* v. *United States,* 155 U. S. 271; *Simmons* v. *United States,* 142 U. S. 148, 153. Similarly, a trial on a fatally defective indictment or a trial before a court having no jurisdiction will not sustain the plea. *United States* v. *Ball,* 163 U. S. 662, 669; *Shoener* v. *Pennsylvania,* 207 U. S. 188, 195–196. As the Circuit Court of Appeals for the Tenth Circuit said in *McCleary* v. *Hudspeth,* 124 F. 2d 445, 447, certiorari denied, 316 U. S. 670, holding that a discharge on habeas corpus did not bar a subsequent retrial—

> * * * A proceeding, to constitute a proper basis for a claim of former jeopardy, must be valid. If the proceedings are lacking in any fundamental prerequisite which renders the judgment void, they will not constitute a proper basis for a claim of former jeopardy.

See also *Levine* v. *Hudspeth,* 127 F. 2d 982, 984 (C. C. A. 10), certiorari denied, 317 U. S. 628; *Sanford* v. *Robbins,* 115 F. 2d 435, 438–439 (C. C. A. 5), certiorari denied, 312 U. S. 628.

The same considerations are applicable here. The Board of Review and The Judge Advocate General have ruled that Radovich's trial by court-martial was not a valid trial. If a rehearing had been ordered, the defense of double jeopardy would not have been available on such retrial. Since, therefore, Radovich could have been re-

tried for the offense consistently with the 40th Article of War, it does not matter for constitutional purposes whether the new trial is by a civil or a military court. In the end he will have had only one real trial for the offense.

The opinion of the court below recognizes that, if the record had shown that the conviction by court-martial had been disapproved for reasons not going to the merits, the plea of double jeopardy would not have been available. See R. 1475–1476. Since the facts as to the disapproval are matters of official record, we submit that, on review of the other aspects of this case, this Court is properly entitled to consider the actual situation, and may, if it finds the trial otherwise free from error, reinstate the judgment as to Radovich.

B. *Even if the question of double jeopardy remains in the case, the plea is not available to Radovich because the civil indictment and the military charges do not cover the same offense.*— If the question of double jeopardy remains in the case, then, we submit, the court below was in error in holding that Radovich's trial by court-martial could sustain a plea of double jeopardy to the present indictment.

Radovich was tried by court-martial for conduct unbecoming an officer and a gentleman, in violation of AW 95, and for conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military

service, in violation of AW 96. As to each charge, Specification 1 alleged that, in August 1943, Radovich received from Samuel Bayer $2,000 to effect the transfer of Martin Bayer and Melvin Usdan from the First Fighter Command to the Medical Detachment, Station Hospital, Mitchel Field, and Specification 2 that on or about December 1, 1943, he accepted and received from Elias Bayer $5,000 for effecting the transfer of the boys from an organization alerted for duty overseas to the Air Transport Command (R. 14–17).[12] The indictment in this case alleged that Radovich and the Bayers entered into a conspiracy to defraud the United States of its right to the unbiased services of Radovich as an officer of the United States Army, and that as part of the conspiracy the Bayers would give Radovich money with intent to influence his action as an officer and induce him to arrange the transfers of Melvin and Martin. The indictment alleged a number of overt acts in support of the conspiracy, none of which consisted of the actual payment of money to Radovich (R. 8–11).

We think it is clear that the military charges and specifications and the present indictment set forth different offenses. In determining questions of double jeopardy, it is not the identity

[12] The conviction of an officer for the same acts under both AW 95 and AW 96 was held proper in *McRae* v. *Henkes*, 273 Fed. 108 (C. C. A. 8), certiorari denied, 258 U. S. 624.

of the evidence actually adduced to support the charge which is significant; rather, it is the *elements* of the offense and the evidence *required* to establish those elements which furnish the criterion for resolving the question of identity. *Pinkerton* v. *United States*, No. 719, Oct. T. 1945, decided June 10, 1946; *Blockburger* v. *United States*, 284 U. S. 299, 304; see also *Ebeling* v. *Morgan*, 237 U. S. 625, 631; *Burton* v. *United States*, 202 U. S. 344, 377–378; *United States* v. *Wexler*, 79 F. 2d 526 (C. C. A. 2), certiorari denied, 297 U. S. 703. The same rule applies at military law. *Carter* v. *McClaughry*, 183 U. S. 365, 394–395.

Here, the elements of the offense charged in the court-martial specifications were different from the elements of the offense charged in the indictment. The indictment alleged conspiracy to defraud the United States by giving and receiving money to influence official action. The military specifications charged the completed act of receiving a bribe by Radovich alone. In *Burton* v. *United States*, 202 U. S. 344, 377, this Court held that the same individual could properly be punished for the separate acts of agreeing to receive and receiving a bribe. And in *Pinkerton* v. *United States*, *supra*, this Court recently reaffirmed a long line of previous decisions holding that "the commission of the substantive offense and a conspiracy to

commit it are separate and distinct offenses." (Slip opinion, p. 3.) Those decisions are controlling here.

Radovich seeks to avoid the effect of the *Pinkerton* decision by arguing that the present case comes within the exception recognized by that decision, to the effect that there cannot be a conviction for conspiracy and for the substantive offense "where the agreement of two persons is necessary for the completion of the substantive crime and there is no ingredient in the conspiracy which is not present in the completed crime." (Slip opinion, p. 2.) But this case does not fall within that rule. In the first place, as we have shown, the overt acts charged in the conspiracy were not the acts of payment which would be necessary to establish the substantive offenses charged in the specifications. More significantly, an agreement need not necessarily have been proved to sustain the court-martial charges. The sole question before the court-martial was whether Radovich had received money from the Bayers to bring about the transfers of Martin and Melvin. Whether he did so pursuant to agreement with the Bayers, or whether he extorted the money from the Bayers by threats as they claimed, he would nevertheless have been guilty of the offense charged in the military specifications. The conspiracy alleged in the indictment, however, could not be established without proof of a meeting of minds between Radovich and the Bayers, and the trial judge specifically

charged the jury that the offense was not established if the jury found that Radovich had obtained the money from the Bayers by extortion. See *infra*, pp. 85–86. Hence the offenses before the court-martial were, both in fact and in law, different from the conspiracy charged in the indictment.

A directly analogous situation was involved in the case of *Fall* v. *United States*, 49 F. 2d 506, 510–511 (App. D. C.), certiorari denied, 283 U. S. 867, in which Fall's conviction for bribery was sustained. Fall and Doheny had previously been acquitted of conspiracy to defraud the United States at a trial in which the facts alleged in the indictment and the evidence offered in support thereof were substantially the same as those alleged in the bribery indictment returned against Fall alone. Indeed, one of the overt acts alleged in the conspiracy indictment was the payment by Doheny to Fall of the $100,000 involved in the bribery charge. The court held that the acquittal on the conspiracy indictment did not preclude Fall's trial for bribery, since in the conspiracy case the jury might have reached the conclusion that Doheny had given the money to Fall in good faith as a loan without intent to defraud, whereas, in the bribery case, the jury was concerned with Fall's state of mind alone. So here, in reverse, the court-martial was concerned only with Radovich's state of mind when he accepted the money; it was not required to find any agree-

ment by the Bayers to defraud the United States in paying over the money. At the civil trial, however, agreement among the Bayers and Radovich was the essence of the offense, and the jury had to find that the Bayers had voluntarily agreed to make payments to Radovich.

One further factor differentiates the court-martial specifications from the conspiracy charge. In substance, the military specifications charged the receiving of a bribe; the indictment charged conspiracy to defraud the United States. In *Glasser* v. *United States*, 315 U. S. 60, 66–67, this Court made it clear that a charge of conspiracy to deprive the United States of its governmental functions by accepting payments to influence official action is a different offense from conspiracy to take or give a bribe. The Court there quoted with approval the following statement from *United States* v. *Manton*, 107 F. 2d 834, 839 (C. C. A. 2), certiorari denied, 309 U. S. 664:

> The indictment does not charge as a substantive offense the giving or receiving of bribes; nor does it charge a conspiracy to give or accept bribes. It charges a conspiracy to * * * defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to effect a conspiracy to murder, is purely ancillary to the substantive offense.

If conspiracy to defraud the United States by means of accepting a bribe is a different offense from conspiracy to give or pay a bribe, then certainly the substantive offense of bribery is different from the offense of conspiracy to defraud the United States by agreeing with an officer to pay him money to influence his official action.

Radovich argued in opposition to the petition for certiorari that because of the practice of courts-martial of making findings by exceptions and substitutions, i. e., of finding the accused guilty of a lesser offense included in the one with which he is charged (MCM, par. 78c; 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *578–583; Davis, *Military Law of the United States* (3d ed. 1913) 142–145; TM 27–255, *Military Justice Procedure*, pp. 105–106, 244–247), any failure of proof at the military trial would have meant that "the particular military specification would have been amended by the court-martial to conform to the proof and a conviction under the charges as they stood would have followed." Br. Opp. 15; and see *id.*, 14–17. The difficulty with this argument is that a court-martial's power to make findings by exceptions and substitutions is strictly limited to instances where the offense charged includes every element of the offense found; a court-martial cannot legally find the accused guilty

of a lesser offense where that offense involves elements not included within the offense charged. *Manual for Courts-Martial* (1921)[13], pars. 299–300;[14] 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *581–583; Davis, *Military Law of the United States* (3d. ed. 1913), pp. 143–144.[14]

As we have shown, the court-martial was not required to find an agreement in order to convict; the jury was. The court-martial was concerned only with Radovich's state of mind, the jury with the Bayers' as well. Consequently, the offense alleged in the indictment could not by exceptions and substitutions have been carved out of the offenses alleged in the military specifications.

It follows that, since the elements of the offenses on which Radovich was tried by court-martial were not the same as the elements of the offense charged in the present indictment, the trial court properly overruled the plea of double jeopardy, and the decision of the court below as to this aspect of the case was error.

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[13] The provisions of the 1921 Manual are still applicable where not specifically changed. See MCM, p. vii.

[14] Numerous rulings of The Judge Advocate General which discuss whether particular offenses are included or not included within the principal offense are collected in Appendix 8 to TM 27–255, *Military Justice Procedure*, pp. 244–247; and in Appendix 1 to Wiener, *Military Justice for the Field Soldier* (Rev. ed. 1944), pp. 126–135.

## III

### THE DISTRICT COURT PROPERLY EXERCISED ITS DISCRETION IN REFUSING TO PERMIT THE BAYERS TO INTRODUCE ADDITIONAL EVIDENCE FOUR HOURS AFTER THE JURY HAD RETIRED

As has been shown in the Statement, *supra*, pp. 15–17, the Bayers sought to defend themselves against the charge of conspiracy on the ground that the payments to Radovich were not made pursuant to an agreement but were extorted. In their defense they called Samuel Bayer's secretary, Miss Solomon, who testified that on November 24, 1943, Radovich called from Washington and asked Samuel Bayer to meet him for lunch that day; and that at lunch Radovich, in her presence, said that he was taking the boys with him to Burma unless Bayer paid him $5,000; and that Radovich repeated such threats on the next day, November 25. A clerk in the office of Headquarters Army Air Forces had previously testified for the Government that on November 24, 1943, Radovich had called her from Goldsboro, North Carolina, and asked her to transfer the boys from the Air Commando Group to the Air Transport Command; and it had also been shown that this transfer had been authorized by a letter from Headquarters Army Air Forces dated November 25, 1943.

In his summing up, the United States Attorney laid great stress on the November 24 date, point-

ing out that the Government's evidence as to Radovich's request for the transfer on November 24 undermined Miss Solomon's testimony relating to the claim of extortion, because it showed that, at the time Radovich was allegedly making threats, he had already put it beyond his power to carry out those threats. For convenience, we repeat here the pertinent paragraphs of his argument to the jury (R. 1072–1073):

> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command.
>
> Now we see clearly here from the undisputed evidence that this alleged extortioner is in fact bringing about the transfers of the boys out of the Transport Command [sic] on the very day that, according to Sam Bayer, he, Radovich, is threatening to take the boys on a dangerous mission that

he arranged—he, Radovich, arranged—through Miss Goertz for the transfer of these boys out of the Air Commando unit the day before the boys even arrived at Goldsboro. Because Melvin Usdan's testimony is that they did not get to Goldsboro until the 25th. So that by the time they arrived there Radovich, in carrying out the conspiracy, with the aid of the lady in Washington, had already arranged to get them out of the Commando. So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very little. Well, there is certainly no doubt that $5,000 was paid by Samuel Bayer and there is no doubt that Radovich got $5,000. Radovich says the Bayers offered him the money. The Bayers say the money was paid under threat. Well, I leave it to you ladies and gentlemen to decide on the basis of the undisputed testimony in this case and the records in this case where the truth lies.

The next day, before the judge charged the jury, counsel for the Bayers stated that they had been surprised by the Government's questioning of the luncheon meeting on November 24, and that a check of the records had shown a collect call from Washington to the Bayers on that day.

At the request of counsel, the judge instructed the jury that the record showed such a call, but, at a suggestion by counsel for Radovich, stated that the record did not show who made the call.

After the jury had been out for about four hours, they requested a rereading of the United States Attorney's summing up, making particular comment on his summary of the telephone message and meetings on November 22 to 26. The court declined to read the argument of one counsel without reading the arguments of all. Thereafter, counsel for the Bayers asked leave to put in evidence records he had obtained showing a collect call from Arlington, Virginia, to the Bayers from one "Ravish" on November 24, 1943. The judge declined to reopen the case at that stage. On appeal the circuit court of appeals held that, in view of the jury's question, this action by the trial judge constituted an abuse of discretion.

The decision below in this respect involves, we submit, a wholly unwarranted substitution of the judgment of the circuit court of appeals for the discretion of the trial judge. It is based on a misconstruction of the United States Attorney's argument and of the significance of the excluded evidence in relation thereto.

The gist of the prosecution's argument was that the defense of extortion was untenable for the reason that, at the very time when, according to the Bayers, Radovich was making threats

to take the boys with him to Burma unless he received $5,000, he had already arranged matters so that it was beyond his power to carry his threats into effect. According to the defense, Radovich was making the threats on November 24 and 25, but the Government's evidence showed that the transfer out of the Commando group to the Air Transport Command had been arranged for on November 24 and was officially directed on November 25.

The United States Attorney did not directly question that there may have been a meeting in New York. He said (R. 1072–1073), "The absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August 1944, when Colonel Snyder asked him to tell him what he knew about the Radovich case and he said he knew very little." He was characterizing as false not the alleged meeting in New York but the claim of extortion.

Regardless of whether Radovich did or did not call Bayer from Washington on November 24, regardless of whether he did or did not see him in New York, the Government's argument loses none of its force. It would still be true, as the United States Attorney argued, that the transfer had been arranged and officially authorized at the time that, according to the Bayers, Radovich was making threats to extort money. Hence the fact

that the jury was interested in this part of the United States Attorney's summing up did not, as the court below thought (R. 1472), make the question of the telephone call from Washington a matter of importance. The fact of the matter is that if the defense had been allowed to put in its evidence in respect of the telephone call, after the trial judge had declined to read the United States Attorney's argument, an inconclusive fact would have been endowed with a significance that was wholly unwarranted. The mere fact that Radovich made the telephone call from Washington on November 24 would not detract from the testimony that he had requested the transfer on November 24th, and that, according to official records, the transfer was authorized by a letter from Headquarters Army Air Forces Washington on November 25th. The United States Attorney's argument would remain as potent as before.

Other evidence sought to be adduced by the Bayers, in support of a motion for a new trial on newly discovered evidence,[15] tends to support

[15] In opposition to the petition for certiorari, Elias Bayer referred to evidence set forth in his motion in the circuit court of appeals for leave to file a motion in the district court for a new trial on the ground of newly discovered evidence. This document, entitled "Petition, Affidavits, and Notice of Motion to suspend Appellate Proceedings, etc.," was not included in the record, since the determination of that motion was not an issue in the judgment as to which the Government sought review. However, a certified copy has been filed with the Clerk by Elias Bayer.

rather than to negative the force of the United States Attorney's argument, and shows even more clearly than the evidence at the trial the insignificance of the fact, if it was one, that Radovich called the Bayers from Washington on November 24.

One point made in that motion was that Miss Goertz, the clerk in Headquarters Army Air Forces, who testified at the trial that Radovich had called her from Goldsboro on November 24 to arrange the transfer from the Air Commando group to the Air Transport Command, had testified at Radovich's court-martial that the request for such transfer was made on November 22 (pp. 35–36). If her prior testimony were correct, it would even more clearly establish that the transfer had been arranged before the alleged threats were made.

There was also included a record of Radovich's flights which shows him to have come to Washington from New York on the morning of November 24 with no other flights that day (p. 48). Radovich in his affidavit stated that he might have gone back to New York in some other plane and had lunch with the Bayers in New York, although he had no independent recollection of such fact. The record further shows, however, that on November 25, Radovich left Washington at 9:30 in the morning for Connecticut and did not arrive at La Guardia Field, New York, until 4:00 p. m. that

day (p. 48). This completely demolishes the Bayers' theory that Radovich arranged for the letter from Headquarters Army Air Forces on November 25 after he had secured a promise of payment from the Bayers on November 25; he could not have secured the promise from the Bayers after arriving at La Guardia Field at four o'clock and had a letter sent from Headquarters in Washington that same day.

All that the record of the telephone call tends to prove is that Miss Goertz may have been mistaken in stating that Radovich called her from Goldsboro, and that in fact he may have called her from Washington on November 24th. The significant point is that the record of the telephone call did not in any way tend to prove extortion by Radovich, nor weaken in any way the argument that he did not make any threats because he had already put it out of his power to carry out such threats.

The evidence that the transfer had been requested by Radovich on November 24, 1943, and officially authorized on November 25, had been introduced as part of the Government's case long before Miss Solomon testified to threats by Radovich on November 24 and 25. We have already noted above, p. 17, that defense counsel took particular note of the date of the November 25th letter authorizing the transfer (R. 123). The

fact that the defense failed to appreciate that the Government's evidence tended to undermine their claim of extortion certainly does not constitute such surprise as would justify the reopening of the trial. On such a theory, any failure of counsel to draw inferences from known evidence is prejudicial surprise which can prolong a trial indefinitely; and certainly the decision below on this point goes a long way towards attaching a premium to the afterthoughts of defendants' lawyers, to the prejudice of orderly administration of the criminal law.

The crux of the matter is that the Government's evidence was put in long before the Bayers were called upon to present their defense, and that the evidence offered by the Bayers four hours after the jury had retired in no way detracted from the substance of the Government's argument. In those circumstances it is clear that the district judge properly refused to reopen the case. At that stage of the trial the matter was clearly one for the discretion of the trial judge (*Crumpton* v. *United States*, 138 U. S. 361, 364; *Safford* v. *United States*, 252 Fed. 471, 474 (C. C. A. 2); *Hart* v. *United States*, 84 Fed. 799, 804 (C. C. A. 3)), and the circuit court of appeals exceeded its appellate function in finding an abuse of discretion on these facts. Cf. *United States* v. *Johnson*, 327 U. S. 106.

## IV

### THE TRIAL JUDGE'S CONCEDEDLY ACCURATE CHARGE FURNISHES NO BASIS FOR REVERSAL

We repeat here, for convenience, the trial judge's charge dealing with the Bayers' defense of extortion (R. 1157–1158):

> Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for [an] immediate dangerous overseas mission, which would be a violation of his duty as an officer.
>
> The Government contends that such payments of money were made voluntarily by mutual agreement in the course of the conspiracy charged.
>
> If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily. However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would

not have been made at all in whole or in part except for Radovich's threats, then such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants.

The opinion of the court below indicates that a majority of the court, while conceding the correctness of the charge, considered it "so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen" (R. 1471), but it is not clear whether reversal of the judgments would have been rested on this ground alone (R. 1471).

We have some difficulty in understanding the basis of the objection to the judge's charge. As Judge Clark, writing the opinion, pointed out (R.

1471), "There is no question but that this charge was an accurate, albeit brief, statement of the law."[16] To us the charge seems to have stated in clear terms that, if the jury found that the payments by the Bayers were made as a result of threats by Radovich, the payments could not be the result of a criminal agreement, and hence would not establish conspiracy. Certainly it was also correct to tell the jury that, if an agreement were proved, the crime was established even though the Bayers may have been reluctant to carry out the agreement by actually paying over the money or may have paid more than they originally expected.

There is no evidence that the jury failed to understand the charge. During the course of their deliberations, they did, it is true, request a rereading of the charge on conspiracy (R. 1155). But, after the judge had repeated his instructions on the subject (R. 1156–1162), he asked whether there was any point which was not clear or which the jury would like to have amplified (R. 1162), and no such request was made.

Under the circumstances, we submit that a reversal of the Bayers' conviction on the basis of the judge's charge was wholly unwarranted. Even

[16] Our reference to "concededly accurate" is, of course, to the concession made by the court below; we do not suggest that the Bayers conceded its accuracy. Cf. Samuel Bayer, Br. Opp. 6; Elias Bayer, Br. Opp. 27.

when error is shown at a trial, such error is not in itself ground for reversal; its significance must be judged and weighed in the light of the whole case. See *Kotteakos* v. *United States,* Nos. 457–458, Oct. T. 1945, decided June 10, 1946, where the history of the harmless error statute is set out in detail. In the present case there is no finding that there was error, and there is not even a suggestion of prejudice. The evidence of the defendants' guilt was clear, strong, and convincing. The mere circumstance that a majority of the court below might have worded the charge in somewhat more elaborate phraseology does not seem to us a proper ground for the reversal of a well merited conviction. The decisions of this Court in *Bollenbach* v. *United States,* 326 U. S. 607, and *Bihn* v. *United States,* No. 675, Oct. T. 1945, decided June 10, 1946, require only that a charge be accurate, not that it be verbose.[17]

[17] The Bayers argue that the trial judge erred in failing to charge the jury that the Air Commando group was a voluntary one and in failing to mention their contention that the boys were not adequately trained for duty overseas (Samuel Bayer, Br. Opp. 6–7, 13; Elias Bayer, Br. Opp. 18–19, 25–26). However, the trial judge did not undertake to review the evidence and thus was under no obligation to cover evidential details. There was never any doubt in this case that the transfer of the boys into the Air Commando group was improper and that they were not fit material for such an organization. The question was merely whether Radovich arranged that transfer as a means of getting them out of the alerted airborne engineer unit pursuant to an agreement with the Bayers, or whether he arranged the improper transfer as a means of extorting money from the Bayers.

## V

THERE IS NO MERIT IN OTHER CONTENTIONS URGED AS INDEPENDENT GROUNDS FOR AFFIRMANCE OF THE JUDGMENT BELOW

In opposition to the petition for certiorari, Elias Bayer has suggested several independent grounds for affirmance of the judgment below, none of which, we submit, present any issue of merit.

A. The propriety of admitting proof of gifts by the Bayers to Army officers other than Radovich is challenged as permitting prejudicial irrelevant matters to go before the jury. Assuming, as Elias Bayer contends, that at the trial the broader charge of the indictment was narrowed to an issue of conspiracy to defraud the United States of the honest services of Radovich alone, the testimony as to the Bayers' relationship with other officers was nevertheless clearly relevant. Proof that the Bayers made a practice of distributing largess to officers who were in a position to help the boys certainly had a bearing on the question of their intent to defraud, and became particularly relevant in view of their claim that they were the innocent victims of extortion. The admissibility of this kind of evidence bearing on the question of motive and intent is well established. *Glasser* v. *United States*, 315 U. S. 60, 81–82; *Williamson* v. *United States*, 207 U. S. 425, 451; *Debs* v. *United States*, 249 U. S. 211, 215.

In his main charge, the judge stated (R. 1137):

> * * * Whether these persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence.

Again, in response to a question by the jury, the judge made clear the purpose of the evidence relating to other officers, stating as follows (R. 1168–1169):

> The only persons whom you are trying in this case are the three defendants, Elias Bayer, Samuel Bayer and the defendant Radovich, and the only persons as to whom your verdict can in any wise affect, and they are the only persons whose guilt or innocence you should consider. Now there are other persons who have been mentioned in the testimony, persons who have testified here about their own activity in connection with the activities of these defendants. Now as to whether those persons, or any of them, are guilty or innocent of anything, should not concern you at all, they are not here on trial, with this exception: you may consider that for what bearing their activities have upon the actions of the defendants who are upon trial and for what effect in

> your judgment the activities of these other persons might have upon the testimony which they have given, that is whether it is true or not, whether it is all true or part true. But as to whether they are guilty, whether any person other than those named in this indictment are guilty of any offense or not, is not a matter which should concern you at all. You are charged with the duty of trying the persons named in the indictment and those only.

Although the court may not have expressly stated that evidence of the dealings with other officers was limited to motive and intent, the instructions quoted above had such effect for they permitted the jury to consider such evidence only insofar as they tended to show an agreement with Radovich.

The Bayers did not object to the admission of such evidence and did not request an instruction limiting its applicability to intent. They merely sought an instruction to the effect that they were guilty of no misconduct in their dealings with other officers (R. 1100, 1104), a request which was, of course, properly refused.

B. The contention that the judge committed reversible error in his charge with respect to the aliases set forth in the indictment is not well taken in view of the fact that the whole issue was raised by the defense. The jury would never have learned of the use of the alias designation

if Bayers' counsel had not unnecessarily brought it to their attention for the first time in his summing up (R. 990). Neither the United States Attorney nor counsel for Radovich ever referred to the alias, and the indictment was neither read to the jury during the trial nor a copy given to them when they retired. After the judge had instructed the jury, counsel for the Bayers specifically asked him to instruct the jury on the meaning of an alias (R. 1147), and asked leave to add such a prayer to his requests to charge (R. 1149). The judge then charged the jury as follows (R. 1152–1153):

> Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the wording "alias" is "other or otherwise," and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the

> indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became Americanized. So I direct you to disregard the alias reference entirely.

When defense counsel objected to this instruction as being inflammatory, the judge said to the jury (R. 1153):

> In view of the exception just made by counsel, I wish to state that I certainly meant nothing inflammatory or derogatory to any one person whatsoever, and I charge you that I certainly meant none and I don't believe you received any. * * *

C. Petitioner's requested instruction concerning the duty of each individual juror to arrive at an independent conclusion with respect to guilt (R. 1091) was properly refused. The requested language is taken from the opinion of this Court in *Allen* v. *United States*, 164 U. S. 492, where this Court was considering the propriety of an instruction impressing upon the jury the duty of considering the opinion of others in an attempt to reach an agreement. The Court was justified in refusing to emphasize one aspect of the juror's duty as against the other. *Egan* v. *United States*, 5 F. 2d 267, 268 (App. D. C.); *Horton* v. *United States*, 15 App. D. C. 310, 329. Moreover, failure to give one out of numerous requests to charge, which does not relate to a vital issue in the

case, does not constitute reversible error, even though such request may be a correct abstract statement of law. *Walker* v. *Johnson,* 96 U. S. 424, 429; *Pine* v. *United States,* 135 F. 2d 353, 355 (C. C. A. 5), certiorari denied, 320 U. S. 740; *Burk* v. *United States,* 134 F. 2d 879, 883 (C. C. A. 5).

D. The requested charge that fraud is never presumed but must be proved (R. 1088) had no application to the facts of this case. The trial judge correctly told the jury that the fraud charged in the indictment was the deprivation of the Government's right to the honest and faithful services of its officer (R. [redacted]33). *Haas* v. *Henkel,* 216 U. S. 462, 479.

E. The request to disregard immaterial statements in the statements by the Bayers (R. 1100) was so intermingled with improper requests to charge on the evidence as to the purchase of uniforms and entertainment of other officers that the failure to give such charge could be justified on such ground alone. In addition, it should be noted that the court expressly afforded the defense opportunity to specify the alleged immaterial matter in the statements and that subsequently counsel withdrew the objection to the portion then under consideration (R. 684–685). Thereafter, defense counsel objected to other parts of the statements apparently on the theory that the Bayers' dealings with officers other than

Radovich were immaterial (R. 686–687). Subsequently, when the Government proposed to omit part of a statement, defense counsel stated that they did not object to having it all read (R. 692). The allegedly immaterial matter to which Bayer objects is apparently the portion of the statements referring to officers other than Radovich. Since, as we have shown, evidence of the Bayers' dealings with these officers was clearly relevant on the issue of their intent, the objection is without merit.

## CONCLUSION

For the foregoing reasons, the judgment of the circuit court of appeals should be reversed and the judgment of the district court affirmed.

Respectfully submitted.

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FEBRUARY 1947.

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# APPENDIX A

## STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

The Articles of War here involved (10 U. S. C. 1471 *et seq.*) are as follows:

> ART. 40. AS TO NUMBER.—No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.
>
> No authority shall return a record of trial to any court-martial for reconsideration of—
>
> (*a*) An acquittal; or
>
> (*b*) A finding of not guilty of any specification; or
>
> (*c*) A finding of not guilty of any charge, unless the record shows a finding of guilty under a specification laid under

that charge, which sufficiently alleges a violation of some Article of War; or

(*d*) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited. [10 U. S. C. 1511.]

ART. 50½. REVIEW; REHEARING.—The Judge Advocate General shall constitute, in his office, a board of review consisting of not less than three officers of the Judge Advocate General's Department.

Before any record of trial in which there has been adjudged a sentence requiring approval or confirmation by the President under the provisions of article 46, article 48, or article 51 is submitted to the President, such record shall be examined by the board of review. The board shall submit its opinion, in writing, to the Judge Advocate General, who shall, except as herein otherwise provided, transmit the record and the board's opinion, with his recommendations, directly to the Secretary of War for the action of the President.

Except as herein provided, no authority shall order the execution of any other sentence of a general court-martial involving the penalty of death, dismissal not suspended, dishonorable discharge not suspended, or confinement in a penitentiary, unless and until the board of review shall, with the approval of the Judge Advocate

General, have held the record of trial upon which such sentence is based legally sufficient to support the sentence; except that the proper reviewing or confirming authority may upon his approval of a sentence involving dishonorable discharge or confinement in a penitentiary order its execution if it is based solely upon findings of guilty of a charge or charges and a specification or specifications to which the accused has pleaded guilty. When the board of review, with the approval of the Judge Advocate General, holds the record in a case in which the order of execution has been withheld under the provisions of this paragraph legally sufficient to support the findings and sentence, the Judge Advocate General shall so advise the reviewing or confirming authority from whom the record was received, who may thereupon order the execution of the sentence. When in a case in which the order of execution has been withheld under the provisions of this paragraph, the board of review holds the record of trial legally insufficient to support the findings or sentence, either in whole or in part, or that errors of law have been committed injuriously affecting the substantial rights of the accused, and the Judge Advocate General concurs in such holding of the board of review, such findings and sentence shall be vacated in whole or in part in accord with such holding and the recommendations of the Judge Advocate General thereon, and the record shall be transmitted through the proper channels to the convening authority for a rehearing or such other action as may be proper. In the event that the Judge Advocate General shall not concur in the holding of the board of review, the Judge

Advocate General shall forward all the papers in the case, including the opinion of the board of review and his own dissent therefrom, directly to the Secretary of War for the action of the President, who may confirm the action of the reviewing authority or confirming authority below, in whole or in part, with or without remission, mitigation, or commutation, or may disapprove, in whole or in part, any finding of guilty, and may disapprove or vacate the sentence, in whole or in part: *Provided*, That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War:[1] *Provided further*, That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.[2]

When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. Such rehearing shall take place before a court composed of officers not members of the court which first heard the case. Upon such rehearing

[1] The first proviso to this paragraph was added by Section 1 of the Act of August 20, 1937, c. 716, 50 Stat. 724.

[2] The second proviso to this paragraph was added by the Act of August 1, 1942, c. 542, 56 Stat. 732.

the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding: *Provided,* That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority. After any such rehearing had on the order of the President, the record of trial shall, after examination by the board of review, be transmitted by the Judge Advocate General, with the board's opinion and his recommendations, directly to the Secretary of War for the action of the President.

Every record of trial by general court-martial, examination of which by the board of review is not hereinbefore in this article provided for, shall nevertheless be examined in the Judge Advocate General's Office; and if found legally insufficient to support the findings and sentence, in whole or in part, shall be examined by the board of review, and the board, if it also finds that such record is legally insufficient to support the

findings and sentence, in whole or in part, shall, in writing, submit its opinion to the Judge Advocate General, who shall transmit the record and the board's opinion, with his recommendation, directly to the Secretary of War for the action of the President. In any such case the President may approve, disapprove or vacate, in whole or in part, any findings of guilty, or confirm, mitigate, commute, remit, or vacate any sentence, in whole or in part, and direct the execution of the sentence as confirmed or modified, and he may restore the accused to all rights affected by the findings and sentence, or part thereof, held to be invalid; and the President's necessary orders to this end shall be binding upon all departments and officers of the Government: *Provided,* That the functions prescribed in this paragraph to be performed by the President may be performed by the Secretary of War or Acting Secretary of War:[3] *Provided further,* That whenever a branch of the office of the Judge Advocate General is established, under the provisions of the last paragraph of this article, with a distant command, such functions may be performed by the commanding general of such distant command in all cases in which the board of review in such branch office is empowered to act and in which the commanding general of such distant command is not the appointing or confirming authority.[4]

Whenever necessary, the Judge Advocate General may constitute two or more boards of review in his office, with equal powers and duties.

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[3] See note 1, *supra*, p. 99.

[4] See note 2, *supra*, p. 99.

Whenever the President deems such action necessary, he may direct the Judge Advocate General to establish a branch of his office, under an Assistant Judge Advocate General, with any distant command, and to establish in such branch office a board of review, or more than one. Such Assistant Judge Advocate General and such board or boards of review shall be empowered to perform for that command, under the general supervision of the Judge Advocate General, the duties which the Judge Advocate General and the Board or boards of review in his office would otherwise be required to perform in respect of all cases involving sentences not requiring approval or confirmation by the President. [10 U. S. C. 1522.]

ART. 70. CHARGES; ACTION UPON.—Charges and specifications must be signed by a person subject to military law, and under oath either that he has personal knowledge of, or has investigated, the matters set forth therein, and that the same are true in fact, to the best of his knowledge and belief.

No charge will be referred to a general court martial[5] for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything

[5] The words "to a general court martial" were inserted by Section 2 of the Act of August 20, 1937, c. 716, 50 Stat. 724.

he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the substance of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court martial within a period of five days subsequent to the service of charges upon him. [10 U. S. C. 1542.]

ART. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. [10 U. S. C. 1567.]

ART. 96. GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court martial, according to the nature and degree of the offense, and punished at the discretion of such court. [10 U. S. C. 1568.]

# APPENDIX B

## MANUAL FOR COURTS-MARTIAL, 1921

76a. Investigation of Charges—If the charges and specifications (1) appear to be in proper form, and (2) properly to allege one or more offenses cognizable by a court-martial, against an accused, who is (3) a person subject to military law, and (4) belongs or pertains to his command, the commanding officer so receiving them will proceed as follows:

1. If the accused is not an officer, and it appears to the commanding officer that the charges are trivial or inconsequential, he may disregard them; otherwise,

2. He will consider whether the case presented is one which he can properly dispose of under the one hundred and fourth article of war; and, if so, he will so dispose of it. (See par. 336a, infra.) Otherwise, he will investigate it, as follows:

3. He will cause the person preferring the charges, together with all available witnesses mentioned in the memorandum in the charges, and also the accused, and any available witnesses desired by the accused, and any other available witnesses of whom he may learn, to appear before him at a stated time (to be fixed either by standing orders or otherwise), at his office or headquarters, or other available place, within the next twenty-four hours (except in the case of an intervening Sunday or holiday, and then within the next succeeding 24 hours thereafter), with all available docu-

mentary evidence, including the service record of the accused, and will there informally investigate the charges, substantially in the same manner as upon a hearing before a summary court. The witnesses (except the accused) will be sworn, but no record will be made of the testimony, and no counsel will ordinarily appear either for the accused or for the prosecution (although in exceptional cases an available defense counsel of a general or special court-martial, or other counsel, may be permitted by the commanding officer, in his discretion, to appear for the accused, and a trial judge advocate of a general or special court-martial, or other officer, for the prosecution). At such investigation full opportunity will be given to the accused to cross-examine the witnesses whose statements are unfavorable to him, and to present anything he may desire in his own behalf, either in defense or mitigation; and all available witnesses requested by the accused will be called and examined. The commanding officer will, before receiving any statement by the accused, carefully warn him that it is not necessary for him to make any statement with reference to the charges against him, but that, if he does make one, it may be used against him. (See par. 225b, infra.)

NOTE.—If exigent circumstances make it impracticable for the commanding officer to conduct any particular investigation himself, he may order it to be made by the second in command, or by such other officer as he may designate on account of rank, experience, and attainments.

* * * * *

7. If either

(a) The accused is an officer, and, upon such informal investigation, the commanding officer is of opinion (1) that the charges are not such as can be disposed of under the one hundred and fourth article of war and (2) that trial by a general court-martial will probably be necessary; or

(b) The accused is any person subject to military law other than an officer, and upon such informal investigation the commanding officer is of opinion that (1) an offense has been committed, and that (2) there is substantial evidence tending to show that the accused is probably guilty, and that (3) the charges are not such as can be disposed of under the one hundred and fourth article of war, or (4) by trial before a summary court-martial within his command, and that (5) trial by special or general court-martial will probably be necessary; he will either himself proceed with the investigation either then or at such other convenient time and place as he may determine, or else he will refer the charges for further investigation to the summary court officer of the command, or to some other officer (other than the officer, if any, preferring the charges) whose rank, experience, and qualifications are such as to fit him for the performance of this important judicial duty.

NOTE.—If such commanding officer is himself the officer exercising general court-martial jurisdiction over the command, he will proceed in case the accused is an officer, in the same way as if the accused were not an officer. No authority inferior to the officer exercising general court-martial jurisdiction over the command will dismiss

properly drawn charges against an officer, except upon disposing of them by punishment under the 104th Article of War.

8. The officer so proceeding with the investigation (whether the commanding officer himself or another officer) will examine all available witnesses and documentary evidence in the same manner hereinbefore directed in clause No. 3 of this paragraph, except that he will, upon such examination, reduce the material testimony given by each witness, on direct examination and on cross-examination, to a clear, succinct statement or summary (for form, see Appendix 18), which, in the presence of the accused, will be read over to the witness and signed and sworn to by him. When it is not practicable to obtain personal testimony from any distant witness, whose testimony is deemed material, either for the prosecution or for the defense, a signed written statement from such witness will be obtained by the investigating officer, if practicable, of the testimony which the witness would give if present, and will be shown to the accused, and included with the summaries of the testimony of the witnesses examined in person, among the documents returned with the report of the investigation. Any available papers or documents which may serve to throw light on the case will be likewise shown to the accused, and returned with the report of the investigation. Any statement made by the accused will likewise be reduced to writing, and will be read over to him, and he will be offered an opportunity to sign it, if he so desires, but he will not be required to do so, and will be advised that it is not necessary for him to do so. Care

will be taken to insure that the accused is fully advised of the nature of the offense, or offenses, charged against him, and of all his legal rights in the premises.

An officer charged with the important duty of investigating charges for trial by court-martial will maintain throughout the investigation an attitude of judicial fairness, the object of his investigation being to prevent unjust or unnecessary trials quite as much as to establish the existence of facts upon which the accused may properly be brought to trial.

# APPENDIX C

## BOARD OF REVIEW OPINION

## WAR DEPARTMENT

### ARMY SERVICE FORCES

In the Office of The Judge Advocate General

WASHINGTON, D. C.

SPJGK—CM 283142 17 AUG. 1945.

| | |
|---|---|
| UNITED STATES<br>*v.*<br>MAJOR WALTER V. RADOVICH, (O–416891), AIR CORPS. | FIRST AIR FORCE<br>Trial by G. C. M., convened at Mitchel Field, New York, 11, 27, 28 and 29 June 1945. Dismissal, total forfeitures and confinement for two (2) years. |

OPINION OF THE BOARD OF REVIEW

LYON, LUCKIE, MOYSE and SYKES, Judge Advocates

1. The Board of Review has examined the record of trial in the case of the officer named above and submits this, its opinion, to The Judge Advocate General.

2. The accused was tried upon the following Charges and Specifications:

Charge I: Violation of the 95th Article of War.

Specification 1: In that Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

Specification 2: In that Major Walter V. Radovich * * *, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

Charge II: Violation of the 96th Article of War.

Specification 1: In that Major Walter V. Radovich * * *, Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth

Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

Specification 2: In that Major Walter V. Radovich * * *, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

The accused pleaded not guilty to and was found guilty of all charges and specifications. No evidence of previous convictions was introduced. He was sentenced to be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor for three years. The reviewing authority approved the sentence but remitted one year of the confinement and forwarded the record of trial for action under Article of War 48.

3. Charges were preferred against accused on 10 August 1944. The report of investigation is dated 24 August 1944. Charges were served on accused 30 May 1945. Accused was tried in June 1945. After arraignment and before pleading to the general issue, accused entered a special plea to the jurisdiction of the court on the ground

"that the Convening Authority in this case was the accuser and the prosecutor of this case" (although his name was not signed to the Charge Sheet) and stated that "we stand ready to prove that plea." The prosecution argued that "this case has been referred to this court for trial and that the court has no other choice than to proceed with the trial." The law member then ruled on the plea as follows:

"Subject to objection by any member of the court, the plea to the jurisdiction is denied." There was no objection to any member of the court (R. 20).

The foregoing transpired after the accused had entered another special "plea in bar" that the investigating officer had not made the investigation required by Article of War 70 and that the case was referred to trial without previously having been thoroughly and impartially investigated, which plea was denied without the opportunity afforded accused to introduce evidence in support thereof, although "an offer of proof" was specifically made (R. 17–19).

After the prosecution had rested its case on the general issue, counsel for defense stated that certain "witnesses" whose attendance had been requested by a letter before trial to the trial judge advocate including "Colonel Stewart" who preferred the charges, and "General Hunter," the convening authority, would not be needed for the defense because of the denial of the special pleas of accused (R. 218). Prosecution stated that all of the witnesses requested were available (R. 219). Before defense introduced any witnesses whatever,

the law member stated that "the court would permit evidence in support of those proffers of proof at the time the defense puts in its case." Defense Counsel stated that he had not "contemplated" the introduction of proof because he assumed that the overruling of his special pleas had been final. The case was then adjourned until the following day. No evidence was adduced relating to the special pleas. (R. 223–225.)

Considering only the plea that the convening authority was actually the accuser, a plea in bar to the jurisdiction of the court (see AW 8), the question presented is whether or not the ruling of the law member in overruling the plea without permitting accused the right to adduce proffered evidence in substantiation of the plea vitiates the record of trial.

The Manual provides that before "passing on a contested special plea the court will give each side an opportunity to introduce evidence and make an argument. A decision on a special plea is a decision on an interlocutory question" (MCM, 1928, par. 64*a*). TM 27–255, Military Justice Procedure, paragraph 86–B, provides that where "the accused has made a special plea to a particular specification or charge, that plea must be disposed of before the accused is required to plead to the merits of the case." This rule of criminal procedure is well established and recognized in practically all state and Federal jurisdictions.

The Supreme Court, in the case of *Thompson* v. *United States*, 155 U. S. 271, said:

> As the matter of the plea *puis darrein continuance*, setting out the previous discharge of a jury after having been sworn,

> and the plea of not guilty were not inconsistent with each other, it accorded with the rules of criminal pleading that they might stand together, *though, of course, it was necessary that the issue under the first plea should be disposed of before the cause was disposed of under the plea of not guilty. "Commonwealth* v. *Merrill,"* 8 Allen, 545; 1 Bishop on Criminal Procedure, sec. 752)." (Italics supplied.) (See also *Ford* v. *United States*, 273 U. S. 593.)

In another case it was stated (dictum) by the same court:

> So if, upon the hearing of the written motion to quash the panel of the petit jurors, facts stated in that motion had been proved, or if the opportunity to establish them by evidence had been denied to the accused, the judgment would be reversed (*Martin* v. *Texas*, 200 U. S. 316).

This dictum was approved in *Edwards* v. *United States*, *infra*. In *United States* v. *Hopkins*, 228 Fed. 173, the court said:

> It may first be noted that the plea of autrefois acquittal or conviction should not be tendered simultaneously with the general issue—It is the rule in criminal law, as it was at common law on the civil side, that defenses both dilatory and peremptory, if they did not go to the merits of the controversy, should be pleaded first, in order that judgment (if against defendant) might be respondeat ouster. This practice arose after the severity which directed final judgment against defendant on overruling a plea in bar (*Rex* v. *Taylor*, 3 B. & C. 502) had been modified.

The basis for the rule is stated in *Earle* v. *State* (Ind. 1924), 142 N. E. 405. In discussing the "Right at common law" to plead specially "in bar" the defense of "former acquittal or conviction" the court said:

> The right to so plead may be very important, but it may be just as important to have the issue thus presented tried separate and distinct from the question of guilt or innocence. These are rights which the accused may insist upon—For by such procedure his special plea would be tried according to legal rules, and uninfluenced by a trial at the same time of the general issue. That he may waive these rights we have no doubt (*Toney* v. *State*, 10 Ala. App. 220, 65 South. 92), but, unless he does so, it would be error to compel him to go to trial on both the general and special issues at the same time. In *Commonwealth* v. *Merrill*, 8 Allen (Mass.) 545, it is said:
>
> "But the defendant had a right to a trial of his special pleas according to legal rules, and, as he did not waive that right, a majority of the court are of opinion that he has suffered a legal injury by being deprived of such trial."

To similar effect is *Foster* v. *State* (Ala. 1864), (39 Ala. 229) where the accused had before the court pleas of autrefois acquittal and of not guilty and the issues were tried together. It was held that failure to decide the issue raised by the special plea prior to that raised by the general issue constituted error. The Prosecution's argument that, regardless of the error, it was apparent from the record as a whole that accused suffered

no injury thereby, was answered by the court as follows:

> The principle is, that injury must be presumed, unless it is clearly seen that no injury resulted. We cannot see that the defendant sustained no injury by the submission of the two issues together to the jury. On the contrary, we can conceive that the defendant may have been seriously injured by such a course of proceeding. The multiplicity of issues to be simultaneously considered may have confused the jury, and embarrassed the defendant, * * * may have caused the jury to be influenced in finding a *verdict* of guilty upon one issue, by testimony which contributed to show guilt under another. * * * In cases of this magnitude which are made felonies by statute, involving the liberty of the citizen, the court will not be astute in speculating upon the chances of injury to the accused, in order to sustain a conviction effected under such circumstances.

The same rule is recognized in Federal courts (*Kirven* v. *Chemical Co.*, 145 Fed. 291).

Tested by the foregoing authorities, it is clear that the aforesaid ruling of the law member was erroneous and injuriously affected the substantial rights of accused. Since accused was precluded from exercising his right to adduce proferred evidence to substantiate his plea in bar he was under no legal obligation to submit such proof after his plea had been arbitrarily rejected and

after the prosecution had completed its case on the general issue, although the opportunity to do so was then offered him. He was entitled to have the evidence supporting his plea considered by a court which was "uninfluenced by a trial at the same time of the general issue." Furthermore, his plea had already been denied, which fact would additionally tend to deny him the impartial decision to which he was fundamentally entitled. As to whether accused might affirmatively have waived his right to the erroneous procedure (see *Earle* v. *State, supra; Toney* v. *State,* 65 So. 92) is immaterial since the record shows that he did not do so.

Although the Board of Review may feel that he is guilty of the alleged offenses, the accused was entitled to a fair, legal and orderly trial. The error is deemed to be substantial and prejudicial, and was not cured by the action of the law member, after the prosecution had rested in then offering accused the opportunity of presenting evidence on a plea in bar previously denied. Article of War 37 is not, under the circumstances, sufficiently comprehensive to justify holding that the belated action of the law member purporting to correct his previous erroneous ruling cured the defective procedure. To hold that the mere opportunity afforded an accused to introduce evidence at a late stage of a case on a preliminary issue previously denied him without hearing testimony thereon in effect cures the error, would deny to accused any right whatever as to established and orderly procedure. As said by the Supreme Court in *Edwards* v. *United States,* 312 U. S. 473:

> But procedure is the skeleton which forms and supports the whole structure of a case. The lack of a bone mars the symmetry of the body. The parties must be given an opportunity to plead and prove their contentions * * *. The opportunity to assert rights through pleading and testimony is essential to their successful protection. Infringement of that opportunity is forbidden.

In this case, the Board of Review is under the solemn obligation of safeguarding the basic principles of military justice and criminal procedure to the end that an accused may not only have a fair trial but that all who read the record may know that he had a fair trial. That a fundamental mode of established procedure was violated is beyond question. The Board of Review considers the error to be a prejudicial one which vitiates the record of trial.

4. The records of the War Department show the accused will be 26 years of age on 16 November and is single. The record of trial indicates that accused is married and has one child. He entered the military service as a Flying Cadet on 12 October 1940 and was commissioned a second lieutenant of Air Corps, Reserve, on 29 May 1941 and ordered to active duty effective 30 May 1941. He was promoted to first lieutenant, Army of the United States, on 1 February 1942; to captain, AUS (AC) on 5 August 1942; to captain, AUS, on 22 February 1943; and to major, AUS (AC), on 1 March 1944. He served in the India-Burma Sector of the China-Burma-India Theater of Operations and while serving overseas he was

awarded the Air Medal and the Distinguished Flying Cross with Oak Leaf Cluster.

5. For the reasons stated, the Board of Review holds the record of trial legally insufficient to support the findings and the sentence.

/s/ IRVING E. LYON, *Judge Advocate.*
/s/ CHARLES A. LUCKIE, *Judge Advocate.*
(On Leave) *Judge Advocate.*
/s/ CHARLES S. SYKES, *Judge Advocate.*

1st Ind.

SPJGK – CM 283142 AUG 23 1945.
Hq ASF, JAGO, Washington 25, D. C.
TO: Commanding General, First Air Force, Mitchel Field, New York

1. In the case of Major Walter V. Radovich (O–416891), Air Corps, I concur in the foregoing opinion of the Board of Review holding that the record of trial is legally insufficient to support the findings and the sentence, and for the reasons stated I recommend that the findings of guilty and the sentence be disapproved. You are advised that the action of the Board of Review and the action of The Judge Advocate General have been taken in accordance with the provisions of Article of War 50½ and that under the further provisions of that Article and in accordance with the fourth note following the Article (MCM, 1928, p. 216), the record of trial is returned for your action upon the findings and sentence, and for such further action as you may deem proper.

2. When copies of the published order in this case are forwarded to this office, together with the record of trial, they should be accompanied by the

foregoing opinion and this indorsement. For convenience of reference please place the file number of the record in brackets at the end of the published order, as follows:
(CM 283142).

(s) MYRON C. CRAMER,
*Major General,*
*The Judge Advocate General.*

2. Incls.
1. Record of trial.
2. Form of action.

# APPENDIX D

## GCMO 240, WAR DEPARTMENT, 1946

GENERAL COURT-MARTIAL
ORDERS, No. 240

WAR DEPARTMENT,
*Washington 25, D. C., 26 July 1946*

Before a general court martial which convened at Mitchel Field, New York, pursuant to paragraph 13, Special Orders No. 148, 28 May 1945, as amended by paragraph 17, Special Orders No. 156, 5 June 1945, Headquarters, First Air Force, was arraigned and tried—

Major *Walter V. Radovich*, O416891, Air Corps.

Charge I: "Violation of the 95th Article of War."

*Specification 1.*—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00 lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York."

*Specification 2.*—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and

receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement."

Charge II: "Violation of the 96th Article of War."

*Specification 1.*—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00 lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York."

*Specification 2.*—"In that Major *Walter V. Radovich* (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organiza-

tion then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement."

PLEAS

To the *Specifications* and CHARGES "Not guilty."

FINDINGS

Of the *Specifications* and the CHARGES: "Guilty."

SENTENCE

*To be dismissed the service, to forfeit all pay and allowances due or to become due and to be confined at hard labor at such place as the reviewing authority may direct for three (3) years.* (No evidence of previous convictions considered.)

The sentence was adjudged 29 June 1945.

The action of the approving authority is:

HEADQUARTERS FIRST AIR FORCE,

*Mitchel Field, New York, 12 July 1945.*

In the foregoing case of Major *Walter V. Radovich,* O416891, Air Corps, Mitchel Field, New York, the sentence is approved, but one year of the confinement adjudged is remitted. The record of trial is forwarded for action under the 48th Article of War.

(Signed) F. O'D. Hunter,
(Typed) F. O'D. HUNTER,
*Major General, U. S. Army,*
*Commanding.*



The record of trial was examined by the Board of Review in the Office of The Judge Advocate General and was held legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General concurred in said holding. Pursuant to Article of War 50½, the findings of guilty and the sentence are disapproved.

BY ORDER OF THE SECRETARY OF WAR:

DWIGHT D. EISENHOWER,
*Chief of Staff.*

OFFICIAL:

EDWARD F. WITSELL,
*Major General,*
*The Adjutant General.*

U. S. GOVERNMENT PRINTING OFFICE: 1947

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No. 606

# In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

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737848—47——1

# In the Supreme Court of the United States

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SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

This is a reply brief. We shall not attempt either to repeat or to restate the arguments already set forth at some considerable length in our main brief. We deal only with new arguments advanced on behalf of the respondents, and with the specific matters in their briefs which seem in most urgent need of correction.

The roman numeral headings of the present reply brief are keyed to the points argued in our main brief.

### I.

At the trial (R. 635–650), in the court below (Brief for Appellant Radovich, pp. 18–20), and in opposition to the petition for certiorari in this

Court (Radovich, Br. Opp. 20–22), Radovich argued that his March 1945 statement was inadmissible because he was illegally in custody when he made his September 1944 statement, since he had not been served with charges within eight days after his original confinement on August 9, 1944, and because his detention had been continued until September 16, 1944, some ten days after the making of the September statement.

In our main brief, we pointed out that the 70th Article of War provided for notice of charges on two separate occasions, and showed that the preliminary investigation required by that Article had been completed well before Radovich made his September statement (U. S. Br. 34–42). We also pointed out that, before making that statement, he was so far advised of the nature of the charges against him that he had submitted his resignation for the good of the service (U. S. Br. 40–41). And we showed, by analysis of the changes made by Congress in what is now AW 70, that all rigid limits on the time during which an accused officer might be restrained prior to trial had been eliminated in 1920, that now the only time limit stated was specifically qualified by the phrase, "if practicable," and that in place of arbitrary schedules there had been substituted a criminal sanction for "unnecessary" delay (U. S. Br. 42–56).

Faced with this analysis of the statute, which was not before the court below, Radovich now mends his hold. His present contention (Br. 24–27) is that his confinement was illegal in its inception, and that the Commanding General, First Air Force, was acting without authority of law when, on August 9, 1944, he directed that Radovich be confined (R. 591).

This new contention is equally without merit.

The 69th Article of War specifically provides (10 U. S. C. 1541):

> Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement

The only restrictions on the power to confine an officer in force in August 1944 were three: first, that an officer could be confined only by commanding officers (MCM, par. 20; Army Regulations 600–355, July 17, 1942, par. 2*a* (1)); second, that the restraint imposed before trial should be the minimum necessary in the circumstances (MCM, par. 19; Army Regulations 600–355, July 17, 1942, par. 3*a*); and third, that the accused should not be restrained except on personal knowledge of or after inquiry into his offense

(MCM, par. 19; Army Regulations 600–355, July 17, 1942, par. 3*a*).

The order to confine Radovich was given by the Commanding General, First Air Force, and showed on its face that Radovich was charged with offenses under the 95th and 96th Articles of War (R. 591). There thus remains for inquiry only the narrow question whether Radovich's restraint by way of confinement was necessary.

Radovich refers (Br. 24–26) to the Army's Technical Manual on Military Justice Procedure to establish that he should only have been arrested, quoting *inter alia* the passage which points out that "Confinement results in loss of manpower."

But the considerations there adduced pertain to policy; here we are concerned with power. Neither the *Manual for Courts-Martial* nor the Army Regulations lay down absolute limitations. They simply establish standards. They do not attempt to control the actual exercise of a commanding officer's discretion. And, in the present case, there was no assurance, when Radovich arrived at Mitchel Field, to which place he had been ordered to face the consequences of his misdeeds, that he would remain tractable, or that he would not attempt to escape.[1]

---

[1] Escape from confinement or breach of arrest would not carry the death penalty suggested by counsel at note 11, Br. 26. See AW 69 and AW 43.

All that was known was the nature of his offense, an offense amply reflected by the present record, an offense which certainly was "serious" within the meaning of the 69th Article of War. In its aspect of bribery, it carried a penalty of three years' confinement in the penitentiary, and perpetual disqualification from holding office. See Section 117 of the Criminal Code, 18 U. S. C. 207; see AW 42; compare GCMO 240, at U. S. Br. 124. In its purely military aspects, it involved conduct unbecoming an officer and a gentleman, carrying with it the mandatory penalty of dismissal, and branding the guilty person as morally unfit for further association with his fellow officers. See 2 Winthrop, *Military Law and Precedents* (2d ed. 1896) *1104–1106. And, apart from the foregoing, the offense of taking money to enable some soldiers to escape dangers which necessarily had to be faced by others, in flat disregard of the declared policy of Congress "that in a free society the obligations and privileges of military training and service should be shared generally,"[2] is, necessarily, shocking to honest folk. We submit, therefore, that every consideration of policy justified—indeed, required—General Hunter to confine Radovich immediately when this officer set foot on Mitchel Field.[3]

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[2] Section 1 (b) of the Selective Training and Service Act of 1940, 50 U. S. C. App. 301 (b).

[3] The "loss of manpower" argument is of course irrelevant in the case of an officer. Even when an officer is merely

Radovich, therefore, was lawfully confined. Later, when it seemed likely that he would not attempt to escape, i. e., that confinement was probably not necessary in the circumstances, he was released from confinement, and subjected only to restriction—precisely as the *Manual* and the Army Regulations contemplate.

But Radovich argues at some length and with considerable vehemence (Br. 27–28, 31–32) that the circumstances in which he was confined were improper.

General Hunter's order to the Base Commander directed simply that Radovich "be confined" (R. 591). We are advised that, generally speaking, the only facility available at Army installations for the confinement of officers is the locked ward of a hospital.[4] Incarceration in a guard house would involve a degradation of rank which, in the case of officers and noncommissioned officers alike, is prohibited while they still hold such rank (see, e. g., MCM, par. 106; Army Regulations 600–375, May 17, 1943, pars. 8*c*, 20*d* (2)). An officer does not normally enter a penal institution until, after his dismissal has been confirmed pursuant

placed in arrest, he may not exercise command (Army Regulations 600–355, July 17, 1942, par. 7*a*) or perform any military duty. See 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *161 cf. Dig. Op. JAG (1912–1940), par. 427 (2).

[4] It is sometimes possible to use a room at an officers' club for the purpose, and to station an armed guard outside the door; but this is rare.

to the 48th Article of War, he ceases to be in the Army. Cf. 3 Bull. JAG 230–231, par. 405 (1).

The locked ward in any hospital is, of course, used for the treatment of the mentally ill; it is referred to, in Army colloquialism (and throughout Radovich's brief), as the "nut" ward. The record shows that, at least during the inception of his confinement, Radovich was treated as a patient rather than as a prisoner. Whether it was wise administration thus to spare him the outward ignominy of one charged with a serious offense we need not here consider; the significant point is that his spirit was not affected, and that, *non constat* the allegations in his brief (Br. 27, 28), he was not in any sense held *incommunicado* when interviewed by the F. B. I. agent in September.

The record shows clearly that, prior to that visit, he had consulted with counsel (R. 576, 578–579); that he probably consulted with counsel during the course of the interview (R. 543, 549); and that he interrupted the interview on several occasions to make telephone calls (R. 543, 549).

Moreover, he made his statement without any pressure or persuasion, simply because he was convinced that this course was in his interest (R. 542–543, 549–550). He had previously submitted his resignation for the good of the service, in the face of charges (R. 596), and with full realization that acceptance of that resigna-

tion did not imply separation from the service under honorable conditions (R. 597). It is significant that at no time, before, during, or after trial, did he ever repudiate or attempt to recall either his statement or his resignation.

Counsel in their briefs make much of the hardships allegedly visited upon Radovich consequent upon his assimilation to the status of patient (Br. 27–28). While pointing out that he was several times decorated for gallantry and unusual devotion to dufy (Br. 5–7), they nonetheless insist that he was so cowed by his confinement that his voluntary statement made while so confined must be rejected by the courts as not entitled to credence (Br. 27, 32), and this in the face of evidence that, in the very course of giving his statement, he deliberately and willfully disobeyed an order of his military superiors that he remove his decorations (R. 553, 577–578, 784–785).

We agree with the United States Attorney (R. 1067) that "There is no basis whatever for assuming that this man who flouted and defied the order of the Army to remove his decorations would meekly submit and make damaging statements against his own interest to two civilians."

After Radovich's March confession was admitted into evidence (R. 655–661), he was permitted to present to the jury full and circumstantial testimony concerning not only the

circumstances under which that statement was given (R. 672–677), but also all the circumstances incident to the making of the September statement (R. 729–731). All the details of Radovich's mode of life as a patient in the locked ward were spread at length upon the record (R. 677–682, 731–743), and counsel in their summing up made the most of them. Here are some of the hyperboles of advocacy presented to the jury:

> • • • The truth of the matter is that that September statement was extorted and coerced out of Major Radovich by a third-degree that was as cruel and as effective as any treatment with a blackjack and a rubber hose ever was. Now let us see what the situation was. Major Radovich gets back from overseas, he is on the Pacific Coast somewhere, where his home is; he gets orders to report to Mitchel Field, as far away from home as he can get and still stay in this country. He reports to Mitchel Field for duty. No suggestion about what is going to happen to him. As soon as he gets there what happens? He is thrown in a crazy ward and put in a cell. He is stripped of his uniform. He is given a bathrobe, with no cord on it, and a pair of hospital pajamas. He is not allowed to use the telephone. He does not have counsel. He can't communicate with his wife or his family. He is watched, he is watched

night and day. He is watched when he sleeps, he is watched when he goes to the bathroom. He has eyes staring at him. He is deprived of his knife and his fork and he is fed like a wild beast. And this goes on for days and days and weeks and weeks. Locked in that ward with crazy men and screaming drunks, locked there for weeks under those conditions, held incommunicado.

Let me ask you, if you had the choice of being beaten with a piece of rubber hose and going through weeks of that kind of confinement, which would you prefer? Which would break you down the more? A little beating in some back room of a police station in the old-fashioned orthodox way of giving the third degree, or this kind of subtle, cruel, ceaseless beating of the spirit that Radovich took in the crazy ward? You know which would be more effective. And it was more effective. (R. 961-962.)

* * * * *

* * * you will find that the testimony and the evidence against Major Radovich, when you boil it all down, comes to this: one statement, supported only by the testimony of Flynn, sweated out of Radovich by the third degree, that one statement plus a flimsy tissue of circumstantial evidence, full of doubt, full of contradiction, full of perjury. * * * (R. 970).

* * * * *

I say there are only two bits of evidence here against Radovich, only two, and one of them has been dealt with very fully by Mr. Robb, that is, these F. B. I. statements, Flynn-Radovich statement, nut ward statement. One thing, I would supplement Mr. Robb's argument by saying: If the jury finds that the nut ward statement followed by this statement made by Flynn up here in this building was induced or coerced in the least, in the least extent, you have got to throw it aside. That I believe to be the law laid down by the Supreme Court of the United States. (R. 972.)

The jury were instructed that they could consider the circumstances surrounding the making of the statement in passing on the weight and credibility to be given thereto (R. 1141):

I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or

> any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

In the face of this instruction, which permitted them to disregard Radovich's statement in its entirety, and after having heard counsel's contention that that statement had been induced by calculated cruelty, the jury convicted him. We submit that their general verdict of guilty forecloses any further contention that the statement was involuntary. Cf. *McNabb* v. *United States,* 318 U. S. 332, 338–339, note 5.

## II

If the question of double jeopardy is still in the case and not moot, then, as we have pointed out, the present case is governed by *Fall* v. *United States,* 49 F. 2d 506 (App. D. C.), certiorari denied, 283 U. S. 867. There Fall's conviction for bribery was sustained, although Fall and Doheny had previously been acquitted of conspiracy to defraud the United States, although at the conspiracy trial the facts alleged in the indictment and the evidence offered in support thereof were substantially the same as the allegations in and the evidence in support of the bribery indictment involving Fall alone, and although one of the overt acts alleged in the conspiracy indictment was the payment by Doheny to Fall of the very

same $100,000 involved in the bribery charge. The Court of Appeals held that the acquittal on the conspiracy indictment did not preclude Fall's trial for bribery, since in the conspiracy case the jury might have felt that Doheny had given the money to Fall in good faith as a loan without intent to defraud, whereas in the bribery case the jury was concerned with Fall's state of mind alone.

It is highly significant that Radovich does not undertake to discuss, let alone distinguish, the *Fall* case. He avoids it—by avoiding mention of it. Instead, he first characterizes and then misstates the Government's arguments.

He says (Br. 41)—

> Indeed it seems absurd to argue, as the Government apparently does, that Radovich could have accepted the money from the Bayers "for the purpose of effecting the transfer" of the named soldiers, in the absence of an agreement and a common design between him and the Bayers.

And further (Br. 41–42)—

> The argument of the Government, that the court-martial would have acquitted Radovich if only the corrupt agreement had been proved, is literally fantastic.

Here is what we actually said (U. S. Br. 71–72):

> * * * an agreement need not necessarily have been proved to sustain the court-martial charges. The sole question before the court-martial was whether Rado-

> vich had received money from the Bayers to bring about the transfers of Martin and Melvin. Whether he did so pursuant to agreement with the Bayers, or whether he extorted the money from the Bayers by threats as they claimed, he would nevertheless have been guilty of the offense charged in the military specifications. The conspiracy alleged in the indictment, however, could not be established without proof of a meeting of minds between Radovich and the Bayers, and the trial judge specifically charged the jury that the offense was not established if the jury found that Radovich had obtained the money from the Bayers by extortion. * * *

Next, after discussing the *Fall* case, we argued (U. S. Br. 72–73):

> * * * So here, in reverse, the court-martial was concerned only with Radovich's state of mind when he accepted the money; it was not required to find any agreement by the Bayers to defraud the United States in paying over the money. At the civil trial, however, agreement among the Bayers and Radovich was the essence of the offense, and the jury had to find that the Bayers had voluntarily agreed to make payments to Radovich.

And, finally, we said, in response to Radovich's argument based on the military practice of making findings by exceptions and substitutions (U. S. Br. 75):

> As we have shown, the court-martial was not required to find an agreement in order to convict; the jury was. The court-martial was concerned only with Radovich's state of mind, the jury with the Bayers' as well. Consequently, the offense alleged in the indictment could not by exceptions and substitutions have been carved out of the offenses alleged in the military specifications.

In short, our argument is, not that the court-martial could not have convicted Radovich if only the agreement was proved, but that the court-martial could have convicted even if no agreement had been proved.

## III

Since even the effect of admitted error cannot be properly weighed except in its setting (*Kotteakos* v. *United States,* 328 U. S. 750), obviously a claim of error cannot be. Under the present heading the Bayers contend (Br. 24–36) that it was error for the trial judge, four hours after the case had been submitted to the jury, to refuse to reopen the case to put into evidence a slip showing a collect call from Arlington, Virginia, to the Bayers from one "Ravish" on November 24, 1943.

We pointed out in our main brief (U. S. Br. 76–84) why reopening the case to have introduced evidence of the call would have attached to an

inconclusive fact wholly unwarranted significance, and why the ruling of the court below that the trial judge's refusal to reopen amounted to an abuse of discretion was based on a misconstruction of the United States Attorney's summing up and of the significance of the excluded evidence in relation thereto.

We will not repeat that foregoing argument here. But we think that the immateriality of the proffered evidence becomes even more apparent when it is viewed against the background of the entire argument of the United States Attorney dealing with the Bayers' defense of extortion.

A. (1) The United States Attorney commenced his argument on this subject by pointing out that Colonel Vidal, Colonel Jacobson, Captain Kogan, Major Saffron, and Joseph Busch had all testified that Samuel Bayer pleaded with them and begged them to help secure the result which Radovich was ultimately able to accomplish, namely, the boys' transfer out of the Airborne Engineer units which had been alerted for overseas service (R. 1069).

Colonel Vidal had testified that on two occasions, Samuel Bayer had approached him, once in person (R. 140) and once over the telephone (R. 141), to see whether he could do something to get the boys out of the Airborne Engineers. Colonel Jacobson testified that, after he had been transferred to Albany, Samuel Bayer telephoned

him from New York in September 1943 in a very upset and excited tone of voice, saying that "the boys were alerted and they were in a hot outfit and that they were going overseas," and asked Colonel Jacobson whether he could do anything for them (R. 373–374). When Colonel Jacobson said that "there was nothing that could be done and nothing should be done," Samuel Bayer fainted (R. 374). Captain Kogan testified that in late September 1943, Samuel Bayer asked him if he thought there would be any trouble if the boys were transferred out of the alerted Airborne Engineers (R. 283). "I tried to tell Mr. Bayer at that time that I thought there would be very serious consequences, and Mr. Bayer cried out and— * * * the gist of what he said was he wanted him out of that alerted unit for overseas into another unit" (R. 283–284). Major Saffron testified that in the summer of 1943, Samuel Bayer was very much agitated, frightened, and concerned because his son was in the Airborne Engineers and was about to be sent overseas (R. 176, 181, 182). At that time, Samuel Bayer said, "I would do anything in my power to keep my boy from going overseas" (R. 176). Major Saffron said there was nothing he could do, that the case was a celebrated matter at Mitchel Field, and that it was full of dynamite; Samuel Bayer did not deny the truth of these rumors (R. 176–177). Joseph Busch confirmed

the conversation between Samuel Bayer and Major Saffron (R. 154–160).

(2) The United States Attorney then argued (R. 1069) that the payments to Radovich were consistent with Samuel Bayer's statement to Major Saffron, just quoted, that he would do anything to keep his boy from going overseas.

(3) Next, the United States Attorney pointed to the Bayers' conduct (R. 1069). He referred to the fact that both of them had lied to Colonel Snyder, who in August 1944 was investigating the military charges against Radovich (R. 235, 404). At that time both of the Bayers denied making any payments of money, denied paying for any uniforms, and denied speaking to any Army officers for the purpose of effecting the transfer of the two boys (R. 509–513); and Elias Bayer denied going to Goldsboro, North Carolina, in November 1943 (R. 513). The United States Attorney also referred to the evidence which showed that the I. Buss Uniform Co. had, at Samuel Bayer's request, altered its books to indicate that payment for the uniforms had been made by the officers themselves, rather than by the Bayers' Plymouth Thread Co. (R. 190–195). The United States Attorney asked the jury whether the Bayers' action in lying to the investigating officer and in procuring a falsification of the Buss Company's books was consistent with extortion or was the conduct of men driven by a

sense of guilt and by a fear of disclosure (R. 1069).

(4) He went on to argue that the claim of extortion was never raised until the investigation began to close about the Bayers (R. 1069–1070), and that, while the Bayers may have paid a little more than they may have anticipated paying, particularly after all the other favors they had lavished on Radovich, still (R. 1070),

> can there be any doubt that the payments were made for favors which the Bayers avidly and avariciously sought? Can there be any doubt that the Bayers sought to obtain and were willing to pay for and did pay for favors, for considerations to which they were not legally entitled?

(5) The United States Attorney next answered the contention that in making their gifts to these Army officers the Bayers were simply expressing the gratitude of civilians to those who serve in the forces in time of war, pointing out that the record showed no gifts to any but officers who could help with the transfers, and that all such officers except Captain Kogan had been in the First Fighter Command (R. 1070).

(6) At that point, and only at that point, did the United States Attorney proceed to show that, at the time of the alleged threats by Radovich to take the boys with him to Burma unless he received $5,000, he had already put it beyond his power to carry out those threats (R. 1070–1073).

It is that portion of the charge which we quote and discuss in our main brief (U. S. Br. 18–19, 76–84).

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The foregoing summary of the United States Attorney's closing argument on the defense of extortion emphasizes and underscores what we have already pointed out, that when the telephone slip is considered in its setting, and not abstractly isolated from the remainder of a long record, its immateriality becomes patent. To have admitted it at that point would simply have confused. The trial judge exercised a sound discretion in refusing at that point, long after the jury had retired, and at the close of a long trial, to reopen the case for the taking of additional—and wholly inconclusive—evidence.

B. We have documented the United States Attorney's argument on the defense of extortion with record references, not only in order that it might be considered against the context of the evidence in the case, but also because the Bayers' brief falls considerably short of reflecting all of the pertinent facts.

(1) The Bayers start by saying that Martin Bayer and Melvin Usdan voluntarily enlisted in the Air Corps (Br. 7). They fail to state that Samuel Bayer had them volunteer for the Air Corps in order to avoid having them drafted and assigned to the infantry (R. 184, 276–277).

(2) The Bayers admit that their concern, the Plymouth Thread Corporation, paid the Buss Company for the uniforms furnished to Radovich and other officers of the First Fighter Command (Br. 9). They fail to state that, at Samuel Bayer's request, the Buss Company's books were later altered to show that the officers themselves paid for the uniforms (R. 190–195; Govt. Ex. 5, 6, 7, R. 192, 193, 195, 1219, 1221, 1223).

(3) The Bayers now admit that Samuel Bayer gave Colonel Jacobson a set of automobile tires (Br. 9). They fail to state that Samuel Bayer denied making this present in his statement to the United States Attorney (R. 1258). Nor do they state, what is the fact, that this gift was made after Colonel Jacobson had transferred the boys from Base Headquarters to the First Fighter Command (R. 370–372),* and after Samuel Bayer had been assured by Colonel Jacobson that this transfer would mean that the boys would stay at Mitchel Field for another year (R. 278).

(4) Throughout their brief, the Bayers urge that the boys had received only scanty basic training (Br. 10), and that Samuel Bayer was upset at their transfer overseas without adequate basic training (Br. 12, 15). But the record is bare of a single intimation that Samuel Bayer was concerned with the boys' training or lack of

*The gift was made on April 21 (R. 370); the transfer had been effected on April 15 (R. 1312).

training. He did not want them overseas, trained or untrained. The record makes it perfectly clear that the thought about training is simply a rationalization of counsel, quite unsupported by any word of Samuel Bayer's.

(5) The Bayers quote Samuel Bayer as urging Radovich to leave the boys at Westover and Bradley Fields with the Airborne Engineers because they were happy there (Br. 13, 15). "I said 'Walter please let's forget all about the kids, they are very happy, they met a nice captain, a nice sergeant.' * * * I said 'Walter I told you once before please let's forget all about the kids, they are happy and I am happy.'" (R. 1228, 1229.) The Bayers do not say in their brief, nor did Samuel Bayer tell the United States Attorney, that in fact he approached Colonel Vidal, Colonel Jacobson, Major Saffron, and Captain Kogan in his attempts to have the boys transferred out of the Airborne Engineers, and that he fainted when Colonel Jacobson told him that nothing could or should be done (*supra*, pp. 16–18).

(6) The Bayers place Radovich in New York on the morning of November 25, urging Samuel Bayer to come to a decision on whether he will pay $5,000 to keep the boys from being sent to Burma (Br. 16, 35). But their own motion for new trial, on which they rely to establish error here (Br. 33–36), shows that Radovich was in Washington on the night of November 24/25, that

he left Washington at 9:30 A. M. November 25 and flew to Connecticut, and that he did not arrive at La Guardia Field, New York, until 4 P. M. on that day (Motion, p. 48; U. S. Br. 82–83).

(7) The Bayers twice state that the order transferring the boys from the Air Commando Group at Goldsboro into the Air Transport Command in Wilmington was dated November 29 (Br. 17, 35). This is literally true (R. 1218). But they fail to state that this transfer was directed by a letter from Headquarters Army Air Forces dated November 25 (R. 123, 1218), and that this letter was written in consequence of Radovich's telephone call to Miss Goertz on November 24 (R. 256–257). Consequently, even if, as the Bayers now assert (Br. 16), the $5,000 was paid not later than November 27, it is still clear that, when the payment was made, Radovich had put it out of his power to take Martin and Melvin to Burma.

## IV

The Bayers complain at some length that the trial court's charge as to the basic issues concerning them was inadequate (Br. 18–24).

They say (Br. 20)—

> As regards the Bayers, the "basic issue" in the case was whether or not the payments had been extorted by Major Radovich by threats to violate his duty, or had

been made pursuant to conspiracy to seduce Radovich from fulfilling his duty.

They then go on to quote three sentences from the court's charge (Br. 21, 22, 23), and conclude (Br. 21)—

> It will be observed that there was no statement by the Trial Court anywhere in the charge that the jury could find that there would in law be no conspiracy or agreement on the part of the Bayers as charged in the indictment if the jury believed the contention of the defense, namely, that the Bayers were the victims of a shrewd and ruthless plan of extortion.

The difficulty with considering particular, isolated sentences of a charge instead of the charge as a whole, or even a portion of the charge, is that important aspects are apt to be overlooked. The Bayers' sampling technique in this instance has produced the very consequences which might have been anticipated; they failed to note that the trial judge did in fact charge on the precise point with which they were concerned. He added, following the sentence quoted by the Bayers at Br. 22, and preceding the sentence quoted by the Bayers at Br. 23, the following (R. 1134):

> However, as to the payments of money, if you believe that they were coerced by the defendant Radovich, that is, that they would not have been made at all in whole or in part except for Radovich's threats, then

such payments would not be the result of agreement nor any evidence of a crime. And if you so believe, and also are not satisfied beyond a reasonable doubt by other evidence in the case that the conspiracy existed as charged in the indictment, you should find all the defendants not guilty, as Radovich is not here charged with extortion.

The foregoing intervening excerpt is nowhere quoted in the Bayers' brief.

Respectfully submitted.

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No. 606

# In the Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

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THE UNITED STATES OF AMERICA, PETITIONER

*v.*

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

*ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT*

## SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

Pursuant to permission granted at the oral argument on April 2, we submit herewith additional authorities bearing on the finality, for purposes of double jeopardy, of the court-martial proceedings against the respondent Radovich.

### I

A. We start with the familiar and recognized principles governing double jeopardy in the civilian criminal courts. Where a verdict and judgment of conviction in such a court have been reversed on appeal, that verdict and judgment, it is clear, will not sustain a plea of double jeopardy.

*Murphy* v. *Massachusetts*, 177 U. S. 155, 159; *Brantley* v. *Georgia*, 217 U. S. 284; *Stroud* v. *United States*, 251 U. S. 15, 18. Similarly, when an indictment is dismissed on appeal, a new indictment may be returned against the defendant, which, manifestly, need not follow the terms of the old indictment. *United States* v. *Ball*, 163 U. S. 662, 672. And, where the judgment is reversed for errors committed at the trial and not on grounds invalidating the indictment, the prosecutor may, if he deems such a course desirable, obtain a new indictment charging the same offense in a different manner; when he then proceeds on the new rather than the old indictment, the new prosecution cannot be barred by a plea of double jeopardy. *Burton* v. *United States*, 202 U. S. 344, 380.

The expressed rationale of some of the foregoing authorities is that, by taking the appeal, the defendant himself waives the protection against a second trial, because he has himself caused the first judgment to be set aside. But other decisions show that the validity of the second trial rests on grounds quite independent of waiver whenever the first trial was, for any reason, an invalid one, or did not proceed to final judgment.

Thus, where the jury at the first trial disagreed and was discharged, the new trial, it was early held, did not subject the defendant to double jeopardy. *United States* v. *Perez*, 9 Wheat. 579;

see *Dreyer* v. *Illinois*, 187 U. S. 71; *Keerl* v. *Montana*, 213 U. S. 135. Certainly no waiver can be spelled out in that situation; nor can it be said that the result was one which the defendant brought about. Similarly, where a mistrial is declared and the jury is discharged because of the misconduct of a juror (*Simmons* v. *United States*, 142 U. S. 148, 153) or because one of the petty jurors was on the grand jury panel which returned the indictment on which the defendant is being tried (*Thompson* v. *United States*, 155 U. S. 271), the proceedings up to the point of discharge will not sustain a plea of double jeopardy; and this is so even when the jury is discharged over the defendant's objections (*Simmons* v. *United States*, *supra*). The principle of these cases, we think, is that a trial conducted in a manner contrary to established principles of justice is not such a trial as will support a plea of double jeopardy.

B. In *Kepner* v. *United States*, 195 U. S. 100, this Court by a bare majority held that the prohibition against double jeopardy was not confined to jeopardy in a new and independent case, but forbade jeopardy in the same case where the second trial, under Philippine law, was at the instance of the prosecution and not on the defendant's motion. The Court rejected the view advanced by Mr. Justice Holmes, speaking for the dissenting Justices, that (195 U. S. at 134) "The jeopardy

is one continuing jeopardy from its beginning to the end of the cause," and that "there is no rule that a man may not be tried twice in the same case." Subsequently, in *Trono* v. *United States*, 199 U. S. 521, the Court held that, where the defendant himself appealed, the Supreme Court of the Philippines might, under Philippine law, find him guilty of a more serious offense and impose a heavier sentence than did the court of first instance.

The Court's latest expression on the subject, upheld, as against a contention that the Fourteenth Amendment was violated, a Connecticut statute giving the State a right of appeal. There the defendant had been found guilty at the first trial of murder in the second degree and sentenced to life imprisonment. The State appealed and the judgment was reversed. At the second trial, defendant was found guilty of murder in the first degree and sentenced to death; that conviction was upheld here. *Palko* v. *Connecticut*, 302 U. S. 319. While the case involved the Fourteenth Amendment,[1] the opinion, the last deliv-

[1] "Is that kind of double jeopardy to which the statute has subjected him a hardship so acute and shocking that our polity will not endure it? Does it violate those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'? * * * The answer must surely be 'no.' * * * The state is not attempting to wear the accused out by a multitude of cases with accumulated trials. It asks no more than this, that the case against him shall go on until there shall be a trial free from

ered by Mr. Justice Cardozo, intimates strong doubts as to the correctness of the *Kepner* holding. 302 U. S. at 322–323.

C. The basic question in the present case is whether the automatic appellate review of court-martial proceedings prescribed by AW 50½ involves an appeal by the Government, as in the *Kepner* case, or an appeal by the accused, as in the *Trono* case.

We think it clear that this is not a *Kepner* situation. There the prosecution appealed to set aside an acquittal. Similarly, in the *Palko* case, the prosecution appealed to set aside a verdict of a lower degree of murder. Here the prosecution does not appeal at all. It cannot appeal. The old military practice whereby, in proceedings in revision, a court-martial could at the instance of the reviewing authority reconsider an acquittal and then convict the accused, or reconsider a sentence with a view to increasing its severity (see 1 Winthrop, *Military Law & Precedents* (2d ed. 1896) *694–702; *Swaim* v. *United States*, 165 U. S. 553, 563–565; cf. *Ex parte Reed*, 100 U. S. 13), is now expressly forbidden by AW 40. Indeed, that was the very purpose of the 1920 amendment.[2]

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the corrosion of substantial legal error. * * * The edifice of justice stands, its symmetry, to many, greater than before." 302 U. S. at 328.

[2] See Rigby, *Military Penal Law: A Brief Summary of the 1920 Revision of the Articles of War* (1921) 12 J. Crim. L. 84.

The automatic appeal is in no sense an appeal by the prosecution. To the contrary, it is an automatic appeal taken for the benefit of the accused, who, under the prevailing practice, is not bound by waivers that his counsel may have made at the trial.[3] Article of War 50½ constitutes an enlightened modification of penal law, which gives every accused the benefit of appellate scrutiny, without requiring him to retain counsel or to possess the funds necessary to prepare the record.[4] Such a procedure is obviously wholly different, both in substance and purpose, from the prosecution's appeal of the acquittal involved in the *Kepner* case.

Not only that, but Radovich here joined in the automatic appeal which the law accorded him. As Mr. Robb stated at the argument, Radovich's counsel appeared orally before the Board of Review, urging that the conviction be set aside as legally insufficient. They filed a brief in support

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[3] See e. g., Dig. Op. JAG (1912–1940), pars. 395 (2), 395 (21) (2); 1 Bull. JAG 212, par. 395 (18); 2 *id.* 60, par. 395 (18).

[4] A soldier tried by court-martial has been entitled to a verbatim copy of the proceedings without charge since 1786. Clause 3 of AW 24 of 1786, Res. of May 31, 1786; 30 J. Cont. Cong. 316, 321; AW 90 of 1806, Act of April 10, 1806, c. 20, 2 Stat. 359, 370; AW 114 of 1874, R. S. 1342; AW 111 of 1916, Act of August 29, 1916, c. 418, 39 Stat. 619, 650, 668; AW 111 of 1920, 10 U. S. C. 1583. But a defendant tried in a federal court, lacking funds, has only had this privilege since the Act of January 20, 1944, c. 3, 58 Stat. 5, 28 U. S. C., Supp. V, 9a. See *Miller* v. *United States*, 317 U. S. 192.

of their contention that "the error complained of has injuriously affected [Radovich's] substantial rights." AW 37; 10 U. S. C. 1508. This differs not at all in substance from the ordinary appeal taken by a defendant in a civilian criminal trial. And certainly Radovich never repudiated the appellate action in the Office *of the* Judge Advocate General that resulted in the setting aside of a sentence which, even as cut down by the reviewing authority, still carried dismissal and two years' confinement at hard labor. See GCMO 240, set out at U. S. Br. 122–125. He embraced the results of the action taken by reason of the automatic appeal. He never offered to serve the term of confinement imposed, nor did he seek to compel the Secretary of War to issue a certificate evidencing the dismissal from the service which the court-martial had adjudged. Having accepted the benefits of the appeal which the law provided for him, he cannot now be heard to deny that he is bound by its burden, viz, that there has not been a valid trial. We think that in this situation the circumstance that the noting of the appeal was automatic by virtue of AW 50½ does not make the appeal any less the act of or the result effected by Radovich.

The case of *Sanford* v. *Robbins*, 115 F. 2d 435 (C. C. A. 5), certiorari denied, 312 U. S. 697, is instructive in the present connection. There the accused was tried for rape and sentenced to death

under the 1916 Articles of War (39 Stat. 650–670), which made no provision for a new trial. But the Acting Judge Advocate General held that the errors committed had been so fundamental that they reached the very jurisdiction of the court martial,[5] and the President, on the strength of that holding, issued an order stating "that, by

[5] See R. 70–104, No. 613, Oct. T., 1940. There was a review by a Special Board of Review in the Office of the Judge Advocate General, which is signed by S. T. Ansell, Acting Judge Advocate General. The holding on the point noted in the text was as follows (R. 103):

"It is the judgment of this office that in this case a lawful trial can and should be ordered, and that such a course is sustainable, first, upon the view that the proceedings had are a nullity, and, secondly, that even if it should be assumed that the errors here had in view did not have such destructive effect upon the proceedings as that attributed to them, still where this office, upon the review which the statute requires it to make, pronounces the proceedings invalid for prejudicial error, and the President, as confirming authority, so holds and declares, he may order another trial in the exercise and by virtue of his confirming authority alone."

At that time, 1918, there was an automatic appellate review provided for, not in the Articles of War, but prescribed by General Orders No. 7, War Department, January 17, 1918 (see Wigmore, ed., *Military Law and War-Time Legislation* (1919), pp. 604–606, 808–810). At that time, also, the 40th Article of War of 1916 provided that (39 Stat. at 657), "No person shall be tried a second time for the same offense."

The reference in the opinion to "the statute" is doubtless to R. S. 1199, directing that the Judge Advocate General "revise" the proceedings of all courts-martial. The scope of that provision was a subject much controverted in the War Department in 1917–1919. See *Establishment of Military Justice*, Hearings before the Senate Committee on Military Affairs on S. 64, 66th Cong., 1st sess. (1919) *passim*.

reason of the errors, jurisdictional and fundamental, committed during the trial, to the manifest injury of the accused, the said trial and proceedings are invalid."* He ordered a new trial. At the new trial, accused's plea of double jeopardy was overruled by the court-martial, and he was found guilty and sentenced to life imprisonment. This second sentence was approved by the President in 1920. Nineteen years later, the accused sued out a writ of habeas corpus, and it was that proceeding which was before the Fifth Circuit in *Sanford* v. *Robbins*.

The Circuit Court of Appeals held, reversing the district court, that the second court-martial's action in overruling the plea of double jeopardy was not reviewable on habeas corpus, but that, in any event, its ruling was correct. Judge Sibley said (115 F. 2d at 439):

> * * * In the present case there was no express request for a new trial made to the President by the accused. Yet since he was condemned to death and might be helped and could not possibly be hurt by a new trial, his consent to it ought to be presumed in favorem vitae. As against his country a citizen and a soldier has not the right to elect to die. Robbins has in fact never desired to be executed. He wished to take advantage of the President's failure to confirm the old sentence, but to

* R. 23, No. 613, Oct. T., 1940.

> repudiate the condition annexed that there be a new trial. He would go free. We hold the request for and consent to a new trial by one condemned to death is to be presumed, the presumption being true in fact and required by a sound public policy.

This view, of course, supports our contentions as to the nature of the automatic appeal on behalf of the defendant, first introduced in statutory form in 1920 in AW 50½. In other words, the situation presented is that of the *Trono* case, i. e., a defendant's appeal, but with greater advantages for the accused. Trono's sentence was increased on appeal, and he was found guilty of a more serious offense. This cannot be done at military law today, either by the reviewing or confirming authority, see AW 40 (10 U. S. C. 1511), or by the second court-martial at the rehearing (i. e., new trial) provided for by AW 50½ (10 U. S. C. 1522). AW 50½ expressly states,

> Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court, and no sentence in excess of or more severe than the original sentence shall be enforced unless the sentence be based upon a finding of guilty of an offense not considered upon the merits in the original proceeding. * * *

Or, in short, summing up the foregoing discussion, the situation in the present case is identical

in substance with that considered by this Court in *Burton* v. *United States*, 202 U. S. 344, 380. Radovich was convicted. An appeal was taken on his behalf. He joined in that appeal and pressed it. The conviction was set aside on grounds not going to the merits. Radovich embraced the benefits of the appellate action. The original charges were then no longer pressed. The United States proceeded against him, not under the old military charges, but upon a new civil indictment. In those circumstances the *Burton* case is conclusive against the validity of his plea of double jeopardy.

## II

A. The incompleteness of the military proceedings is brought more clearly into focus when the nature of a sentence by court-martial is considered. Until such a sentence has been acted upon by the reviewing authority, and, as here, by the confirming authority as well, it is something inchoate and incomplete. The classical view is set forth by Winthrop (1 *Military Law & Precedents* (2d ed. 1896) *683).

> While the function of a court-martial is, regularly, completed in its arriving at a sentence or an acquittal, and reporting its perfected proceedings, its judgment, so far as concerns the *execution* of the same, is incomplete and inconclusive, being in the nature of a *recommendation* only. The

> record of the court is but the report and opinion of a body of officers, addressed to the superior who ordered them to make it, and such opinion remains without effect or result till reviewed and concurred in, or otherwise acted upon, by him. This superior, sometimes referred to as the Approving or Confirming Authority, but more commonly known in military parlance as the Reviewing Authority or Officer, is, as will presently be more fully indicated, the official—military commander or Commander-in-chief—by whom the court was originally constituted and convened, or—where there has been a change in the command since the convening—his successor therein. In some cases indeed where, beside the approval of the original commander, further confirmatory action by a higher commander or the President is required by law, there are in fact, as will also be pointed out, two separate reviewing officers. It is the function of such officer (or officers) which we now proceed to consider. [Italics in original.]

The sentence of the court-martial that tried Radovich, therefore, was not a final judgment until it was acted on by the reviewing authority, here the Commanding General, First Air Force, under AW 46 and AW 47 (10 U. S. C. 1517, 1518), and by the confirming authority, here the President, under AW 48 and AW 49 (10 U. S. C. 1519, 1520), since it was a sentence extending

to the dismissal of an officer." Consequently, the action of the Board of Review and the Judge Advocate General here was really like that of a judge who declares a mistrial prior to the termination of the proceedings.

B. The foregoing analysis will perhaps appear more clearly against the background of an illustration showing the actual travel of a case involving an officer tried by general court-martial and sentenced to dismissal, i. e., a sentence which requires confirmation by the President. For the sake of simplicity we assume a trial in the same court-martial jurisdiction as that involved in the present case, viz, the First Air Force.

We will suppose that Captain Doe, on duty with that Air Force, has embezzled money of the United States furnished for the military service, in violation of AW 94 (10 U. S. C. 1566). The charges against him, after being investigated and examined by the staff judge advocate (AW 70; 10 U. S. C. 1542), are referred for trial by the Air Force Commander to a general court-martial appointed by him.

The trial takes place, the court-martial finds Captain Doe guilty, and he is sentenced to dismissal and a term of confinement. The record of trial is then transmitted to the staff judge advocate pursuant to AW 46 (10 U. S. C. 1517).

(a) If the staff judge advocate holds the record of trial legally insufficient, he will recommend

that the proceedings be disapproved. The Air Force Commander then acts on the record pursuant to AW 46 and 47 (10 U. S. C. 1517, 1518). If he concurs in the recommendation of his staff judge advocate, he will disapprove the findings and sentence. If he determines not to order a rehearing, for the reason, e. g., that the evidence is insufficient, he will disapprove the findings and sentence and publish the result in General Court-Martial Orders issued from Headquarters First Air Force. Such a disapproval would be equivalent to an acquittal, would be a final trial within the sense of AW 40, and would bar a further trial for the same offense.

(b) If the Air Force Commander disapproves the findings and sentence because of irregularities or errors at the trial, and determines to order a rehearing under AW 47 (c), the case goes back to be tried by a new court. In that event, there has been no final trial within the sense of AW 40.

(c) If the staff judge advocate advises that the record is legally sufficient and the Air Force Commander concurs, he approves the sentence and forwards it under AW 48 (10 U. S. C. 1519), for confirmation by the President. (This is what was done in the Radovich case.)

After action by the Air Force Commander, who is the reviewing authority, the case of Captain Doe goes to the Board of Review in the Office

of the Judge Advocate General. Here again there are several different possibilities.[7]

(d) The Board of Review may hold the record of trial legally insufficient. (This is what happened here, in the Radovich case.) In that event, the record is not forwarded to the President at all (see MCM, pp. 216–217), but is returned to the reviewing authority. Up to this point, there has been no trial within the meaning of AW 40. The reviewing authority may then order a rehearing before a new court or he may dismiss the charges. If he orders a rehearing, the subsequent proceedings are dealt with as indicated in subparagraph (b). If he dismisses the charges, then there is final action within the meaning of AW 40. (In the present case, as we have shown (U. S. Br. 63–64), he did neither.)

(e) The record of trial may be held legally sufficient. It is then transmitted to the Secretary of War for action by the President. The President acts under AW 49 (10 U. S. C. 1520); he may confirm the sentence, he may commute it (AW 50, 10 U. S. C. 1521), he may remit part of it (AW 50), he may suspend it (AW 52, 10 U. S. C. 1524), or he may disapprove it. His

[7] In order to simplify the discussion, we assume that The Judge Advocate General concurs in the holding of the Board of Review, and that there is no occasion for the Secretary of War, under the third subparagraph of AW 50½, as amended, to resolve the differences between the two

action is published in War Department General Court-Martial Orders. In all of the possibilities noted, there has been a trial within the meaning of the 40th Article of War. The President also may ignore the recommendation that is made and, on his own initiative, order a rehearing. AW 49 (c). In that event, there has been no trial within the meaning of AW 40. The record goes back to the reviewing authority, and the new court is appointed by that authority. In the event of a conviction, the record goes forward once more, as indicated above in subparagraph (c).

And, of course, if there is an acquittal by the court-martial, that is final. AW 29 (10 U. S. C. 1500).

C. There is nothing in *Ex parte Costello*, 8 F. 2d 386 (E. D. Va.), cited by Mr. Robb at the argument, contrary to the foregoing analysis. That case involved the Articles for the Government of the Navy (34 U. S. C. 1200), which, like the Articles of War prior to 1920, have no provision for a Board of Review. *Ex parte Costello* holds, relying upon and following some opinions of the Attorney General (13 Op. A. G. 459; 26 Op. A. G. 239), that a disapproval is equivalent to an acquittal.

But the disapproval there considered is the disapproval by the reviewing or confirming authority contemplated by Articles of War 47 (a),

47 (b), 49 (a) and 49 (b).* It is the disapproval considered in the supposititious case above at subparagraphs (a) and (c). It is the disapproval, in the naval practice, under Article of the Government of the Navy 54 (b). Such a disapproval is entirely different from a holding of legal insufficiency by the Board of Review and the Judge Advocate General under AW 50½—action for which there is no counterpart in the Navy articles.

The Army had no such procedure, either, prior to the First World War. The traditional Army practice was that new trials were never ordered except where jurisdictional defects made the first trial a nullity, or where the accused himself requested a retrial. See Ives, *Military Law* (1879), 200–202; 1 Winthrop, *Military Law & Precedents* (2d ed. 1896) *693. It was not until the First World War that provision was made for routine review of proceedings in the Office of the Judge Advocate General prior to the execution of sentences of death (General Orders No. 169, War Dep't, 1917) or of sentences of dismissal or dishonorable discharge not suspended (General Orders No. 7, War Dep't, 1918; see Wigmore, ed., *Military Law and War-Time Legislation* (1919),

* Recent examples of Presidential disapprovals under AW 49 may be found in GCMO 14 of 1941, GCMO 100 of 1943, and GCMO 152 of 1943, discussed below, p. 21.

pp. 604–606, 808–810). Even so, new trials, as in *Sanford* v. *Robbins*, 115 F. 2d 435, *supra*, were rested on jurisdictional grounds, and at that were thought by some to be of doubtful validity.[9] Moreover, the review provided for by the cited General Orders was still advisory, and not binding on officers exercising court-martial jurisdiction. It was not until the enactment of AW 50½ in 1920 that the Board of Review and the Judge Advocate General, agencies wholly outside the chain of military command, could independently set aside a sentence of a court-martial on the grounds of legal insufficiency.

D. The changes made by Congress in AW 40 in 1920 reflect the nature of a court-martial sentence, i. e., that it is inchoate until acted upon, and reflect also the restrictions then placed on the return of proceedings for revision and the provision made for a rehearing, i. e., a new trial, when the record of the first trial was held legally insufficient.

In 1920, Congress prohibited proceedings in revision looking to reconsideration of acquittals, i. e., the kind of appeal by the prosecution considered in *Kepner* v. *United States*, 195 U. S. 100. It likewise prohibited proceedings in revision

[9] It is perhaps significant that, when the court-martial at Robbins' second trial overruled his plea of double jeopardy, it said (115 F. 2d at 437) that the new trial was "possibly not in strict accord with the 40th Article of War and the Fifth Amendment of the Constitution."

looking to increased sentences. See *Swaim* v. *United States*, 165 U. S. 553; cf. *Trono* v. *United States*, 199 U. S. 521. And, while providing for new trials, Congress expressly stated that, where the first trial was set aside for invalidity in the proceedings before the sentence had been finally acted on, the first trial would not constitute jeopardy. In other words, Congress adopted the rule of the cases discussed above, *supra*, pp. 1–3, and applied that rule to military proceedings.

AW 40, which in 1916 had simply stated (39 Stat. at 657) that "No person shall be tried a second time for the same offense," was carefully rewritten. As enacted in 1920, it provides (41 Stat. at 795):

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.
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> No authority shall return a record of trial to any court-martial for reconsideration of—
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> (*a*) An acquittal; or
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> (*b*) A finding of not guilty of any specification; or
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> (*c*) A finding of not guilty of any charge, unless the record shows a finding

of guilty under a specification laid under that charge, which sufficiently alleges a violation of some Article of War; or

(*d*) The sentence originally imposed, with a view to increasing its severity, unless such sentence is less than the mandatory sentence fixed by law for the offense or offenses upon which a conviction has been had.

And no court-martial, in any proceedings on revision, shall reconsider its finding or sentence in any particular in which a return of the record of trial for such reconsideration is hereinbefore prohibited.

The only differences between double jeopardy under AW 40 in its present form and under *Trono* v. *United States*, 199 U. S. 521, are two—and both are favorable to the accused. First, his sentence cannot be increased as a result of the appeal. Second, the appeal is taken on his behalf without the necessity of his asking that it be taken. And, we might add, the provisions of AW 50½, quoted *supra*, p. 10, preclude the result approved in *Palko* v. *Connecticut*, 302 U. S. 319, i. e., a more severe sentence on the new trial.

We will not repeat here what we have already discussed at length above, viz., that an automatic appeal which is taken on behalf of the accused and whose benefits he embraces is in no sense an appeal by the prosecution.

E. The appellate procedure introduced into the administration of military justice by the 1920 re-

vision of the Articles of War requires a reexamination of the "disapproval equals acquittal" doctrine relied on by Radovich here.

(1) Where the President, acting under AW 49 (10 U. S. C. 1520), personally disapproves the findings and sentence, such action constitutes an acquittal, and AW 40 bars further trial. That is the precise kind of action considered in *Ex parte Costello,* 8 F. 2d 386, *supra.* Recent examples of Presidential disapprovals are GCMO 14 of 1941, GCMO 109 of 1943, and GCMO 152 of 1943, Appendix, *infra,* pp. 28–37. In all of those cases, as the General Court-Martial Orders show, the President took action in person. Here, however, in the *Radovich* case, the proceedings were never even submitted to the President; see the practice set out at MCM, pp. 216–217.

(2) Where the Board of Review and the Judge Advocate General have found a record of trial legally insufficient, the convening authority has then to determine whether he will order a rehearing of the charges. He may do so, in whole or in part. When he determines that certain specifications are not to be retried, he uses appropriate language to that end.

A recent example may be found in War Department GCMO 436 of 1944, Appendix, *infra,* pp. 38–41, which announces those portions of the charges against the officer concerned which were not referred for rehearing. The order expressly

states that certain specifications "are withdrawn and will not be further prosecuted." This is a dismissal of the charges which constitutes final action within the meaning of AW 40.

(3) Here, however, there was no action by any reviewing or confirming authority. GCMO 240 of 1946, which deals with Radovich's case, is not a disapproval by the President. It is not a dismissal of the charges by the convening authority. It is simply an announcement that the independent judicial agency outside the chain of command—the Board of Review and the Judge Advocate General—have held the record of trial legally insufficient. Neither agency had power to order a rehearing or to direct that one be not had. General Court-Martial Orders 240 simply announces the fact of disapproval because of the holding of legal insufficiency:

> The record of trial was examined by the Board of Review in the Office of The Judge Advocate General and was held legally insufficient to support the findings of guilty and the sentence. The Judge Advocate General concurred in said holding. Pursuant to Article of War 50½, the findings of guilty and the sentence are disapproved.[10]

In other words, GCMO 240 in *Radovich's* case reflects action by the Board of Review and the

[10] The words, "By order of the Secretary of War", do not import personal action by the Secretary. They appear on every War Department GCMO, including those announcing action by the President.

Judge Advocate General, while the other GCMO's reflect action taken in command channels. Only the latter constitutes final action within AW 40.

When the proceedings in Radovich's case were initially disapproved under AW 50½ and when thereafter the Commanding General, First Air Force, took no action looking either towards dismissal of the charges or towards ordering a rehearing, the military charges were in the situation of a civil indictment which has been reversed on appeal and where the prosecutor has not yet decided whether to retry the defendant or to *nolle prosequi* the indictment. Later, by the time the War Department published GCMO 240,[11] Radovich had been convicted by a jury in a federal district court, his appeal had been taken, and his case was *sub judice* in the Circuit Court of Appeals. All that General Court-Martial Orders No. 240 did was to announce the fact of disapproval because of the holding of legal insufficiency; in no sense did it amount to an acquittal or a dismissal of the charges.

Consequently, we assert with confidence that in the present case, the court-martial proceedings against Radovich never were a trial in the sense of the 40th Article of War, and that, having regard to the nature of a military conviction which has not been finally acted on by the confirming

[11] GCMO 240 is dated July 26, 1946; the argument in the C. C. A. had been had on June 4 (R. 1467).

authority, the proceedings were not the kind of trial on which a plea of double jeopardy in the constitutional sense could be based. The situation is identical with the cases of mistrials for disagreement or invalidating error before the termination of the proceedings. *United States* v. *Perez*, 9 Wheat. 579; *Simmons* v. *United States*, 142 U. S. 148; *Thompson* v. *United States*, 155 U. S. 271. In the end, Radovich will have had only one valid trial.

F. While, as we have indicated, the military proceedings in this point did not amount to a trial in the sense of the 40th Article of War, Radovich strongly argues the contrary (Br. 37–38). But that narrow question is not dispositive of the plea in bar involved in the present case.

The present trial was had in a United States District Court. The governing double jeopardy provision is that contained in the Fifth Amendment, "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb", and the governing authorities those just discussed. The circumstance that a new military trial might be barred by the statutory provisions of AW 40, or for any other reason, would not militate against a holding that the civil trial was not double jeopardy in the constitutional sense, in view of the incompleteness of the military proceedings. In other words, even if the military authorities had put it out of their power

to retry Radovich by court-martial by reason of dismissing the charges, such action would, in the subsequent civil trial, amount to no more than a *nolle prosequi*; and that, as the *Burton* case teaches, is no bar to a subsequent civil trial on a new indictment.

The soundness of this approach is confirmed by *Grafton* v. *United States*, 206 U. S. 333. Grafton was charged with manslaughter under old AW 62 (now AW 96, 10 U. S. C. 1568),[12] and was acquitted. He was thereafter charged with the crime of assassination under Philippine Law, for the same homicide, and convicted. This Court held that the second trial constituted double jeopardy. It reached that holding, not in reliance on the double jeopardy provision of the then Articles of War,[13] but on the basis of the double jeopardy provision of the Act of Congress establishing a civil government in the Philippines. See 206 U. S. at 345 and 355.[14]

We do not suggest that AW 40 gives an accused less protection before a court-martial than the Fifth Amendment accords a defendant on trial in

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[12] At that time, old AW 58 (now, in substance, AW 93, 10 U. S. C. 1565) was not applicable except in time of war, and manslaughter was laid, in time of peace, under the general article, old AW 62.

[13] AW 102 of 1874, R. S. 1342: "No person shall be tried a second time for the same offense."

[14] "* * * no person for the same offense shall be twice put in jeopardy of punishment * * *." Sec. 5 of the Act of July 1, 1902, c. 1369, 32 Stat. 691, 692.

a federal district court. We do say, however, that even if, as Radovich urges, he could not have been retried by court-martial because of the limitations of AW 40, because of what that Article holds to be a trial, it would not follow that, if the military proceedings had not amounted to jeopardy in the constitutional sense, he could not then be tried by a district court. After all, factors other than AW 40 could have prevented a rehearing by court-martial.[15] Here the military proceedings were never completed: They were set aside for reasons not going to the merits. In those circumstances they do not bar a subsequent trial on an indictment. *Burton* v. *United States*, 202 U. S. 344.

## III

We are not certain to what extent this Court should consider the consequences of a contrary holding. Cf. Holmes, J., dissenting, in *Kepner* v. *United States*, 195 U. S. 100, 134.[16] But, obviously, if Radovich's plea of double jeopardy is sustained, he goes free: that plea bars his trial by any civil court, and being out of the service, he is

[15] E. g., intervening separation from the service.

[16] "At the present time in this country there is more danger that criminals will escape justice than that they will be subjected to tyranny. But I do not stop to consider or to state the consequences in detail, as such considerations are not supposed to be entertained by judges, except as inclining them to one of two interpretations, or as a tacit last resort in case of doubt."

no longer amenable to military jurisdiction, quite apart from the circumstance that the military statute of limitations has long since run. AW 39 (10 U. S. C. 1510).

Respectfully submitted.

GEORGE T. WASHINGTON,
*Acting Solicitor General.*

THERON L. CAUDLE,
*Assistant Attorney General.*

FREDERICK BERNAYS WIENER,
*Special Assistant to the Attorney General.*

ROBERT S. ERDAHL,
BEATRICE ROSENBERG,
*Attorneys.*

APRIL 1947.

## APPENDIX

GENERAL COURT-MARTIAL
ORDERS, No. 14

WAR DEPARTMENT,
*Washington, July 23, 1941.*

Before a general court martial which convened at Camp Blanding, Florida, May 5, 12, 13, and 14, 1941, pursuant to paragraph 5, Special Orders No. 112, Headquarters 31st Division, Camp Blanding, Florida, May 5, 1941, was arraigned and tried—

Second Lieutenant *Horace D. Hester* (O–366-390), 124th Infantry.

CHARGE I: "Violation of the 61st Article of War."

*Specification 1.*—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, did, without proper leave, absent himself from his organization at Camp Blanding, Florida, from about April 26, 1941, at 6:00 o'clock A. M., until about April 28, 1941, at 9:00 o'clock P. M."

*Specification 2.*—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, did, without proper leave, absent himself from his organization at Sanford, Florida, from about March 31, 1941, at 9:00 o'clock P. M., until about April 1, 1941, at 6:00 o'clock A. M."

CHARGE II: "Violation of the 85th Article of War."

*Specification.*—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Camp

Blanding, Florida, on or about March 16, 1941, found drunk while on duty as the Adjutant of the Second Battalion, 124th Infantry, on parade in the regimental parade ground."

CHARGE III: "Violation of the 95th Article of War."

*Specification 1.*—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Camp Blanding, Florida, on or about March 16, 1941, in a public place, to-wit, the regimental parade ground, drunk while in uniform."

*Specification 2.*—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Camp Blanding, Florida, on or about March 23, 1941, drunk in quarters, while in uniform."

*Specification 3.*—"In that Second Lieutenant *Horace D. Hester,* 124th Infantry, was, at Orlando, Florida, on or about March 31, 1941, in a public place, to-wit: Berger's Tavern, drunk and disorderly while in uniform."

To which charges and specifications the accused pleaded "Not Guilty."

FINDINGS

Of *Specification 1,* CHARGE I: "Guilty."
Of *Specification 2,* CHARGE I: "Not Guilty."
Of CHARGE I: "Guilty."
Of the *Specification,* CHARGE II: "Guilty."
Of CHARGE II: "Guilty."
Of *Specification 1,* CHARGE III: "Guilty."
Of *Specification 2,* CHARGE III: "Not Guilty."
Of *Specification 3,* CHARGE III: "Guilty."
Of CHARGE III: "Not Guilty, but Guilty of a violation of the 96th A. W."

SENTENCE

*To be dismissed the service.*

The sentence was adjudged May 14, 1941.

The following is the action of the convening authority:

HEADQUARTERS
THIRTY-FIRST DIVISION,
CAMP BLANDING, FLORIDA,
*May 28, 1941.*

In the foregoing case of Second Lieutenant *Horace D. Hester* (O–366390), 124th Infantry, the sentence is approved. Pursuant to Article of War 50½ the order directing the execution of the sentence is withheld.

(Signed) John C. Persons,
(Typed) JOHN C. PERSONS,
*Major General, U. S. Army,*
*Commanding.*

The sentence having been approved by the convening authority, the record of trial forwarded for the action of the President, and the record of trial having been examined by the Board of Review in The Judge Advocate General's Office, and the Board of Review having submitted its opinion in writing to The Judge Advocate General, and the record of trial, the opinion of the Board of Review, and the recommendations of The Judge Advocate General having been transmitted directly to the Secretary of War for the action of the President, and having been laid before the President, the following are his orders thereon:

In the foregoing case of Second Lieutenant *Horace D. Hester* (O–366390),

124th Infantry, the findings of guilty and the sentence are disapproved.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
*July 21, 1941.*

Second Lieutenant *Horace D. Hester* (O–366390), 124th Infantry, was restored to a duty status July 23, 1941.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
*Chief of Staff.*

OFFICIAL:
E. S. ADAMS,
*Major General,*
*The Adjutant General.*

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GENERAL COURT-MARTIAL ORDERS, NO. 100

WAR DEPARTMENT,
*Washington, May 7, 1943.*

Before a general court martial which convened at Camp Murphy, Florida, December 19, 1942, pursuant to paragraph 21, Special Orders No. 293, Headquarters Fourth Service Command, Office of the Commanding General, Atlanta, Georgia, December 8, 1942, as amended by paragraph 17, Special Orders No. 300, Headquarters Fourth Service Command, Office of the Commanding General, Post Office Building, Atlanta, Georgia, December 16, 1942, was arraigned and tried—

Second Lieutenant *Donald V. Marks,* O–455524, Signal Corps.

CHARGE I: "Violation of the 93rd Article of War."

*Specification.*—"In that 2nd Lieutenant *Donald V. Marks,* Signal Corps, Army of the United States, assigned to the Officers Signal Corps Replacement Pool, did, at Camp Murphy, Florida, on or about October 11, 1942, feloniously take, steal and carry away one brown leather wallet, value about $2.50, one hundred dollars ($100.00) in United States currency, one "A" class gasoline rationing book value about $.03 and, one "B" class gasoline rationing book value about $.03, the property of 2nd Lieutenant William A. Brady, Signal Corps, Army of the United States, Officers Signal Corps Replacement Pool, Camp Murphy, Florida."

CHARGE II: "Violation of the 95th Article of War."

*Specification.*—"In that 2nd Lieutenant *Donald V. Marks,* Signal Corps, Army of the United States, assigned to the Officers Signal Corps Replacement Pool, did at Camp Murphy, Florida, on or about October 11, 1942, feloniously take, steal and carry away one brown leather wallet, value about $2.50, one hundred dollars ($100.00) in United States currency, one "A" class gasoline rationing book value about $.03, and one "B" class gasoline rationing book, value about $.03, the property of 2nd Lieutenant William A. Brady, Signal Corps, Army of the United States, Officers Signal Corps Replacement Pool, Camp Murphy, Florida."

PLEAS

To each charge and specification: "Not guilty."

FINDINGS

Of all specifications and charges: "Guilty."

SENTENCE

*To be dismissed from the service.*

The sentence was adjudged December 19, 1942.

The following is the action of the convening authority:

HEADQUARTERS FOURTH SERVICE COMMAND
OFFICE OF THE COMMANDING GENERAL
POST OFFICE BUILDING,
*Atlanta, Georgia, January 25, 1943.*

In the foregoing case of Second Lieutenant *Donald V. Marks*, O–455524, Signal Corps, Assigned Officers Signal Corps Replacement Pool, Camp Murphy, Florida, only so much of the findings of the specification of Charge I and the specification of Charge II as in each instance involves a finding of guilty of larceny of one Class A gasoline ration book as alleged, at the time and place and of the ownership alleged, of some value less than $0.03, is approved. The sentence is approved and the record of trial is forwarded for action under the 48th Article of War.

[Signed] Wm. Bryden,
[Typed] WM. BRYDEN,
*Major General, U. S. Army,*
*Commanding.*

The sentence having been approved by the convening authority, the record of trial forwarded for the action of the President, and the record of trial having been examined by the Board of

Review in The Judge Advocate General's Office, and the Board of Review having submitted its opinion in writing to The Judge Advocate General, and the record of trial, the opinion of the Board of Review, and the recommendations of The Judge Advocate General having been transmitted directly to the Secretary of War for the action of the President, and having been laid before the President, the following are his orders thereon:

In the foregoing case of Second Lieutenant *Donald V. Marks* (O–455524), the sentence is disapproved.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
*May 1, 1943.*

Second Lieutenant *Donald V. Marks*, O–455524, Signal Corps, was restored to duty May 6, 1943.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
*Chief of Staff.*

OFFICIAL:

J. A. ULIO,
*Major General,*
*The Adjutant General.*

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GENERAL COURT-MARTIAL
ORDERS, No. 152

WAR DEPARTMENT,
*Washington 25, D. C., 20 July 1943.*

Before a general court martial which convened at Camp Roberts, California, 8 January 1943, pursuant to paragraph 19, Special Orders No. 276, Headquarters Camp Roberts, California, 19 November 1942, as amended by paragraph 5, Spe-

cial Orders No. 281, Headquarters Camp Roberts, California, 25 November 1942, as amended by paragraphs 11, 12 and 13, Special Orders No. 6, Headquarters Camp Roberts, Califoria, 7 January 1943, was arraigned and tried—

Second Lieutenant *Thomas J. Lanyon*, O–1770820, Field Artillery.

CHARGE: "Violation of the 93d Article of War."

*Specification 1.*—"In that *Thomas J. Lanyon*, Second Lieutenant, Field Artillery, Battery "C," 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, did, at Camp Roberts, California, on or about 18 October 1942, feloniously take, steal, and carry away one dollar ($1.00), lawful money of the United States of America, the property of Robert E. O'Connell, First Lieutenant, Field Artillery, Battery "B," 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California."

*Specification 2.*—"In that *Thomas J. Lanyon*, Second Lieutenant, Field Artillery, Battery "C," 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, did, at Camp Roberts, California on or about 18 October 1942, feloniously take, steal, and carry away one (1) certain Bank of America, National Trust & Savings Association, San Francisco, California Travelers Cheque Number A6715060, dated 3 October 1942, in the denomination of ten dollars ($10.00), value about ten dollars ($10.00), and one (1) certain Bank of America, National Trust & Savings Association, San Francisco, California Travelers Cheque Number A6715061, dated 3 October 1942, in the denomination of ten dollars ($10.00), value about ten dollars ($10.00), the property of George

A. McCaleb, Second Lieutenant, Field Artillery, Battery "A," 56th Battalion, Twelfth Field Artillery, Training Regiment, Camp Roberts, California."

PLEAS

*To Specification 1* of the CHARGE: "Not guilty."
*To Specification 2* of the CHARGE: "Not guilty."
To the CHARGE: "Not guilty."

FINDINGS

*Of Specification 1* of the CHARGE: "Guilty."
*Of Specification 2* of the CHARGE: "Guilty."
Of the CHARGE: "Guilty."

SENTENCE

*To be dismissed the service, to forfeit all pay and allowances due or to become due, and to be confined at hard labor at such place as the reviewing authority may direct for one year.*

The sentence was adjudged 8 January 1943.

The following is the action of the convening authority:

HEADQUARTERS CAMP ROBERTS
OFFICE OF THE COMMANDING GENERAL
CAMP ROBERTS, CALIFORNIA

4 FEBRUARY 1943.

In the foregoing case of Second Lieutenant *Thomas J. Lanyon*, O-1770820, Battery C, 54th Battalion, Twelfth Field Artillery Training Regiment, Camp Roberts, California, the sentence is approved. The Ninth Service Command Detention and Rehabilitation Center, Turlock, California, is designated as the place of confinement. Pursuant to Article of War 48, the order

directing the execution of the sentence, is withheld.

[Signed] A. W. Lane,
[Typed] A. W. LANE,
*Brigadier General, U. S. Army,*
*Commanding.*

The sentence having been approved by the convening authority, the record of trial forwarded for the action of the President, and the record of trial having been examined by the Board of Review in The Judge Advocate General's Office, and the Board of Review having submitted its opinion in writing to The Judge Advocate General, and the record of trial, the opinion of the Board of Review, and the recommendations of The Judge Advocate General having been transmitted directly to the Secretary of War for the action of the President, and having been laid before the President, the following are his orders thereon:

In the foregoing case of Second Lieutenant *Thomas J. Lanyon* (O–1770820), Field Artillery, the findings and sentence are disapproved.

FRANKLIN D. ROOSEVELT.

THE WHITE HOUSE,
*7 July 1943.*

Second Lieutenant *Thomas J. Lanyon*, O–1770820, Field Artillery, was restored to duty status 10 July 1943.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
*Chief of Staff.*

OFFICIAL:

J. A. ULIO,
*Major General,*
*The Adjutant General.*

GENERAL COURT-MARTIAL
ORDERS, No. 436

WAR DEPARTMENT,
*Washington 25, D. C., 15 August 1944.*

Paragraph 2, General Court-Martial Orders, No. 188, War Department, Washington 25, D. C., 25 May 1944, is amended to read as follows:

2. Following are the Charges and Specifications on which First Lieutenant *James Bergman Benfield,* O-576921, Quartermaster Corps, was arraigned and tried at a former hearing before a general court martial which convened at Fort Knox, Kentucky, 15 October 1943, pursuant to paragraph 7, Special Orders, No. 245, Headquarters, Fort Knox, Kentucky, 9 October 1943, and which were not referred for rehearing, together with the action of the Court and reviewing authority thereon:

CHARGE: "Violation of the 96th Article of War."

*Specification 2.*—"In that First Lieutenant *James B. Benfield,* Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Louisville, Kentucky, on or about August 24, 1943, with intent to deceive wrongfully, and unlawfully, make and utter to Stewarts Dry Goods Company, Louisville, Kentucky, a certain check in words and figures, to wit: August 24, 1943, Stewarts Dry Goods Company, Louisville, Kentucky, fifty five dollars ($55.00), and by means thereof did fraudulently obtain goods or services from Stewarts Dry Goods Company, Louisville, Ken-

tucky, in the value of fifty five dollars ($55.00), while the said 1st Lieutenant *James B. Benfield*, then well knowing that he did not have and not intending that he should have sufficient funds in the Citizens Union National Bank for the payment of said check."

*Specifications 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18,* and *19*, are identical in form and substance with *Specification 2*, except for the dates, amounts and names of payees which differ from it in the following, respectively:

| | Date | Amount | Payee |
|---|---|---|---|
| *Specification 5* | August 28, 1943 | $29.95 | H. P. Selman & Co. |
| *Specification 6* | August 24, 1943 | 25.00 | Stewarts Dry Goods Co. |
| *Specification 7* | September 6, 1943 | 10.00 | Fort Knox Officers Club. |
| *Specification 8* | September 6, 1943 | 10.00 | Fort Knox Officers Club. |
| *Specification 9* | September 9, 1943 | 10.00 | Fort Knox Officers Club. |
| *Specification 10* | September 9, 1943 | 5.00 | Fort Knox Officers Club. |
| *Specification 11* | September 17, 1943 | 12.00 | Fort Knox Officers Club. |
| *Specification 12* | September 17, 1943 | 10.00 | Fort Knox Officers Club. |
| *Specification 13* | September 18, 1943 | 10.00 | Fort Knox Officers Club. |
| *Specification 14* | September 20, 1943 | 10.00 | Fort Knox Officers Club. |
| *Specification 15* | September 24, 1943 | 10.00 | Fort Knox Officers Club. |
| *Specification 16* | September 21, 1943 | 50.00 | Fort Knox Exchange. |
| *Specification 17* | September 22, 1943 | 200.00 | Fort Knox Exchange. |
| *Specification 18* | September 13, 1943 | 50.00 | Levy Bros. |
| *Specification 19* | September 24, 1943 | 10.00 | Fort Knox Officers Club. |

*Specification 23*:—"In that First Lieutenant *James B. Benfield*, Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about 16 June 1943, borrow one hundred dollars ($100) from Sergeant Robert Brumbaugh, Headquarters Company, Headquarters and Service Battalion, Armored Replacement Training Center, to the prejudice of good order and military discipline."

*Specification 24.*—"In that First Lieutenant *James B. Benfield,* Infantry, Company A, 10th Armored Replacement Battalion, Armored Replacement Training Center, did, at Fort Knox, Kentucky, on or about 1 September 1943, with intent to deceive Major Melvin B. Hallett, Headquarters, Armored Replacement Training Center, officially state to the said Major Melvin B. Hallett that his total indebtedness was two hundred twelve dollars and fifty cents ($212.50), which statement was known by said First Lieutenant *James B. Benfield* to be untrue."

*Specification 25.*—"In that First Lieutenant *James B. Benfield,* Infantry, Company A, 10th Armored Replacement Training Battalion, Armored Replacement Training Center, having received a lawful command from Colonel Edwin C. Greiner, Headquarters Second Group, Armored Replacement Training Center, on or about September 15, 1943, 'not to write any checks unless he had sufficient funds in the bank to cover himself,' did fail to obey said order by writing numerous checks knowing full well that he did not have sufficient funds in the bank to cover the same:"

FINDINGS

Of *Specifications 1* through *22:* "Guilty."
Of *Specifications 23* and *24:* "Not guilty."
Of *Specification 25:* "Guilty."
Of the CHARGE: "Guilty."

ACTION

The sentence is disapproved.

*Specification 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19,* and *25,* of the CHARGE are withdrawn and will not be further prosecuted.

BY ORDER OF THE SECRETARY OF WAR:

G. C. MARSHALL,
*Chief of Staff.*

OFFICIAL:

J. A. ULIO,
*Major General,*
*The Adjutant General.*

U. S. GOVERNMENT PRINTING OFFICE 1947

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ERENS BAYER and WALTER V. RADOVICH

**On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit**

## BRIEF FOR RESPONDENT WALTER V. RADOVICH IN OPPOSITION

SAMUEL T. ANSELL,
ROGER ROBB,
*Attorneys for respondent Walter V. Radovich*

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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---

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## BRIEF FOR RESPONDENT WALTER V. RADOVICH IN OPPOSITION

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### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1467-1476) is reported at 156 F. (2d) 964.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 14, 1945 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition

for a writ of certiorari was extended to October 12, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

## QUESTIONS PRESENTED

1. Whether a written confession taken from the respondent, an Army officer, by a special agent of the Federal Bureau of Investigation, was rendered inadmissible by reason of the fact that it was based upon and derived from an earlier statement taken from the respondent by the same agent while the respondent was being, and after he had been for approximately four weeks, unlawfully held in an Army psychopathic ward.

2. Whether proof of the allegations of the indictment against the respondent would have sustained certain military charges under which the respondent had previously been convicted.

## STATUTES INVOLVED

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Article of War 70, 10 U. S. C. 1542, provides in part:

> No charge will be referred to a general court martial for trial until after a thorough and impartial investigation thereof shall have been made. This investigation will include inquiries as to the truth of the matter set forth in said charges, form of charges, and what disposition of the case should be made in the interest of

justice and discipline. At such investigation full opportunity shall be given to the accused to cross-examine witnesses against him if they are available and to present anything he may desire in his own behalf either in defense or mitigation, and the investigating officer shall examine available witnesses requested by the accused. If the charges are forwarded after such investigation, they shall be accompanied by a statement of the testimony taken on both sides.

Before directing the trial of any charge by general court martial the appointing authority will refer it to his staff judge advocate for consideration and advice.

When any person subject to military law is placed in arrest or confinement, immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court martial may direct. When a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay. The trial judge advocate will cause to be served upon the accused a copy of the charges upon which trial is to be had, and a failure so to serve such charges will be ground for a continuance unless the trial be had on the charges furnished the accused as hereinbefore provided. In time of peace no person shall, against his objection, be brought to trial before a general court-martial within a period of five days subsequent to the service of charges upon him.

## STATEMENT

### The Plea in Bar

The indictment against Radovich, Samuel Bayer and Elias Bayer (R. 8-11) alleged that beginning on or about September 1, 1942, and continuing up to and including the date of the indictment (July 12, 1945), the three named de-

fendants, and divers other persons whose names were to the grand jurors unknown, conspired

> to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

The indictment further alleged that it was a part of the conspiracy

> that defendants Samuel Bayer and Elias Bayer would during the period aforesaid give sums of money amounting to approximately $7,000 to the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant, Walter V. Radovich, and to induce him, in violation of his lawful duty, to transfer Private Martin Bayer, and Private Melvin Usdan, both soldiers in the United States Army, from and to various units of the United States Army in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of continental United States.

Before trial Radovich filed a plea in bar, setting up that he had previously been convicted and sentenced by a general court-martial for the same offense charged in the indictment. His plea in bar was as follows (R. 13):

> Now comes WALTER V. RADOVICH, one of the defendants herein, and pleads in bar to the indictment herein against him as follows:
>
> 1. On June 11, 1945, this defendant, then and now an officer of the United States Army, before a United

States general court-martial having jurisdiction of the defendant and the offense charged, was arraigned upon charges preferred against him, pleaded not guilty, was tried, and on June 29, 1945, was convicted and sentenced by said general court-martial. A copy of said charges, findings, and sentence are herewith, Exhibit A.

2. Thereafter on July 12, 1945, a grand jury, duly empaneled in the District Court of the United States, Southern District of New York, returned in said court the indictment herein charging the defendant with the same offense as that for which he was tried, convicted and sentenced by said general court-martial.

WHEREFORE, defendant prays that the said indictment against Walter V. Radovich be dismissed.

## Exhibit A

RECORD OF TRIAL OF RADOVICH, WALTER V., MAJOR, AIR CORPS, MITCHEL FIELD, NEW YORK, BY GENERAL COURT-MARTIAL APPOINTED BY THE COMMANDING OFFICER, HEADQUARTERS FIRST AIR FORCE, MITCHEL FIELD, N. Y.—TRIED AT AIR BASE, MITCHEL FIELD, N. Y., 11, 27, 28, 29 JUNE 1945.

### ARRAIGNMENT

The accused was then arraigned on the following charges and specifications—

CHARGE I: Violation of the 95th Article of War.

[ART. 95. *Conduct Unbecoming an Officer and Gentleman.*—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. Title 10, U. S. C., § 1567.]

SPECIFICATION 1: In that, Major Walter V. Radovich, (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and

Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December, 1943, wrongfully and unlawfully accept and receive from Elias Bayer the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

CHARGE II: Violation of the 96th Article of War.

[Art. 96, *General Article*.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. Title 10, U. S. C. § 1568.]

SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer,

the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

## FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

| | |
|---|---|
| Of Specification 1 of Charge I: | Guilty |
| Of Specification 2 of Charge I: | Guilty |
| Of Charge I | Guilty |
| Of Specification 1 of Charge II: | Guilty |
| Of Specification 2 of Charge II: | Guilty |
| Of Charge II | Guilty |

## SENTENCE

The court was closed, and upon secret written ballot two-thirds of the members present at the time the vote was taken concurring, sentenced the accused to be dismissed the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years.

The Government demurred to the respondent's plea in bar (R. 20). After argument the demurrer was sustained and an exception noted (R. 85). In sustaining the demurrer the District Court said (R. 83, 84):

> As to the plea of former jeopardy, filed by defendant Radovich, he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offense as alleged in the indictment here, and that by virtue of the constitutional provision

against double jeopardy, this prosecution must be dismissed. The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one, and therefore the constitutional provision against double jeopardy does not apply.

The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against double jeopardy applies to prosecutions in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in the indictment here is substantially the same as the offense for which he was tried by a court-martial.

The District Court held that the offense charged in the indictment was not substantially the same as the offense for which Radovich was tried by court-martial.

By motions at the close of the Government's case (R. 446) and again at the close of all of the evidence (R. 949) the respondent renewed his plea in bar. Both motions were overruled.

## The Incriminatory Statement Introduced in Evidence Against Radovich

The Government offered in evidence against Radovich a written statement made by him to Special Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945. This statement, which was marked "Government's Exhibit 25" (R. 1306) and was admitted in evidence over the objection and exception of the respondent (R. 659), was the basis of the case against Radovich. The statement was in the handwriting of Flynn and was initialed and signed by Radovich. According to the statement, Radovich told Flynn that in consideration of $7,000 paid to him by Samuel and Elias Bayer during the summer and fall of 1943, he had transferred Privates Martin Bayer and Melvin Usdan to certain units of the United States Army which were not to be sent out of the continental United States.

In the absence of the jury, the Court heard testimony bearing upon the admissibility of the respondent's statement (R. 533-660). The statement having been admitted in evidence, the testimony heard by the Court in the absence of the jury was in large part repeated before the jury.

The evidence disclosed the following facts respecting the statement taken from Radovich by Special Agent Flynn on March 15 and 17, 1945:

Special Agent Flynn testified that he took the statement from Radovich at the office of the Federal Bureau of Investigation at New York City; that Radovich, who at this time was stationed at Mitchel Field, Long Island, New York, came to Flynn's office at the request of Flynn; that Flynn warned him that his statement might be used against him, etc.

Flynn testified (R. 538-540; R. 677 et seq.) that before taking the statement on March 15 and 17, 1945, he produced and showed to Radovich another written statement which he had taken from Radovich on September 5 or 6, 1944; that this previous statement was "basically" the same as the one Radovich gave on March 15 and 17, 1945; that before taking the new statement, Flynn read over the previous one and then handed it to Radovich, who also read it over; that the old statement was on Flynn's desk when he wrote the new one; that he produced the old statement at the suggestion of Radovich. *The March 15-17 statement on its face purported to be a "supplementary" statement.* (R. 1306) Flynn admitted that he included in the new statement, not all that Radovich told him, but only "most of what I considered important," although he said that he did not leave anything out "with any design." (R. 673)

A request by counsel for Radovich that the District Attorney produce the prior written statement was denied by the District Attorney and by the Court, the ground of the Court's denial being that there was no material conflict between the two statements (R. 551, 552; 681; 901).

The evidence further showed that Radovich returned to the United States from Burma in the late spring of 1944.

(R. 720, 746, 752). On August 3, 1944, while stationed at the Santa Monica Redistribution Center, Santa Monica, California, not far from his home in Los Angeles (R. 728), he was ordered to report to Mitchel Field, New York. (R. 733, 734) On August 9, 1944, having reported at Mitchel Field, he was placed under arrest and incarcerated in the psychopathic or "nut" ward in the Station Hospital at the Field. (R. 591, 766, 573, 782) His uniform was taken from him and locked up and for clothes he was given only hospital pajamas without a string to tie up the pants, and a bathrobe without a cord. (R. 561, 736) He was deprived of his razor, toilet articles, money, and all personal belongings. (R. 561 et seq., 736). He was placed in a small room or cell approximately 9 by 6 feet and a guard was assigned to watch him constantly, night and day, even when he went to the bathroom. (R. 561-564, 738, 782-787) The other inmates of the ward were mental cases, drug addicts and alcoholics. (R. 564, 733) The ward was entered through a heavy steel door similar to that used in jails which was kept locked, and the windows of the ward, including that of the respondent's room, were covered with heavy steel grille work which was also locked. (R. 562 et seq., 734 et seq., 782-787) The respondent was 3,000 miles from his home and friends. He was not permitted to receive visitors or to use the telephone. (R. 567-569, 737, 576) He did not have counsel. (R. 569, 783, 785, 789-790) His food was served on a tin plate, with no knife, and later he was deprived of both knife and fork, and was required to eat with a spoon. (R. 565, 737) There was nothing whatever wrong with the respondent at this time. (R. 568, 742) After some two weeks of such incarceration, he was permitted a brief exercise period each day, in the company of an armed guard. (R. 573, 781) Although it appeared that he was being held by the military authorities for trial under the 95th and 96th Articles of War, on charges growing out of his transactions with Samuel and Elias Bayer, charges were not served upon the respondent as required by the 70th Article of War (10 U. S. C. A. 1542) nor was he taken before a committing

magistrate for arraignment upon any charges preferred against him in the civil courts. (R. 805) The respondent was being held under these circumstances when he made the statement to Agent Flynn on September 5 or 6, 1944.

The evidence showed that Radovich was released from the psychopathic ward on September 16, 1944 (R. 591-593, 766, 767); that from September 16, 1944 until January 2, 1945, he was restricted to the confines of Mitchel Field; and that from January 2, 1945 to and including the date of the supplementary statement to Agent Flynn on March 15-17, 1945, he was under "administrative restraint," which meant that he could not leave Mitchel Field without the personal permission of the Base Commander. (R. 595, 768)

The record made in the absence of the jury showed that the respondent was finally served with military charges on May 30, 1945. (R. 587, 588) The official report of the Staff Judge Advocate, made pursuant to the 70th Article of War (10 U. S. C. A. 1542), stated (R. 606):

> Delay. The charges were preferred on 10 August 1944. Investigation completed about 24 August 1944 and received at this headquarters 25 August 1944.
>
> The delay referring them (charges) for trial was at the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused.

The evidence taken in the absence of the jury also showed that on August 21, 1944, while confined in the psychopathic ward, Radovich tendered his resignation from the Army of the United States, for the good of the service. (R. 596) This resignation was not forwarded to the Adjutant General by the respondent's commanding officer until January 27, 1945. (R. 597) The War Department refused to accept the resignation. (R. 600) On March 8, 1945 the respondent's commanding officer at Mitchel Field was advised of this action by the War Department, and ordered to inform Radovich. (R. 600) The respondent, however, was not

informed until after March 20, 1945, (R. 600, 601) several days subsequent to his statement to Agent Flynn. In forwarding the respondent's resignation to the War Department, under date of January 27, 1945, respondent's commanding officer at Mitchel Field stated "The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe money." (R. 597)

At the hearing in the absence of the jury, Assistant United States Attorney Edward C. Wallace testified (R. 607 et seq.) that he talked to Major Radovich on several occasions prior to March 15, 1945; that the first talk occurred on or about November 10, 1944; that the talks took place in Mr. Wallace's office, and Agent Flynn was usually present; that when Mr. Wallace talked to Radovich he, Radovich, was justified in assuming that he was not going to be indicted, since it was not the policy of the United States Attorney to proceed against military personnel who were subject to military discipline.

Upon the foregoing evidence, the District Court ruled as a matter of law that the statement made by the respondent to Agent Flynn on March 15-17, 1945 was voluntary and admissible. (R. 655 et seq.) The respondent duly excepted. (R. 659, 660)

The District Court instructed the jury as follows with respect to the written statement made by the respondent to Special Agent Flynn on March 15-17, 1945 (R. 1140):

> Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants which has been introduced in evidence was admissible because not coerced nor induced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.
>
> I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your

consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

Exception to the Court's charge was duly noted, (R. 1143).

## ARGUMENT

The decision of the Circuit Court of Appeals was plainly right, and there is no conflict.

### 1. The Plea in Bar.

Proof of the allegations of the indictment would have sustained the military charges under which the respondent had previously been convicted. The trial of the respondent upon the indictment, therefore, put him twice in jeopardy for the same offense.

It is established that one convicted by a military court of competent jurisdiction cannot be tried a second time in a Federal civil court for the same offense. *Grafton* v. *United States*, 206 U. S. 333. The question therefore is whether or not the offense of which the respondent was convicted and sentenced by general court-martial was the same or substantially the same as that alleged in the indictment. In answering that question "The test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second can not be maintained; when there could not, it can be." *Manning* v. *United States*, 275 Fed. 29, 31 (C. C. A. 8; 1921), citing Bishop's Criminal Law (8th Ed.) § 1052, subd. 2; *Morgan* v. *Devine*, 237 U. S. 632, 641, 35 Sup. Ct.

712, 59 L. Ed. 1153; *Carter* v. *McClaughry*, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236; *Burton* v. *United States*, 202 U. S. 344, 381, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362.

Proof of the allegations of the indictment would have supported the conviction of the respondent under the military charges and specifications. This becomes apparent when the charges and specifications are considered in the light of military law and precedent.

The 95th and 96th Articles of War, 10 U. S. Code, Sections 1567, 1568 (formerly the 61st and 62nd Articles) are military common law articles.[1] Conduct which violates them must be specified but need not be, and usually is not, given a name; whether conduct does or does not violate the Articles, is determined by the court-martial in the light of service custom and precedents. According to military common law, conduct which in any manner defrauds, or tends to defraud, the Government of its rights, or which violates or neglects official duty, or prejudices military command and good order and discipline, *including* conspiracies, is cognizable under those articles. ***In fact, any conspiracy to defraud the Government, except the particular fraud specified in Article 94, 10 U. S. Code Section 1566, must be charged under Articles 95 and 96.*** In other words, the charge made in the indictment was cognizable under the 95th and 96th Articles of War and only under those Articles. See Manual for Courts Martial U. S. Army (United States Government Printing Office 1943) 186, 187; Winthrop, *Military Law and Precedents* (Second Edition, 1920) 710 et seq.; 720 et seq.

If at the trial of the respondent by the court-martial, under the military charges and specifications actually pre-

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[1] Article 95, 10 U. S. C. Sec. 1567. *Conduct unbecoming an officer and gentleman.* Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

Article 96, 10 U. S. C. Sec. 1568. *General article.* Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court martial, according to the nature and degree of the offense, and punished at the discretion of such court.

ferred against him, the proof had shown only those things charged against him in the indictment—that is, if the proof had fallen short of showing the consummated act of accepting and receiving money fom the Bayers, but had shown a corrupt agreement by Radovich, which contemplated the giving of money to him by the Bayers, to induce him to transfer the named soldiers—then under age-old military practice the particular military specification would have been amended by the court-martial to conform to the proof and a conviction under the charges as they stood would have followed.

In this connection it is important to observe that the military charge that Radovich accepted and received money from the Bayers "*for the purpose of effecting the transfer*" of the named soldiers necessarily imported an agreement and concurrence between Radovich and the Bayers. *Gebardi* v. *United States*, 287 U. S. 112-122; *United States* v. *Katz*, 271 U. S. 354, 355; *Norris* v. *United States*, 34 F. (2d) 839, 841; *United States* v. *Dietrich*, 126 Fed. 664, 667; *United States* v. *N. Y., C. & H. R. R. Co.*, 146 Fed. 298; *United States* v. *Sager*, 49 F. (2d) 725. The military charges, therefore, clearly included in their scope an agreement or conspiracy to pay and receive money, and thus to defraud the United States as alleged in the indictment; and a finding by the court-martial that Radovich corruptly agreed or conspired to accept and receive money would have been entirely consistent with the charges, would have been proper under military law, and would have supported a verdict of guilty of the charges.

The flexibility of military charges and specifications, the wide latitude allowed to a court-martial in making findings thereunder, and the vast scope of the 95th and 96th Articles of War, are well illustrated by the following quotations from Winthrop, *Military Law and Precedents* (Second Edition, 1920) 380, 381, 383, 384:

> Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid, that is to say is guilty of a part but not of the remainder, or is guilty of the substance of the entire specification

but not of certain details, it may, and it is its duty, in convicting him thereon, to except specifically from the finding of Guilty such portions as are not proved, and thus declare the *exact measure* of the criminality deemed to be established. Thus, it may find him Guilty of the facts set forth in certain of the averments, and Not Guilty of those set forth in certain other averments; or it may find him Guilty of the specification as a whole except only as to certain designated words, amounts, articles, quantities, or other matters of description set forth therein. Having thus shaped its finding on the specification according to the proof, it may find the accused Guilty of the *charge*, provided of course there is enough left in the specification to support the charge.

* * * * * * * * *

The authority of a court-martial to make a partial finding is not limited to the mere making of exceptions. Where, while the allegations in a specification are substantially made out, certain items therein are not precisely proved as averred, the court, in excepting the same, may *substitute* the true facts or details as established by the evidence. As, for example, where sums of money, numbers of things, kinds of quantities of articles, species of military stores, etc., words spoken, names of persons, dates, or places, have been incorrectly set forth in the specification, and the true particulars have been disclosed in the course of the testimony on the trial; in such cases the court, in its finding of Guilty, may and properly will except the erroneous and substitute for them the correct statements or words of description. The authority to make substitution is subject to the same conditions as the authority to make exceptions, *viz.*, that the specifications shall not be rendered legally defective, or the nature of the offence so modified that the finding upon the specification will not support a conviction upon the charge.

In regard to the authority to except and substitute in findings, it may be remarked that it is certainly one of no little practical value and convenience. By its exercise defects in the pleadings may to a considerable extent be remedied, and variances between the pleadings and the proof be in the main cured. Moreover, the finding is thus made to correspond with the precise

facts of the case, justice to both sides is more nearly done, and the accused is the more effectually protected against a second prosecution based upon the same transaction.

* * * * * * * * *

Though at one time otherwise ruled, it is now fully settled by the uniform practice of the service that where the charge is of one of the specific designated offences made punishable by the Articles of War other than the general, or 62d Article, and the evidence fails fully to sustain the charge as laid, but fixes upon the accused a neglect of duty or disorder as involved in the acts alleged in the specification, the court may properly find him Guilty of the specification, (with such exceptions, etc., as may be required) and Not Guilty of the charge but Guilty of Conduct to the prejudice of good order and military discipline.

This finding, of an offence in violation of the General Article under a charge for a violation of a specific Article, was first sanctioned where the charge was 'Conduct unbecoming an officer and a gentleman,' in violation of Art. 61, and is still most frequently resorted to thereunder. It has since, however, been extended *to all cases of charges of specific offences* made punishable by the code, having been especially applied to such as Disobedience of Orders, Disrespect to a commanding officer, Mutiny, Misbehavior before the enemy, Breach of Arrest, Violations of Art. 60, and—in time of war—Violations of Art. 58.

The legal theory upon which this form is based is that it is a finding of a *lesser included offence*, every specific offence being viewed as including either *a neglect of duty or a disorder in breach of discipline;* and it is resorted to in order to prevent the failure of justice which would in general be incurred were it not availed of.

As the record shows the respondent and his counsel have had no notice from the War Department as to the disapproval of the court-martial conviction of Radovich; nor were the opinion and order disapproving the conviction produced at the hearing upon the respondent's plea in bar. In this situation the District Court decided the matter upon

the plea and the Government's demurrer admitting the facts set out in the plea—including the fact of the respondent's military trial and conviction. The petitioner now states, upon information from the office of the Judge Advocate General, that the court-martial conviction of Radovich was disapproved by the War Department because of an error of law (Petition, p. 22). The Government admits that "no rehearing by court-martial under Article of War 50½ (10 U.S.C. 1522) was ordered."

The authority for the petitioner's departure from the record, by reference to information received from the Judge Advocate General, is not apparent to us. As the Circuit Court of Appeals held, the facts respecting the approval or disapproval of the respondent's court-martial conviction may be determined upon a rehearing of this matter. Certainly the facts should not be determined upon ex parte statements by the petitioner.

Upon the petitioner's own statement, however, it is apparent that a plea of former jeopardy by Radovich would be good. Article of War 40 (10 U.S.C. 1511) provides in part:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial, in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

Article of War 50½ (10 U.S.C. 1522) provides in part:

> When the President or any reviewing or confirming authority disapproves or vacates a sentence the execution of which has not theretofore been duly ordered, he may authorize or direct a rehearing. * * * *Provided, That such rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence.*

*or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless, in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority.* (Emphasis supplied)

According to the petitioner no rehearing was ordered at the time the conviction of Radovich was disapproved (Petitioner's Brief, p. 22). As the petitioner correctly states, a direction for rehearing must be made at the same time as the action disapproving the sentence; it cannot be made later (Petitioner's Brief, p. 32). It thus appears from the petitioner's own statement that the reviewing and confirming authority has taken "final action" within the meaning of Article of War 40; that is the reviewing and confirming authority has finally disapproved the court-martial conviction. No further action can be taken in the case, by rehearing. Moreover, Article of War 50½ requires that in a case such as the one at bar, where it is held by the Board of Review and the Judge Advocate General that errors of law have been committed injuriously affecting the substantial rights of the accused, a rehearing *shall* be had unless the findings and sentence are approved in part only, or the record is returned for revision, "*or unless the case is dismissed by order of the reviewing or confirming authority.*" Since in this case no rehearing was ordered, and since there is no suggestion that the findings or sentence were approved in part only or that the record was returned for revision, it follows that the case must have been dismissed by order of the reviewing or confirming authority. In any event, whether the case was dismissed, or the conviction merely disapproved without direction for a rehearing, a retrial of the military charges is barred. See *Ex parte Costello*, 8 F. (2d) 386 (D.C.E.D. Va., 1925, Opinion by Groner, J.); Winthrop, Military Law and Precedents (Second Edition, 1920) 260. And if a retrial of the military charges is barred,

then the trial of the respondent for the same offense in the Federal criminal court is likewise barred.

### 2. The Incriminatory Statement Introduced in Evidence Against Radovich

The 70th Article of War, 10 U. S. Code Section 1542, provides:

> When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct. When a person is held for trial by general court-martial, the commanding officer will within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay.

The evidence at the trial, which we have summarized above, disclosed that Radovich was confined and held in flagrant violation of the 70th Article of War. Not only that, but his confinement was under circumstances of great hardship and oppression. After about a month of such confinement, on September 5 or 6, 1944, he made to Special Agent Flynn a written statement. This written statement was used by Special Agent Flynn in obtaining from Radovich on March 15 and 17, 1945, the statement which was introduced in evidence against Radovich. The March 15-17 statement purported on its face to be a "supplementary" statement and the evidence showed conclusively that it was in fact based upon and derived from the earlier statement taken from Radovich while he was unlawfully held in the phychopathic ward—the second statement was clearly the fruit of the first.

It should be emphasized that the delay of the military authorities in serving charges upon Radovich was at the ex-

press request of the United States Attorney. It should also be noted that the record showed that at the request or suggestion of the United States Attorney the military authorities delayed action upon the appellant's resignation for the good of the service—that is the military authorities postponed decision as to whether or not they would try Radovich, and postponed the service of charges upon him. It is significant also that the military authorities did not inform Radovich that his resignation would not be accepted and that he would be tried, until several days after Radovich had made the March 15-17 statement to Special Agent Flynn.

The statement made by Radovich to Special Agent Flynn, while Radovich was unlawfully confined in the psychopathic ward, was clearly inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 332, and *Anderson* v. *United States*, 318 U. S. 350. Since the statement taken by Flynn in March was obtained by the use of the statement taken in the psychopathic ward, and was admittedly derived from the earlier statement, the March statement was likewise vitiated. *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338; *Watson* v. *United States*, 6 F. (2d) 870. As this Court said in *Nardone* v. *United States*, 308 U. S. 338

> To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, 64 L. Ed. 319, 321, 40 S. Ct. 182, 24 A. L. R. 1426, is pertinent here: 'The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.'

The petitioner argues that Radovich was informed of the nature of the complaint against him during the preliminary investigation of the charges (Petitioner's Brief, p. 26). Pe-

titioner concludes that, if Radovich was so informed of the nature of the complaint against him, this excuses the flagrant violation of Article of War 70 by his long detention without the service of charges. This argument is, of course, unsound. The basis of the decision of the Circuit Court of Appeals is that Radovich was and had been for weeks unlawfully detained when he made his first statement to Flynn. The fact—if it is a fact—that the authorities may have complied with some of the provisions of Article of War 70 in connection with the investigation cannot excuse or wipe out the fundamental lawlessness of their detention of Radovich. The statute required that Radovich be promptly served with the formal charges upon which he was to be tried, or that he be released. He was not served, nor was he released. Information as to the "nature of the complaint" was, of course, not a legal or practical substitute for the service of written charges; the "nature of the complaint" and the precise written charge are two very different things.

The decision of the Circuit Court of Appeals is not in conflict with *Lyons* v. *Oklahoma*, 322 U. S. 596. In that case, after improper coercive methods were used to obtain a confession, a second statement was made in another place and with different persons present; and the second statement was used at the trial. This Court held that the second statement was not shown to have been the unavoidable outgrowth of the first, and that the introduction in evidence of the second statement therefore did not constitute a violation of due process. In the case at bar, however, the second statement purported on its face to be "supplementary" to the first and it was made to the same agent who had taken the first, under such circumstances that the conclusion that it was based upon and derived from the first statement is inescapable. Furthermore, the decision in *Lyons* v. *Oklahoma* did not involve a violation of a statute requiring prompt arraignment or prompt service of charges; on the contrary the decision depended only upon the question whether or not the effect of prior coercion had *in fact* been dissipated

before a second confession was made. In other words, the principle of the *McNabb* and *Anderson* cases was not involved in the *Lyons* case.

## CONCLUSION

The decision below is clearly correct. There is no conflict. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,

SAMUEL T. ANSELL,
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*Attorneys for respondent*
*Walter V. Radovich.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

UNITED STATES OF AMERICA,
*Petitioner,*

v.

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH.

## BRIEF OF DEFENDANT ELIAS BAYER IN OPPOSITION

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## BRIEF OF DEFENDANT ELIAS BAYER IN OPPOSITION

This brief is submitted on behalf of defendant Elias Bayer in opposition to the petition of the United States that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals, Second Circuit, reversing the convictions of respondents Bayer for conspiracy to defraud the United States.

### Opinion Below

The opinion of the Circuit Court of Appeals has not yet been reported. It is found in the record at pages 1467-76.

## Jurisdiction

The judgment of the Circuit Court of Appeals was filed on August 14, 1946. Thereafter, on September 13th, the Government's time to file the present petition was extended to October 12, 1946.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

## Questions Presented

*1.* Whether the Trial Court committed error in its charge to the jury and its refusal to charge, with reference in particular to the theory of the defense of defendants Bayer.

*2.* Whether the Trial Court committed reversible and prejudicial error in refusing permission to put in evidence the slip of the Telephone Company, showing that a collect call was made by Radovich from Arlington to Bayer's office in New York City on November 24, 1943, and in denying the motion of the defense for a new trial after refusing to receive the slip in evidence.

The opinion of the Circuit Court of Appeals bases its reversal of the conviction of the Bayers upon the errors committed by the Trial Judge in the two foregoing respects (pp. 1467-73). The opinion then adds (p. 1473, lines 14, 15): "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich." At that point the opinion might have terminated. The Circuit Court of Appeals then proceeded to consider the admissibility of Radovich's statements, which in nowise affected the appeal of the Bayers. The Government's reasoning, therefore, at page 34 of its petition, in subdivision numbered "3", first paragraph thereof, is a *non sequitur*

and without merit, because the judgments of conviction were not reversed for the Bayers on account of the erroneous admission of Radovich's statements; but, to the contrary, the Radovich conviction was reversed on account of the serious errors committed as to the Bayers in connection with the charge of the Trial Judge and the exclusion of the Telephone Company slip.

## Statutes Involved

Section 37 of the Criminal Code, 18 U. S. C. 88, provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

## Preliminary Statement

The references in this brief are to the *folios* in the record unless otherwise stated.

The indictment, in a single count (22-32), charges the three defendants with conspiracy to defraud the United States under Title 18, Section 88, United States Code. It charges that, beginning on or about September 1, 1942, defendants combined with each other, and with other persons whose names are unknown, to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, and, more particularly, its right to the conscientious and faithful services and judgment of defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

It is alleged that as a part of the conspiracy defendants Samuel Bayer and Elias Bayer became acquainted with various officers, entertained and made gifts to them, and gave sums of money amounting to approximately $7,000 to defendant Radovich, an officer, with intent to influence his action and to induce him, in violation of his lawful duty, to transfer Privates Martin Bayer and Melvin Usdan, both soldiers, from and to various units of the United States Army in order that they would not be attached to a unit which was about to be sent out of the continental United States. The indictment sets forth a number of overt acts in furtherance of the conspiracy (28-32).

After a lengthy trial the jury, on October 23, 1945, returned a verdict of guilty with a recommendation for the "*highest degree of clemency for all three defendants*" (3526).

On the next day the Court sentenced Samuel Bayer to a term of imprisonment of two years and a fine of $10,000 and Elias Bayer to a term of imprisonment of eighteen months and a fine of $5,000; and Radovich to a term of one year and a day (3632-4). The jail sentence of two years for Samuel Bayer was in excess of the United States Attorney's recommendation of eighteen months; and the jail sentence of Elias Bayer to eighteen months was in excess of his recommendation of a year and a day (3533-5).

## Statement of Facts

All references herein are to the *folios* in the record.

At the conclusion of the trial, the case against the Bayers (assuming there was any sufficient case at all) came down to certain financial transactions between them and Radovich. Those transactions were the subject of the summations and of the charge. There was no evidence of corruption of or by any other officer and no such issue was submitted to the jury.

Neither of the Bayers nor Radovich testified. Certain written statements taken from each by the investigating officers were put in evidence. The statement by Radovich was objected to by the Bayers' counsel and was expressly received by the Court solely as evidence against Radovich and against him alone (fol. 1976).

The theory of the Bayer defense was that the Bayers were the victims of coercion and duress practiced upon them by Radovich; that he extorted money from them by threats and menaces of violating his duty; and that the payments were made in the hope that these grave threats would not be carried out but that, on the contrary, he would perform his duty.

In the eye of the law as well as by any standards of morals, an assent or conduct forced by coercion, duress or threats of exposure to bodily harm or danger is not an assent or voluntary conduct at all and certainly is not conduct to defraud the United States.

As we shall show hereinafter, not only was this defense not accurately or appropriately set before the jury in the charge, but actually it was (as we submit) misstated; and the jury were bound to infer that in law it was no real defense at all and that essential factors in it were irrelevant.

The following statement is presented for the purpose of showing how forceful and substantial that defense was in point of fact and how vital to the rights of the Bayers was a full, correct and clear charge concerning its factual and legal bases. (*Bollenbach* v. *United States*, 90 L. Ed. 318; 66 Sup. Ct. 402, 405; 326 U. S. 607; *Bird* v. *United States*, 180 U. S. 356, 361; *M. Kraus & Bros., Inc.* v. *United States*, 66 Sup. Ct. 705, 719; 14 Law Week (March 26, 1946) 4252.)

Samuel Bayer and Elias Bayer, two brothers, were engaged in the business of manufacturing yarn and thread under the name of Plymouth Thread & Rayon Corporation, and thread converting under the name of Thread Converters, Inc., with offices at 30 West 21st Street. They

enjoyed a very good reputation and had never previously been in any difficulty. Their good character was testified to by the president of a bank, their minister and by business men and attorneys of repute (2451-71; 2638-55). The elder, Samuel, has three sons, Martin, Robert and Sanford. At the time of the trial, Martin, a soldier, was in Burma; Robert, a soldier, was at Okinawa; and Sanford, a sailor, was aboard a United States warship (2477).

In December 1942, Martin Bayer, then eighteen years of age, and Melvin Usdan, a nephew of Samuel and Elias Bayer, voluntarily enlisted in the United States Army Air Corps (2481; 3702-3). Martin was not strong, had suffered from rickets and was only accepted upon his urgent request (2480-8). After being sent for a short time to Camp Upton (2489), both young men, within two weeks of their enlistment, were assigned to duties as filing clerks in the Headquarters Base, Mitchel Field, Long Island (2495). Being volunteers, they were entitled to choose the branch of the service in which they wished to serve and they had designated the Air Corps (828-9).

In January 1943, while at a night club in New York City, Elias Bayer met two officers, who were stationed at Mitchel Field, Lt. Col. Vidal and Lt. Roser (396-8; 3817). They entered into conversation and became quite friendly (3817). The officers asked Elias about his business and, on being told, they inquired if he knew anybody in the uniform manufacturing business and about the possibility of securing uniforms at a wholesale price (3817-18). Elias responded in the affirmative and the officers took his telephone number (3847).

A month later the officers telephoned him, came to his office, and there met Samuel for the first time (399-403; 3818). A conversation followed concerning the procurement of uniforms at wholesale. Elias Bayer accompanied the officers to the establishment of I. Buss Company, run by three brothers named Busch, one of whom was a brother-in-law of Samuel Bayer. Elias introduced them and

arranged for their buying uniforms at wholesale prices (3819-20). It was Elias Bayer's understanding that the officers would pay for the uniforms (3848). This was also understood by Harold Busch (562; 590; 607-8).

Subsequently, a friendship developed between these two officers and the Bayers (3820; 3715-18). Through them, Elias Bayer met Lt. Col. Jacobson of the First Fighter Command at Mitchel Field (1090; 3820). Col. Jacobson thereafter met Samuel Bayer at the office and was extended the same courtesy of purchasing a uniform at wholesale price from the Buss Company (1094-5; 3820).

While Col. Jacobson was at Bayer's office he noticed the pictures of the two young soldiers, Martin Bayer and Melvin Usdan, in uniform on the wall of the office (2760-3; 3673). He inquired about them and Samuel Bayer told him that the boys were filing clerks at Mitchel Field in the Headquarters Base Command (2761-2; 3822-3; 3673). Col. Jacobson stated that he could use clerks in his outfit and said that he was going to have them transferred (2762-3; 3822-3; 3673-4).

In April 1943, without any request from the Bayers, Col. Jacobson requisitioned the boys from the Headquarters Base to his own command, the First Fighter Command (2501; 1101-3; 2761-3; 2822-3). Col. Jacobson, a witness for the Government, testified that he had not acted upon any inducement from the Bayers and that they had never requested him to do anything improper or corrupt (1136; 1149). Indeed, *no witness called by the Government testified to any improper action or favoritism so far as the two young soldiers were concerned, done at the request of the Bayers or otherwise* (fols. 429; 432-4; 540; 544-5; 867; 1136; 1149).

Defendant Radovich—then a Captain, a flyer—was the commanding officer of Privates Bayer and Usdan (1103; 2503). He met Samuel and Elias Bayer through the other officers, above mentioned, and under similar circumstances. He likewise wished to procure a uniform at wholesale price and was introduced by Elias Bayer to the Buss Company (3673-4; 3822-4).

While Elias Bayer had understood that the uniforms would be paid for (3848) and the officers had been given bills at wholesale prices in the packages containing the uniforms (598-9), none of them paid the Buss Company (596; 3847-8). Some of them complained that the uniforms did not fit and Radovich returned both of his to the Buss Company (3740-1; 3849-50; 596-7; 451-2). Being unpaid, the Buss Company, a small concern, called upon the Plymouth Thread Corporation to pay for the uniforms, which it thereafter did (498-9; 596; 3737-8; 3848).

At no time was there any suggestion of impropriety or corruption, according to the testimony of the officers who were witnesses for the Government. Not a single one testified that he was ever requested or induced by the Bayers to perform any act in derogation or violation of his duties to the Army (429; 432-4; 540; 544-5; 867; 1136; 1149).

Radovich visited the office of Samuel Bayer very frequently (2767-8; 3674-5; 3824). He accepted much hospitality. It soon became apparent that he was greedy and avaricious. He showed an acquisitive interest in things which he saw around the office (3743). For example, he hinted about a traveling bag of Samuel Bayer and received a similar one (3743-4) and, again, a set of golf clubs which belonged to Martin Bayer were loaned to him but he never returned them (3790-1). He took advantage of the privilege of purchasing theatre tickets, which he charged to the account of Plymouth Corporation (3772; 3881). The other officers were entertained and on one occasion, upon his birthday, a set of automobile tires was given by Samuel Bayer to Col. Jacobson (1108-16). His relations with Elias Bayer were close (1134) and they had exchanged gifts. For example, when a child was born to the Elias Bayers, Col. Jacobson presented them with a baby blanket (1156-7). Col. Jacobson, testifying for the Government, stated that he had never done anything for Samuel Bayer in return (1136; 1149-50). In fact, all of the officers were called as Government witnesses and uni-

formly testified that *they had done nothing in their official capacities for the Bayers and had never been requested to do anything improper or corrupt* (429; 432-4; 540; 544-5; 867; 1136; 1149).

Samuel Bayer was greatly concerned about his son, Martin, who, as above stated, was not strong and vigorous and had been accepted only upon his own insistence (2480-8). Martin was given no physical training by the Army to fit him for the combat service of a soldier. He received only two weeks' basic training (2495). He was given work as a filing clerk, for which he apparently was best suited (2498). It was obviously never the intention of the Army officers to make a combat soldier of him. The same appeared true of Melvin Usdan, who received only about one week's basic training (2492). He likewise was a filing clerk (2495).

When Radovich became friendly with Samuel Bayer he learned of the extreme solicitude of Samuel for the welfare of the boys and promptly proceeded to prey upon it. He was a young man, active, strong and daring—a flyer—and he told Samuel of the dangerous nature of his work (3686-8). Unquestionably, he was a brave soldier, but his purpose was formulated to take advantage of Samuel's great interest in the boys. This is shown conclusively by the subsequent developments.

In the early summer of 1943, Radovich came to Samuel Bayer's office and informed him that something had occurred at Mitchel Field which required him to transfer Martin Bayer and Melvin Usdan to another camp (3676-6; 3826). The boys were happy at Mitchel Field and Samuel Bayer asked Radovich to leave them alone (3676). He said he could not and thereupon left Bayer's office (3676). He returned on the following day and told Samuel Bayer that he had an angle through which he could have the boys transferred to the Medical Unit at Mitchel Field (2772-3; 3676-7; 3828-9). At the same time, he told Samuel Bayer that he needed $500 in order to send his wife home

to Los Angeles (2775-6; 3677; 3829). Samuel Bayer was taken aback at Radovich's suggestion. He had extended hospitality in the form of entertainment and gifts but never in the form of money. He told Radovich that he did not have that amount of money available, but to come in on the following day (2776). He was uncertain whether it was a loan to Radovich or a hold-up (3677; 3829-30). On the following day he gave Radovich $450 (3746; 3830). He could have given him $500 but did not wish Radovich to think that he could pay out such large sums of money with ease (3677).

Radovich returned to Bayer's office about a week later and said that the transfer to the Medical Unit was going through and at the same time said that he needed $500 additional, but gave no explanation for his request for this additional money (3679; 3830; 2776). Samuel Bayer, by this time, was in fear of Radovich's control over the boys and was worried that harm might come to them, so he promised to give Radovich the money (3679). To use Samuel Bayer's words, "I was scared if I didn't give it to him he will take it out on my kids" (3679).

Some days later, Radovich again called at Samuel Bayer's office and told him that the application for transfer to the Medical Unit had fallen through and that the boys would have to go overseas (3679; 3831-2). This coercive assertion was made by Radovich in spite of the fact that the young men had received at the most only two weeks of basic training and could not properly be sent overseas (2492-5; 2630-3). Radovich told Samuel Bayer that he needed $1,000 and assured him that if that amount were paid the applications would be approved (3680; 3832). Samuel Bayer was greatly upset at the prospect that the boys might be transferred overseas without any adequate basic training and he was fearful of the power of Radovich over the boys (3679-80; 3749). While at first he delayed about giving Radovich the money, he told Radovich to call him up later on. A few days later Radovich telephoned to Samuel

Bayer, requested the money and asked Bayer to meet him at the Radio City Theatre (3680). Samuel Bayer went to the theatre and met Radovich there. They walked to Radovich's car, which was parked at the corner, and there Samuel Bayer gave Radovich $500, informing him that he would try to get together some more money within a few days (3680-1; 3752-3). A little later on, Radovich telephoned Samuel Bayer and asked Bayer to meet him at the St. Moritz Hotel, where Bayer then gave him $400 (3681; 3754-5). On the following day, Radovich went to Bayer's office and succeeded in obtaining an additional $600 (3681; 3755).

Upon applications made in the regular form by Martin Bayer and Melvin Usdan, at the instance of a 1st Lieutenant of the Medical Corps at Mitchel Field (Dft. Bayers' Exh. D), they were transferred from the First Fighter Command to the Medical Unit at the same field. The labor there was arduous and Usdan testified they worked both day and night (2518-19). They remained there for about a week (2518; 3682-3). They received orders for their transfer—Martin Bayer to Bradley Field, Connecticut, and Melvin Usdan to Westover Field, Massachusetts (2520). They were attached, at these Fields, to the Medical Unit of Airborne Engineers (2522). They remained at these Fields throughout the late summer and early autumn of 1943 (2525-9). There was nothing to show that these transfers were obtained through corruption by Radovich. They went through in the regular way. The only evidence admitted against the Bayers established that they were part of the general scheme concocted by Radovich in order to extort money from Samuel Bayer through the exercise of mental duress.

In about September 1943 Radovich became a member of a secret project commanded by Col. Philip Corcoran, which was to operate behind the Japanese lines in Burma as a commando unit (631-2; 780; 686-7; 698). This unit was strictly voluntary in its nature and was intended for

well-trained, daring volunteers (631-2; 686-98). Radovich had broad authority to select any members of it (2785). But the work was so hazardous that nobody was required to become a member without his consent, even though he had been selected (632; 686-98; 793; 807-8). The assembly point of this unit was Goldsboro, North Carolina. Corcoran, or Radovich, designated and selected the members, which would be followed by a notification from Col. Goetz in Washington of the necessary orders for the transfer (755-63). The notification would result in orders as a matter of course. A young woman, Miss Goertz, in Col. Goetz's office, would prepare these orders at the request of Corcoran or Radovich (757-63).

In the meantime, Radovich had not abandoned his scheme to extort money. Shortly after the boys were transferred respectively to Westover and Bradley Fields, Radovich telephoned Samuel Bayer and informed him he knew who was responsible for the transfer of the boys from the Medical Unit and that if Bayer paid him $1500 additional he would have them re-transferred to Mitchel Field (2779; 3684-5). Samuel Bayer remonstrated and "asked him to please forget about it, to leave the boys alone as they were very happy where they were at their new station" (2779; 3684-5). For the time being Radovich subsided (3685).

For about a month Samuel Bayer did not hear from Radovich. Then Radovich telephoned to Bayer's office, talked with his secretary, Miss Solomon, and she made an appointment for Radovich to meet Bayer and herself at the McAlpin Hotel in New York City (2781-3; 3685-6). He was accompanied by another officer. They dined together and Radovich related his flying exploits (3686). The apparent purpose of this McAlpin meeting was to impress upon Samuel Bayer the dangerous nature of Radovich's new duty.

Subsequently, nothing was heard from Radovich for maybe six weeks or two months (3686). Then, suddenly,

on November 24, 1943, Radovich telephoned to Miss Solomon, at Bayer's office, from Arlington, Virginia, near Washington, and which is the location of the Pentagon Building of the War Department (2779-80; 3360-1; 3386; 3508-13; 3788). This is borne out by the slip of the Telephone Company, which became available after the case was submitted to the jury and while the jury was out (3508-18). It shows that a telephone call was made "collect" by Radovich from Arlington, Virginia, to Chelsea 3-2872, which is the Bayers' telephone number in New York City, on November 24, 1943. It was error for the Judge to refuse to admit this slip in evidence, for it directly corroborates the testimony of Miss Solomon (see Point II, *post*). Exception was taken to the ruling which excluded it (3519). Radovich said that he was flying to New York and that it was very important for him to meet her and Samuel Bayer. An appointment was thereupon made for lunch at Cavanagh's Restaurant (2780; 3686-7). There were present Radovich, Samuel Bayer and Miss Solomon (2784; 3686). Radovich told them that he was attached to a commando unit which was going abroad to the Burma-India front "on a very dangerous mission" and that it "would write history" (2784; 3687-8). He told Bayer that he was taking Martin Bayer and Melvin Usdan with him as members of this commando unit, "and if the boys were lucky enough to return they would return in eight months" (2784-5; 3688). The boys, as Samuel Bayer knew, were utterly unfitted and untrained for such work and had received no substantial amount of basic training (2492-5; 2630-3). Nevertheless Radovich had already, on November 22, 1943, selected these inexperienced and unqualified young men as members of the Special Commando Unit and, in fact, orders for their transfer from their posts at Bradley Field and Westover Field had already been issued at Radovich's insistence (764-6).

Samuel Bayer remonstrated and asked Radovich "why he was taking it out on the boys" (2785; 3688). Radovich responded that he had the authority to do it, that "he could do anything he wanted" (2785), but that if Samuel Bayer

would pay him $5,000 he would release the boys from the unit into some other outfit (2785-6; 3688-9).

Thereupon Samuel Bayer begged Radovich not to interfere with the boys but to leave them alone (3689; 2787). Radovich's response was that the boys would have to go with him and that Samuel Bayer should not worry "because maybe if the boys were lucky they would come home alive" (2787; 3688).

Samuel Bayer kept on pleading with Radovich, who insisted that the money must be paid promptly. Radovich turned a deaf ear to the pleas of Samuel Bayer (2787; 3689). He finally gave Samuel Bayer a direction for the payment of the money (3689).

On the same day that Radovich was making these demands, Martin Bayer telephoned to his father and told him that he and Melvin Usdan had been assigned to Goldsboro, North Carolina, and were going through New York City en route (3687).

On the very next morning Radovich came to Bayer's place of business and asked, "What did you decide?" (2788-9; 3690). Samuel Bayer again begged him to leave the boys alone. Radovich replied that it was not up to him alone but that he had to pay most of the money to others in order to prevent the departure of the boys with the commando unit, and he advised Samuel Bayer to act promptly (2788-9; 3690-1). Elias Bayer, who overheard some of the conversation, also then pleaded with Radovich to leave the boys alone, to which Radovich replied by giving an "ultimatum" that the money had to be delivered to Goldsboro by a certain date (3835-8).

During the course of these discussions the two young men were reporting to the commando unit at Goldsboro, North Carolina (786-91; 2551-60; 2585-7).

Finally yielding to the demands of Radovich, Samuel Bayer sent $5,000 to Radovich, which was delivered to him at Goldsboro in the latter part of November by an unnamed person, who was accompanied by Elias Bayer (3758; 3765-6; 3839-41).

When Martin Bayer and Melvin Usdan reported at Goldsboro, Lt. Col. Boebel, who was the Adjutant of the Air Commando group at the time when they arrived, found them unfit for its purposes (791-2; 795-6; 817-18). He testified that he told Radovich, "I do not think these are the type of men we want in our organization. They are not the calibre of man that we are looking for" (795-6). He directed Radovich to transfer them out of the unit (795-6; 817-18). They remained there about a week (2546-7). Radovich, in full possession of the $5,000, arranged the transfer of Martin Bayer and Usdan to the Newcastle Army Air Base, Air Transport Command, at Wilmington, Delaware (767-9; 2546). Thus, Radovich had fully accomplished his scheme of extortion; the payment made by Samuel Bayer had been coerced from him by Radovich, who had refused to do his true duty by the boys and had included them in a commando unit for which they had not volunteered and were not fitted, and who took advantage of the situation which he had created, in order to conceive and execute his wrongful purpose.

The theory of the defense, which was not accurately or clearly set forth by the Trial Court in his charge to the jury, is that they wanted Radovich to do his duty as an officer, not to violate it; that Samuel Bayer made the payments, not to corrupt Radovich, but in order to induce him to act properly and conscientiously toward the two young soldiers.

These two boys had only two weeks of basic training and were not fit for Radovich's Commando Unit, which was intended for highly dangerous special duty in the Pacific, nor had the boys volunteered for such duty, though it was a voluntary unit, nor were they physically or by training equipped for such a task. Hence, Radovich's duty was to exclude them from the unit—*not* to include them.

It was further the theory of the defense that the payments made by the Bayers were coerced and extorted from them by Radovich, who would not do his true duty by the

boys, but would discriminate improperly against them, unless he was paid, and who took advantage of the situation to frighten the Bayers in order to conceive and execute an outrageous plan of extortion.

Quite apart from the statements of the two Bayers, the theory of the defense is borne out by the testimony of Melvin Usdan, Captain Pepper, Lt. Colonel Boebel and of Miss Anne Solomon, and the Telephone Company's slip showing Radovich's "collect" call to Bayer from Arlington on November 24, 1943. Stress is laid upon this fact because, as will be hereinafter shown, the jury was not instructed adequately or properly, either on the elements of the offense as charged in the indictment or upon the theory and basis of the defense thereto. Nor was the guilt of the Bayers established beyond a reasonable doubt, as required by the law.

## POINT I

**The Trial Court committed serious errors in its charge to the jury and in its refusals to charge. The charge with reference to the theory and nature of the defense of the defendants Bayer was inadequate, mixed up and unclear. It tended to confuse the jury, not to enlighten them.**

### A

The only allegation in the indictment is that in violation of the language of Title 18, Sec. 88, U. S. Code, the defendants Bayer had conspired with certain Army officers, including Radovich, "to defraud the United States" of its right to their faithful performance of their duties.

The Court, in its charge, appears to have assumed that the evidence must be deemed to sustain the indictment only in connection with Radovich, since the charge turns only on the relationship between defendants Bayer and Radovich.

No issue of bribery of Radovich by defendants Bayer is involved. The crime of bribery was not charged; and the Bayers were not on trial for such an offense. The only issue for the jury was whether the Bayers had voluntarily entered into a corrupt agreement with Radovich whereby he was to perform less than his duty as an Army officer. The basis of the defense was that defendants Bayer were the victims of duress and coercion exercised upon them by Radovich and that, therefore, they did not voluntarily agree to prevent Radovich from performing his duty, but, to the contrary, were frightened and coerced into paying him money in order that he would not commit upon Privates Martin Bayer and Melvin Usdan the gross violations of duty which he was wrongfully threatening.

The Court charged the jury (3397-8) that the essence of the offense was the conspiracy to deprive the United States of its right to the faithful services of Radovich as an officer of the United States Army. The indictment alleges, however, that the conspiracy was to defraud the United States of the faithful service of officers (note the plural) of the United States Army, and particularly of Radovich.

In accordance with the verbiage of the indictment, a mass of proof was received from one Army officer after another, who testified that they had received gifts from the defendants Bayer. None of them testified that the Bayers asked them to do anything improper. In fact, they testified affirmatively on cross-examination that no attempt had been made to influence them improperly (Statement of Facts, *ante*).

None of the foregoing proof should have been received if, as the Judge said, "the gist of the charge made in the indictment" was a conspiracy to defraud the United States of the honest services of Radovich. If Radovich alone was involved, the testimony of the many Army witnesses who had no connection whatever with Radovich, was inadmissible. While this proof was not objected to at the time it was received, this fact is immaterial, because it was not until the close of the case that the Court ruled in its

charge that the gist of the conspiracy was to defraud the United States of the faithful services of Radovich alone.

Certainly, the presence of this mass of testimony, which had no legitimate bearing upon the factual or legal issue ultimately submitted to the jury, made imperative a full and clear charge and presentation to the jury of both the factual and legal bases of the Bayer defense as to this sole final issue.

B

Exception was taken (3436) to the failure of the Court to charge adequately on the theory of the defense of the defendants Bayer (*Bollenbach* v. *United States*, 326 U. S. 607, 90 L. Ed. 318, 66 Sup. Ct. 402, 405; *Bird* v. *United States*, 180 U. S. 356, 361; *M. Kraus & Bros., Inc.* v. *United States*, 66 Sup. Ct. 705, 710; *Thomas* v. *United States*, 151 F. 2d 183, 187).

This exception is extremely important. Indeed, it goes to the essence of the case. The basis of the defense was that the Bayers were the victims of extortion in the form of mental duress exercised upon them by Radovich. In other words, that there was no agreement on the part of the Bayers to pay money to Radovich but that they were the victims of chicanery and extortion employed upon them by Radovich, who was refusing and threatening to refuse to do his true duty.

No denial was made that they had paid him money, but they explained in their statements that this was the result of a "hold-up" and that the payments were actuated by their fear that harm would come to the two young soldiers, by reason of Radovich's wrongful tactics, since they had not received sufficient basic training to be sent overseas. The Court, in its charge, though it fully outlined the theory of the prosecution, neglected the theory of the defense. The Court merely said (3400-1):

> "Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express

or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer."

This was a mere description—and both incomplete and inadequate—of the defendants' claim. It was not a charge as to the extent to which in law it would be a defense or as to the rules of law which should be applied to its component elements.

It will be observed that there was no statement by the Court that the jury could find that there had been no agreement on the part of the Bayers if the jury believed the contention of the defense, namely, that the Bayers were the unfortunate victims of a shrewd plan of extortion. The Judge should have instructed the jury that, if the jury found that the moneys were obtained by Radovich from the Bayers as the consequence of a scheme of extortion concocted by Radovich, in that event there would not be a voluntary agreement, which is the essence of a conspiracy under United States Code, Title 18, Section 88. It will also be noted that the Court made no mention that the Air Commando unit was a voluntary one and that a special type of man was needed for it. Furthermore, as will be shown (Subd. F, *post*), the Court refused defendants' requests to charge as to these important matters.

These errors are greatly accentuated by two further errors in the Court's instructions to the jury.

In the first of these errors the Court told the jury, in practical effect, that the defendants Bayer would be guilty even though the payments of money were involuntary on their part. Thus the Court said (3401):

"If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily."

This instruction was grossly misleading and is covered by the exception taken to the failure on the part of the Court to adequately charge on the theory of the defense (3436).

Certainly, if the payments were made by the Bayers involuntarily and as a result of duress, implied threats and coercion, the jury should have been instructed that they could find that there was no agreement on the part of the Bayers, inasmuch as it was the result, not of *a true meeting of the minds*, but of extortion and duress. The Court, on the other hand, charged in effect that if the defendants Bayer paid money to Radovich, the fact that such payment was made "involuntarily" would constitute no defense if it were made as part of an "agreement". The Court did not call the jury's attention to the vital consideration, which was fundamental in the defense, that if the so-called "agreement" was wrung from the Bayers by threats and coercion, then it and any payments made pursuant to it were not voluntary and, in consequence, the defense would be established. It was grave error for the Court to fail to include and submit the issue of whether the "agreement" which preceded the payment of the money was made voluntarily or involuntarily. This was basic and reversible error because it failed to submit to the jury a clear-cut issue of fact which constitutes the difference between, on the one hand, the position of the defendants Bayer as the victims of an extortion plot practiced upon them by Radovich through threats to violate his duty, and, on the other hand, their alleged position of voluntary contracting parties in a conspiracy to seduce Radovich from performing his duty.

In other words, to confine, as did the Court, the question of voluntary or involuntary action to the mere payment of the money, without also extending it to include the issue of the "agreement" alleged to antedate the payment of the money, was fundamental error.

The jury evidently sensed this fundamental distinction in the moral quality of the Bayers' acts but felt themselves

prevented by the Court's charge from giving that distinction expression in the field of law. In no other way can their extraordinary recommendation of the highest degree of clemency be accounted for.

In the second of these errors the Court in effect instructed the jury to find the defendants Bayer guilty, even though the jury should find that the payments made by them were the result of coercion and extortion. This was the charge of the Court (3403):

> "However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

The foregoing instruction was highly misleading and prejudicial. In effect, the jury was instructed to find the defendants Bayer guilty, even though the so-called "agreement" and their payments under it were the consequence of the extortionate threats of Radovich and were made as the result thereof, and even though all they desired was that Radovich should perform his *true duty* as to the boys.

A payment made under duress, as the result of extortion, is certainly not a voluntary payment and would negative the existence of a voluntary agreement, which is the very basis of a conspiracy to defraud. It cannot be disputed that, in the eye of the law as well as of good morals, an assent or conduct which is brought about by coercion, duress or threats of exposure to bodily harm or danger, is not an assent or voluntary conduct at all (*Williston, Contracts*, Vol. III, Secs. 1622-3; *17 C. J. S., Contracts*, Secs. 168, 169, 175).

Such coercion and duress create an intent to avert the threatened disastrous consequences, and negative an intent to defraud.

In any event, the charge was inadequate and misleading so far as the theory of the defense is concerned. It was "so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen," to use the language of the Circuit Court of Appeals.

In the very recent case of *M. Kraus & Bros., Inc.* v. *United States*, 66 Sup. Ct. 705, 710, decided by the Supreme Court on March 25, 1946, this Court said (slip opinion, p. 9):

> "'A conviction ought not to rest upon an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, — U. S. — (slip opinion, p. 5)."

See also, *Bihn* v. *United States*, decided by this Court on June 10, 1946; 90 L. Ed. 1208.

C

In the indictment Samuel Bayer was indicted as follows: "Samuel Bayer, alias Samuel Boyarsky". Elias Bayer was indicted as follows: "Elias Bayer, alias Elias Boyarsky".

There was not the slightest justification for the use in the indictment of an alias for the defendants Bayer. They had no criminal record. They were not using two names. There was no question as to their identity. Their name was "Bayer", and by that name they were known throughout all the events here involved. The inclusion of the alleged "alias" was grossly unfair and prejudicial.

An examination of the record shows that the Government brought out no proof to justify the use or allegation of such an "alias". The purpose undoubtedly was to create suspicion and prejudice. Indeed, it would carry an inference of prior wrong-doing or criminality.

At the close of the charge a request was made to charge the jury on the subject matter of "alias" and that the jury should be instructed to disregard it completely (3440).

It was pointed out that no proof of any use of an alias had been offered by the Government. The Judge did not cure the error but, to the contrary, he unfortunately accentuated it when he charged the jury as follows (3455-7):

> "It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word 'alias' is 'other or otherwise', and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became Americanized. So I direct you to disregard the alias reference entirely."

Exception was taken to the Judge's charge on the alias as in itself inflammatory (3458-60).

It was pointed out at the time of sentence that the use of the alias in the indictment, as well as the charge on that subject, injected an atmosphere of prejudice, particularly because of the reference to the former Russian nationality of the Bayers (3566-72). An unfortunate atmosphere was brought into the case, which was emphasized by references to the religion of the Bayers and the young men, which had occurred during the course of the trial, particularly in the testimony of Captain Pepper, who would not deny saying that the boys were Jewish (730-1) and that he may or he may not be prejudiced (749-50; see also fols. 2047; 3566-72).

The jury should have been instructed definitely that the Government should not have included the alias in the in

dictment. And, certainly, the Judge should not have told the jury "that the name 'Boyarsky' was their Russian name before they became Americanized" (3456-7); particularly, where an offense is involved which concerns patriotic duties, no such reference should have been made. This is not harmless error, which may be disregarded under the "harmless error" statute (28 U. S. C. A., Sec. 391), but it goes to the essence of the case, since, we submit, it deprived the defendants Bayer of a fair and impartial trial free from any atmosphere of prejudice or bias.

It should be noted that the Court was not justified in stating, in connection with the matter of the "alias" (at fols. 3456-7), that it appeared from the statements of the Bayers "that the name Boyarsky was their Russian name before they became Americanized". We have read the statements in evidence of the Bayers (Government's Exhs. 8 to 22) and can find nothing herein which shows that their name was Boyarsky. There is simply an answer that they were born in Russia but we find nothing which justifies the inclusion of an alias in the indictment. The emphasis laid on the "alias" "Boyarsky" would tend to engender prejudice on the part of the jury.

D

The Court had been requested to charge in Defendants' 28th Request, in paragraph (i), as follows:

> "(i) While it is your duty to confer with your fellow jurors and discuss the evidence with them, the verdict which you render must represent the real judgment and honest conclusion of each of you, and I charge you, upon your oaths and as a matter of law, that each of you has the duty of arriving at your conclusion separately, and that no one of you may surrender his earnest belief concerning the guilt or innocence of the defendants, for the purpose of preventing a disagreement or arriving at a compromise" (3272-3).

This was an entirely proper request, especially under the circumstances of this case, namely, that the verdict should represent the real judgment and honest conclusion of each of the jurors (*Allen* v. *United States*, 164 U. S. 492).

The Court did not cover this subject in its charge and declined to charge as requested, to which exception was taken (3432). This error is emphasized by the apparently compromise verdict which the jury returned, in which the jury stated (3526): "We find them guilty, with the highest degree of clemency for all three defendants.". This verdict followed a deliberation from 11:45 A. M. (3460) until 9:02 P. M. (3525), in the course of which the jury had asked for further instructions, particularly with regard to the charge concerning conspiracy (3461-5). It may well be that, had the Judge given the charge as requested, the jury would have acquitted or disagreed, instead of bringing in a verdict of guilty and recommending "the highest degree of clemency".

E.

Exception was taken (3431) to the failure of the Court to charge the 16th request to charge (3262) that fraud is never presumed but must be proven. That point is important here because of the form of indictment, which merely alleges that the United States was defrauded of Radovich's honest services. The Judge did not properly charge the jury on this element of the offense although requested to do so. Indeed, the Judge did not define "fraud", which is the very gist of the indictment.

F

Exception was taken (3434) to the failure of the Court to charge as to the Army requirement of three months' basic training, in accordance with Request to Charge No. 32 at folios 3279-80. Exception was also taken to the fail-

ure to charge that the commando unit was a voluntary organization, requiring consent, in accordance with Request No. 34 (3281-3). These were very important matters under the theory of the defense. The commando unit in fact did not want men of the type of Martin Bayer and Melvin Usdan. They had neither the training nor the physical equipment for such work. Nor had they volunteered for it. Col. Boebel said he did not want them (791-2; 795-6; 817-18). The attempt on the part of Radovich to include them therein was part of his scheme of extortion. The Judge, therefore, should have charged as requested, since these matters bore directly upon the defense.

G

Exception was also taken (3437-8) to the failure of the Court to charge on the irrelevant and immaterial matter in the statements of the Bayers, as requested in Request No. 48 (3298). The Judge himself had stated that these statements contained "a substantial amount of matter which is immaterial and irrelevant" (1075). He had first excluded these statements completely for that reason (1074-5). Later, the Court reversed itself and admitted these statements over objection and exception (1469-85). Yet the Court failed to charge that the jury should not consider the irrelevant and immaterial matter which abounds throughout these statements (*Schmeller* v. *U. S.*, 143 F. 2d 544).

H

Exception was taken (3443-4) to the Court's failure to charge that part of Request No. 65 (3326-7), that if the payments, etc., were made to Radovich in order to have him perform his lawful duty, they are not evidence of an attempt to defraud the United States. This failure to charge is substantial error because the theory of the defense is that the Bayers were coerced and that Radovich had to be paid in order to induce him to *do* his true duty.

Therefore, if Radovich did merely what he was obligated to do, no crime would be committed. This matter is of much importance because Radovich, had no right to include the two boys in the Conchando unit, indeed his duty was to *ex*clude them—NOT to *in*clude them.

I

**In Answer to the Government's Contention**

The Government states under the heading "Questions Presented" in Subdivision 4, at page 3 of its petition, that the Trial Judge's statement concerning the defense of extortion was "concededly proper". This statement is repeated at pages 36-7 and it is added that a charge need not be "verbose".

Of course, we do not concede that the charge was "concededly proper". Likewise, we have not argued that the charge must be "verbose". The charge was erroneous and misleading because the Court nowhere clearly and definitely instructed the jury that if the agreement by the Bayers to make the payments was made involuntarily and under coercion and duress, that fact would negative in law the existence of any mutual agreement or conspiracy between the defendants. The misleading portions of the charge, above quoted, were so intertwined with the remainder as to confuse and mislead the jury. The language of the Court at folio 3403, quoted in Subdivision "B", *supra*, was particularly confusing. It began with the word "However", and, in effect, negatived what the Court had said previously. The trial counsel for defendants Bayer realized that the charge would be actually misleading to a jury of laymen and, therefore, took exception (3436).

The jury should have been instructed, in so many words, that if the so-called agreement was coerced from the Bayers by threats and duress, then the agreement itself and any payments made under it were not voluntary, and that in such event the jury should acquit the Bayers.

The error is emphasized by the failure of the Trial Judge to charge, as requested in Request No. 65, that if the payments were made to Radovich in order to have him perform his lawful duty, they would not be evidence of an attempt to defraud the United States. Exception was taken to the failure to so charge (3443-4; Subd. "H", *supra*).

It follows that the Circuit Court of Appeals was entirely correct in holding that error was committed in the foregoing respects.

## POINT II

**Reversible error was committed by the Trial Court in refusing permission to put in evidence the slip of the Telephone Company showing that a collect call was made by Radovich from Arlington to Bayers' office in New York City on November 24, 1943, and in denying the motion of the defense for a new trial after refusing to receive the slip in evidence.**

Serious error was committed by the Trial Court in refusing to receive in evidence the record of the Telephone Company, which shows that a telephone call was made collect by Radovich from Arlington, Virginia, just outside of Washington, to Bayers' office in New York City on November 24, 1943 (3508-19). Exception was taken (3519).

In order to understand the gravity of this error and the serious damage which it occasioned to the defense, it is necessary to examine the background.

Miss Solomon, testifying for the defense, stated that Radovich telephoned her one morning in November 1943 from Washington and she made an appointment for Samuel Bayer and her to meet him at Cavanagh's Restaurant in this city (2779-80). He there made threats that the two boys would have to go with him on his commando mission and, if lucky, they would come home alive (2784-7). He further stated that he had broad authority and if Bayer

paid him $5,000 he could have the boys transferred into some other unit (2785-7). This took place *on the same day* that Martin Bayer called his father and told him that he and his cousin Usdan were being transferred to Goldsboro, North Carolina (2788). Samuel Bayer says the same thing in his statement (Exh. 8; 3686-9).

Melvin Usdan testified that he and Martin Bayer phoned to their folks on November 24th, telling about their transfer to Goldsboro (2582-7). The date (November 24th) was thus definitely fixed; and the U. S. Attorney, in his summation, referred to Usdan's statement as accurate (3213-14).

In his summation the U. S. Attorney laid great stress upon the fact that Radovich was in Goldsboro on November 24th (3211-17), since Miss Goertz had testified (766-7) that Radovich phoned her from there on that date concerning the transfer of Martin Bayer and Usdan. He argued accordingly that Samuel Bayer's statement and the testimony about the attempted extortion by Radovich at Cavanagh's Restaurant on November 24th were false, *since Radovich was in Goldsboro at that time*. He characterized it as "just another of the falsehoods" (3216). He said that it showed "the absurdity of Samuel Bayer's claim of extortion" (3216). This was at the very conclusion of the summation, and court then adjourned to the next day (3219-20).

On the next morning, Mr. Keenan (trial counsel for the Bayers) informed the Court in chambers (3347-52) that, in view of the statements in the U. S. Attorney's summation, above referred to, he was checking with the Telephone Company and that the Government must have among the records of the Bayers, which it had subpoenaed, a record of a collect call from Washington on November 24th. He also stated that he wished to show that Radovich was in New York, as testified to by Miss Solomon, on November 24th and 25th (3352-3).

The Government admitted that Bayers' records had been subpoenaed (3355) and agreed to look up the records as to telephone calls during that time (3372-3).

The Government, shortly thereafter, produced from its files a *bill* of the Telephone Company, showing a collect call to Bayers' office from Washington on November 24th (3373-4).

After some discussion the Court stated that it was willing and agreed to tell the jury that there was such a collect call made to the Bayers from Washington on November 24th (3376-7). The Court, however, ruled that it would refuse to state to the jury that the records had been in the Government's possession, to which refusal exception was taken (3383-4).

This was all in chambers and outside of the hearing of the jury (3347).

Proceedings were then resumed in open court in the presence of the jury (3385). The Court proceeded to tell the jury, at the outset of its charge, that the Telephone Company bill showed a collect call from Washington to the Bayers on November 24th, but added somewhat pointedly that "the record *does not show from whom the call came*" (3386-7).

It can be seen that what the Court said concerning the bill of the Telephone Company *failed to connect Radovich with the collect call.*

The jury retired at 11:45 A. M. and returned for further instructions at 3.45 P. M. (3461). At that time Juror No. 6 asked to hear again the U. S. Attorney's summation concerning the messages and meetings on November 24th and 25th (3487-8; 3499). Very evidently the juror had in mind that part of the summation in which it was urged that Radovich could not have been in New York on November 24th in view of Miss Goertz's testimony that he telephoned to her from Goldsboro on that date. Another juror asked for references to the evidence as to those dates (3499).

The Court, in response to this request, referred to the testimony of Miss Goertz, Miss Solomon and Usdan in reference to the dates (3500).

In this connection it should be noted that the statement of Radovich made to the F. B. I. agents, dated March 15, 1945 (Govt.'s Exh. 25), does not touch upon the telephone call by Radovich to Bayers' office on November 24, 1943, nor upon his conference with Samuel Bayer and Miss Solomon at Cavanagh's Restaurant on that date, nor upon what transpired thereat and thereafter. These omissions are significant in view of the fact that Samuel Bayer's statement taken February 7, 1945 (Govt.'s Exh. 8) particularly mentioned these facts and circumstances (Exh. 8, at fols. 3686-9). The Radovich statement merely and only sets forth the following (Govt.'s Exh. 25 at fol. 3931):

> "About Oct. 1943 I called Sam Bayer from Washington D. C. and told him that everything was arranged. He agreed to have Elias Bayer meet me at Goldsboro, North Carolina about midnight on about the 27th or 28th of November, 1943. It had previously been agreed that Sam Bayer would give me $5,000 and an extra $1,000 for arranging these transfers."

Besides being vague and general, the foregoing statement is quite incredible because it would be impossible for Radovich, a flyer with important duties, to arrange in October 1943 to have Elias Bayer meet him at a certain specific time and place on November 27th or 28th, 1943. Even more important, however, is the careful omission from the statement of Radovich of any mention of his telephone call to New York on November 24, 1943, followed by his visit to New York City, in the course of which he met Samuel Bayer and Miss Solomon at Cavanagh's Restaurant. It was during this conference that Samuel Bayer states, and Miss Solomon testified, that extortionate demands were made by Radovich to include the boys in the dangerous commando mission to Burma, for which the boys were entirely unsuited and unprepared, unless he (Radovich) received $5,000 from Bayer.

The jury thereupon again retired at 4:27 P. M. (3506). After the jury retired, Mr. Cohen, the associate defense counsel for Bayers, called to the Court's attention that

the Court had stated to the jury that while there was evidence that a telephone call had been made from Washington on November 24th there was no evidence as to who made the call, to which the Court responded that he recalled saying that there was no evidence on the record (3508). Thereupon Mr. Cohen stated that the defense did not know that the U. S. Attorney was going to make such a point and had made it only in his summation, and that since that time the defense had started a check of the records and had secured the record of the Telephone Company, in the form of a slip, showing that the call was made *by Radovich* (3509). Mr. Cohen then asked leave to put the Telephone Company slip in evidence and emphasized that this was "highly important in view of the statements made by the jury to your Honor" (3509-10). He also emphasized the statement made by one of the jurors "for further information concerning those dates" (3509). He exhibited the slip of the Telephone Company in open court (3510). It shows an Arlington, Virginia, call collect to Bayefs' office *by Radovich* (Captain Ravich) on November 24, 1943 (3509-13).

After some argument, Mr. Cohen again stated that the matter "is of great moment to the jurors, as your Honor could see from the question asked by Juror No. 6" and he emphasized that the whole matter grew out of the Government's summation to the jury (3515).

The Court refused, however, to admit the Telephone Company's slip in evidence (3517-18) since the Court stated that it showed an Arlington call, not a Washington one, and since the case had been closed. The Court further stated (3518) that the Court's procedure in the morning in referring to the Telephone Company bill in his charge had been "irregular, to say the least, and I am not going to make it more irregular * * *".

Exception was taken to the ruling of the Court (3519). A motion was also made either for a mistrial or a new trial, which was denied, and exception again taken (3519).

This ruling was serious error. The case was still within the Court's control and was being considered by the jury, and, in view of the importance which this issue had assumed, the jury should not have been left with a fragmentary and distorted picture of the facts.

While the Telephone Company *bill* showed that a collect call was made to Bayers from Washington on November 24th, it did not show who made the call. Indeed, the Court stated that the bill did not show this fact. Therefore, the Telephone Company's *slip*, which Mr. Cohen desired to put in evidence, was vitally important because it would show that Radovich had telephoned to the Bayers' collect on November 24th from Arlington, which is where Radovich had been working with the Military Personnel Division, just outside of Washington and that, therefore, the statement of Bayer and the testimony of Miss Solomon were accurate and truthful and that they were *not* "just another of the falsehoods". In fact, in view of the question and remark of Juror No. 6, this matter went to the heart of the case because it shows that the jury was vitally concerned with this issue.

It follows that the Court committed serious error in excluding the slip of the Telephone Company because only a fraction of the facts—and not the whole picture—was before the jury. The verdict might well have been different had the jury been in possession of the entire facts.

**In Answer to the Government's Contentions**

The Government urges: (1) that when this Telephone Company slip was offered, the jury already had the case under consideration, and (2) that the slip itself was immaterial and that the United States Attorney did not directly question the meeting in New York on November 24, 1943.

These contentions are without merit. While it is true that the Trial Judge possesses discretion as to the reopening of a case for further evidence, as stated in the cases cited at page 36 of the Government's petition, in view of

the great importance which this issue had assumed and in view of the questions and remarks of several of the jurors, the jury should not have been left with a fragmentary and misleading picture of the actual facts.

In the present case, the ultimate issue of fact to be determined by the jury was a very simple one, to wit: whether the Bayers were corrupting Radovich to do less than his duty or whether, on the other hand, they yielded to extortion in the hope that he would do his full duty.

In the closing events of the trial, the crux of this issue came to depend very largely on the whereabouts of Radovich on November 24, 1943. The record shows conclusively that his whereabouts on that date were regarded, at the close of the trial, by the prosecutor, the defense, the Trial Judge, and, above all, the jury, as highly material in determining the truth as to the issue between corruption and extortion.

At page 1071, folio 3213, the prosecutor said at the close of his summation:

> "Now you will recall that neither Sam Bayer in his statement nor Miss Solomon in her testimony from the stand was able precisely to fix that date of that meeting in Cavanaugh's restaurant, but young Melvin Usdan fixed it precisely. He testified that he and Martin arrived at Goldsboro, North Carolina, on November 25th, and he testified that they had left Westover the day before, November 24th. He testified that the date he left, the 24th, he phoned his family and Martin Bayer phoned his father, Samuel Bayer. So that the date, the date of the telephone call which informed Sam Bayer of the transfer is definitely fixed and since that is the date that Sam Bayer says he met Radovich at Cavanaugh's, the date of that meeting at Cavanaugh's is fixed definitely and precisely as the 24th of November, 1943.
>
> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz

from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command. * * * "

Then at folio 3216, the prosecutor added:

"So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944."

Thus, the prosecutor's final "knock-out punch" was that the defense's version of November 24th was "another falsehood", because Miss Goertz placed Radovich as then in Goldsboro.

Hence, the statement in the Government's petition (p. 35) that, "The United States Attorney did not directly question the alleged meeting in New York", is erroneous and misleading.

In the prosecutor's summation, he correctly fixed the date when the boys left New England for Goldsboro as November 24, 1943, and the date of their arrival at Goldsboro as November 25th (3213). In consequence, on November 24th the boys were actually in transit from New England to join the Burma Commando Expedition being organized at Goldsboro, North Carolina.

Obviously, therefore, according to the Government's own account, on November 24, 1943, Radovich had the stage perfectly set for effective coercion of the Bayers. The picture he could place before the Bayers was that of the boys actually in his power as part of his commando unit which he could truly represent as "a very dangerous mission" that "would write history" (2784, 3687-8)—from which mission "if the boys were lucky enough to return they would return in eight months" (2784-5, 3688).

Obviously, if the jury knew—particularly in view of the questions which they themselves asked when they returned for additional information—that Radovich telephoned from the Pentagon Building to the Bayers on November 24th while the boys were in transit to his commando unit (as Miss Solomon testified) and that Radovich came to New York to see the Bayers on that very day, the jury could readily have found—indeed would inevitably have found—that Radovich thus came to New York to extort from the Bayers the payment of this great sum of money, so huge and characterizing as to be decisive of the truth of what was going on between the Bayers and Radovich. In other words, if Radovich came to New York on November 24, 1943, the triers of fact could very easily believe that he did so for the purpose of preying on the Bayers, and that the meeting which he then and there had at Cavanagh's restaurant and the threats which he there uttered took place precisely as testified by Miss Solomon and as narrated in the statements made by Samuel and Elias Bayer.

Hence, what we conceive to be the extreme injustice of the present situation is that this telephone slip was excluded from the consideration of the jury, and even was not allowed effect on our application for a new trial on the ground of newly discovered evidence. In other words, the triers of fact never saw it although it was available to them before they reached their verdict and although it was a probative answer to the very questions which they asked while deliberating. And no triers of fact could ever see it unless a new trial was granted.

The same logic and the same essential justice which moved the Trial Court to reopen the case for the purpose of telling the jury about the *telephone bill* of December 1st showing a charge to the Bayers by the Telephone Company for a collect charge from Washington on November 24th, should have moved the Trial Court to receive the *Telephone Company's* slip which showed that the telephone call was from the Pentagon Building in Arlington and by Radovich himself. That this call was the one charged for on the Tele-

phone Company's bill of December 1, 1943, is shown by the fact that there was no other charge for any telephone call from the Capitol area on that date. Obviously, the Telephone Company billed Arlington calls under Washington. In refusing to allow the slip to be placed before the jury, the Court said (among other things) (3517):

> "I know that Arlington and Washington are near each other. Conceivably it may be the same call, but it is not conclusive."

For the reasons stated, we believe that the identity between the call on the slip and the call on the bill was conclusive; but, even if not conclusive, the question of identity was vital and was for determination by the jury through comparing the two records in the light of the evidence, particularly Miss Solomon's testimony. We submit that, in view of the fact that the Trial Court, in reopening the case so that the jury could hear the contents of the Telephone Company's bill, had stated to the jury that the bill "does not show from whom the call came" (3386-7), the Trial Court was bound by its own logic and because of this very statement on its part and in the interest of full justice, to let the jury know that an answer (or at least a highly probable answer) to the source of the call had been found and that such source was *Radovich himself*.

It will not do for the Government's counsel now to argue that the question of a meeting in Cavanagh's restaurant on November 24th was immaterial (p. 35). In the first place, Radovich could have come to New York on November 24th and sought such a meeting for one purpose only—to place before the Bayers what he knew would be the frightening picture of their boys then actually in transit to his commando unit in Goldsboro where they would be completely in his power.

Such was not the argument or the significance of the prosecutor's closing statements to the jury. The present change in position seems to us to be merely a tribute to the force and conclusiveness of the telephone slip which

subsequently came before the Trial Court. The prosecutor made no concession before the jury that the meeting at Cavanagh's restaurant on November 24th had in fact occurred or that, if it had occurred, such fact was immaterial. On the contrary, the climax of his argument was the very opposite, to wit: that the story as to the meeting at Cavanagh's restaurant was a falsehood, and was demonstrated to be so by paralleling the testimony of Miss Goertz over and against the testimony of Miss Solomon and the statements of the Bayers as to what had occurred on November 24th.

The queries by the jury, which occurred at folios 3487-8 and 3498-9, showed that the concluding paragraphs of the prosecutor's summation had made a deep impression and had become the subject of discussion in their deliberations.

Moreover, it is utterly inconceivable that if the Trial Court itself had not appreciated the importance and materiality of the prosecutor's closing remarks and the consequent importance of determining just where Radovich was on November 24th, and particularly whether he was or could have been in New York on that day, the Trial Court would have taken the unusual course of giving to the jury, on the morning following the close of the summations, the contents of the Telephone Company's bill.

The Trial Court's appreciation of the importance and materiality of this subject is also made perfectly plain by the fact that the Court, in taking this action, responded to a request of defense counsel and to the argument of defense counsel that the prosecutor's summation had taken the defense by surprise, that the prosecutor's claim that the meeting at Cavanagh's restaurant could not have occurred had caused them to demand an opportunity to see the telephone records seized by the Government from the Bayer concern, and that the aforesaid bill (then discovered as in the Government's possession) was some proof that Radovich was not in Goldsboro on November 24th but rather was in Washington demanding an immediate appointment and conference in New York (3347 *et seq.*).

By notice of motion and petition, dated March 8, 1946, the defendants Bayer moved in the Circuit Court of Appeals to suspend appellate proceedings and to remand the case to the District Court for the purpose of entertaining a motion for a new trial on the ground of newly discovered evidence, pursuant to Rule 33 of the new Rules of Criminal Procedure. This petition was accompanied by affidavits of Elias Bayer, Anne Solomon, Walter V. Radovich, Robert T. Murphy and Willis Mahoney. Accompanying the petition also were a copy of the Telephone Company slip and of the testimony of Miss Goertz in the court-martial proceeding against Radovich. Her testimony in that proceeding was materially different from her testimony on the trial concerning the dates beginning with the middle of November, 1943. In the court-martial proceeding she gave the date of Radovich's telephone call from Goldsboro as November 22nd, whereas at the trial she fixed November 24th as the date. The affidavit of Radovich shows that he was not in Goldsboro on November 24th. It further shows that he was in Washington in the morning of that date, and that he was in New York City between November 22nd and November 25th. His affidavit states that he had lunch with Miss Solomon and Samuel Bayer, after which they took him in a taxi to LaGuardia Airport and that the date could have been November 24th and that he cannot say that it was not. All of the papers used on said motion were received before the Circuit Court of Appeals upon the argument and are on file. Certified copies are on file in this Court.

Certainly, the jury's verdict might well have been different, in view of the jurors' questions and remarks, had they known that Radovich made the telephone call from Arlington on November 24th and that he was in New York on November 22nd, 24th, 25th and 26th, as stated in his affidavit, and that there is no evidence that he was in Goldsboro on November 24th or 25th.

## POINT III

**The basis of the reversal in the Circuit Court of Appeals was the errors committed to the prejudice of the defendants Bayer.**

The Circuit Court of Appeals based its reversal of the conviction of the Bayers upon two propositions: (1) The confusing and misleading charge concerning their defense of extortion; and (2) the error committed in excluding the Telephone Company slip.

The opinion on these two propositions begins at page 1467 and terminates at page 1473. It is then stated in the opinion at page 1473 on lines 14-15:

> "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich."

The opinion might then and there have been terminated. The Circuit Court of Appeals, however, then proceeded to consider two claims of error assigned by the defendant Radovich in connection with the admission in evidence of signed statements, which it was contended that he had made. These claims of error in no wise affected the appeal of the defendants Bayer. The Government's argument, accordingly, in the 1st paragraph of the subdivision numbered "3", at page 34 of the petition, is sophistry and without merit. It is a *non sequitur*, because the judgments of conviction were not reversed as to the Bayers on account of the admission of Radovich's statements. To the contrary, the conviction of Radovich, as one of the alleged conspirators, was reversed on account of the errors committed as to the Bayers in connection with the charge and the exclusion of the Telephone Company slip. Neither of these errors involves any important question of law or public policy.

It is elementary that a writ of certiorari will not be granted unless the question of law is novel, or involves

public policy, or has been differently decided by the Circuit Courts of Appeal. There is no such proposition involved herein.

The Circuit Court of Appeals found, as to the Bayers, that the charge was confusing and that the telephone company slip was improperly excluded. Neither of these matters is of a nature that requires a review by this Court.

The ends of substantial justice required that the Circuit Court of Appeals should order a new trial in this case, as it did.

## CONCLUSION

**For the foregoing reasons it is therefore respectfully submitted that the petition for a writ of certiorari should be denied.**

Respectfully submitted,

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I. MAURICE WORMSER,
ARCHIBALD PALMER,
of Counsel.

IN THE

# Supreme Court of the United States

October Term, 1946

No. 606

UNITED STATES OF AMERICA,
*Petitioner,*

*against*

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,
*Respondents.*

## BRIEF FOR RESPONDENT SAMUEL BAYER

CHARLES H. TUTTLE,
*Counsel for Respondent Samuel Bayer.*

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## BRIEF FOR RESPONDENT SAMUEL BAYER

### I

### None of the Established Reasons for Certiorari is Present

(1) All that has happened below is that the Circuit Court of Appeals for the Second Circuit has ruled "that the ends of justice require a new trial in this case."

As regards the defendants Bayer, the reversal was on the following grounds (156 Fed. 2d 964):

1. The language of the charge to the jury on the crucial issue was "so equivocal" "as to be difficult to understand, if not actually misleading to a jury of laymen" (p. 967).

> 2. After the summations, the Trial Court received certain additional evidence which, as the court then pointed out, was incomplete and unprobative in one particular respect, but the court did not permit the jury to receive additional matter which became immediately available and which supplied the very thing which the court had declared to be missing. This ruling was prejudicial error and a misuse of discretion (p. 968).

Obviously, these rulings have no importance outside of the present case, and can be of significance only in the new trial which has been ordered.

Thus, this is a typical case where the Circuit Court of Appeals exercised its power to determine whether, in its opinion, "the ends of justice require a new trial" (p. 967); and where, as a result, that Court's determination is really nothing more than an expression of its view that the objectives of a just and final result would be more certainly served by having the case tried again.

(2) That this *was* the fundamental basis of the decision of the Circuit Court as to the Bayers is asserted right in its opinion which declares (156 Fed. 2d, 964, 967):

> "We are all agreed, however, though for somewhat differing reasons, that the ends of justice require a new trial in this case."

This determination and reversal as to the Bayers naturally and inevitably required a reversal also as to their co-defendant Radovich. Again to quote the opinion of the Circuit Court (p. 968):

> "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich."

(3) It is true that the Circuit Court thereafter went on to discuss "two claims of error" by Radovich peculiar to

the case against him. But the fact is that, irrespective of such discussion, a reversal as to the Bayers necessitated a reversal as to Radovich. Hence, as to Radovich there is also no finality. It is entirely speculative as to how far the special discussion by the Circuit Court concerning him may have pertinency at all in the light of further developments and proofs at the new trial, especially since such discussion avowedly turned on the special state and incompleteness of the evidence in the record and avowedly recognized that on a new trial different evidence and different facts might develop and the blanks might be filled in.

Indeed, the Circuit Court itself expressly said (p. 970):

> "The record leaves the present status of the military judgment in doubt. * * * Determination of whether or not jeopardy attached (to Radovich) may therefore be more appropriately made when the full facts are in evidence on a new trial."

Likewise, the petitioner's own brief now expressly concedes (p. 21):

> "However, inasmuch as the record left the status of the military judgment in doubt, and a new trial was being ordered for other reasons, the circuit court of appeals left open the question of double jeopardy for determination on the new trial."

Hence, of the seven "Specifications of Error" enumerated on pages 22 and 23 of the petitioner's brief, the first five are really academic. They deal with a discussion by the Circuit Court of Appeals which was not necessary to the result, and which the Circuit Court itself declared might have no pertinency at the new trial. The remaining two Specifications (Nos. 6 and 7) relate exclusively to the decision of the Circuit Court of Appeals that the interests of justice required a new trial as to the Bayers and that, since the charge was conspiracy, the reversal must be as to all three defendants.

In short, as to all the defendants, the Circuit Court has done no more than rule that a fair and just result would

be better assured by having a new trial. On such new trial, as the Circuit Court pointed out, the full facts could be more completely developed as to all points, the jury could have the benefit of a clearer charge, and the pertinent law could be declared and applied with greater certainty.

(4) In no case which we know has such a disposition by the Circuit Court of Appeals been made the subject of a writ of certiorari from this Court.

Rule 38 of the Rules of the Supreme Court provides (par. 5):

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor."

This Rule then embodies various illustrations, such as a decision by a state court of a federal question not theretofore determined by the Supreme Court or not in accord with applicable decisions of the Supreme Court; diversity as between circuit courts of appeal or between a circuit court of appeals and local decisions; "an important question of federal law which has not been, but should be, settled by this court", etc.

The present case approaches in no way the wording of the Rule and has no parallelism with any of the illustrations therein given. It is the ordinary case where a Circuit Court of Appeals has in a criminal case ordered a new trial in the interests of justice and in order that the evidence and the facts may be more fully developed and a clearer charge given the jury.

## II

### The Jury's Recommendation of the "Highest Degree of Clemency"

On October 23, 1945, the jury returned a verdict of guilty with a recommendation for the "highest degree of clemency for all three defendants" (3526).

On the next day, the Court sentenced the defendant Samuel Bayer to a term of imprisonment of two years and a fine of $10,000 (which was the limit); the defendant Elias Bayer to a term of imprisonment of eighteen months and a fine of $5,000; and the defendant Radovich to a term of one year and a day (3632-4). The jail sentence of two years for Samuel Bayer was in excess of the United States Attorney's recommendation of eighteen months; and the jail sentence of Elias Bayer to eighteen months was in excess of his recommendation of a year and a day (3533-5).

## III

### The Charge as to the Defense of Extortion

(1) The charge to the jury was open to the criticism which this Court made on March 25, 1946, in *M. Kraus & Bros., Inc.* v. *United States*, U. S. Sup. C't, Law. ed. Advance Opinions, Vol. 90, No. 11, pp. 653, 660:

> " 'A conviction ought not to rest upon an equivocal direction to the jury on a basic issue.' *Bollenbach* v. *United States*, 326 U. S. ——, —— *ante*, 318, 322." (326 U. S. 607.)

In *Bihn* v. *United States*, U. S. Sup. Ct., Law. ed. Advance Opinions, Vol. 90, No. 17, p. 1208, decided June 10, 1946, this Court said (pp. 1211-2):

> "Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the

> erroneous charge. Hence we cannot say it was not prejudicial and hence treat it as a minor aberration of trivial consequence. Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach* v. *United States*, 327 U. S. ——, *ante*, 318, 66 S Ct 402."

If the right and duty to make rulings of this character are part of the appellate jurisdiction of this Court, then all the more are they part of the appellate jurisdiction of circuit courts of appeals.

(2) At the outset, we challenge as untrue the statement on page 3 of the petitioner's brief that the trial judge's charge "concerning the defense of extortion" was "concededly proper." On the contrary, both at the trial and since we have earnestly argued that it was erroneous, misleading and prejudicial.

(3) As regards the Bayers, the "basic issue" in the case was whether or not the payments had been extorted by Major Radovich by threats to violate his duty, or had been made pursuant to conspiracy to seduce Radovich from his duty.

The basis of the Bayers' defense was that Major Radovich demanded money as the price of not forcing the two untrained boys to go with him on a commando expedition behind the Japanese lines in Burma. The theory of the prosecution was that Major Radovich accepted money as an inducement to see that the boys were not sent overseas. The Bayers claimed that they paid in fear that he would violate his duty. The prosecution claimed that they paid in agreement with him to violate his duty.

Exception was taken to the failure of the Trial Court to charge adequately as to this basic distinction, and to

its refusal of a request designed to clarify the fact and the nature of the distinction (3436, 3400-1).

The Trial Court, in its charge, though it fully outlined the theory of the prosecution, neglected to outline the theory of the defense. The Court merely said (3400-1):

> "Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer."

This was a mere description—and both incomplete and inadequate—of the defendants' claim. It was not a charge as to the extent to which in law it would be a defense or as to the rules of law which should be applied to its component elements.

It will be observed that there was no statement by the Court that the jury could find that there had been no agreement on the part of the Bayers if the jury believed the contention of the defense, namely, that the Bayers were the unfortunate victims of a shrewd plan of extortion. The Judge should have instructed the jury that, if the jury found that the moneys were obtained by Radovich from the Bayers as the consequence of a scheme of extortion concocted by Radovich, in that event there would not be a voluntary agreement, which is the essence of a conspiracy under United States Code, Title 18, Section 88. It will also be noted that the Court made no mention that the Air Commando unit was a voluntary one and that a special type of man was needed for it.

(4) These errors were greatly accentuated by two further errors in the Court's instructions to the jury.

In the first of these errors, the Trial Court told the jury, in practical effect, that the defendants Bayer would be guilty even though the payments of money were involuntary on their part. Thus the Court said (3401):

> "If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily."

This instruction was grossly misleading.

Certainly, if the payments were made by the Bayers involuntarily and as a result of duress, threats and coercion, the jury should have been instructed that they could find that there was no agreement on the part of the Bayers, inasmuch as it was the result, not of a true meeting of the minds, but of extortion and duress. The Court, on the contrary, charged in effect that if the defendants Bayer paid money to Radovich, the fact that such payment was made "involuntarily" would constitute no defense if it were made as part of an "agreement". The Court did not call the jury's attention to the vital consideration, which was fundamental in the defense, that if the so-called "agreement" was wrung from the Bayers by threats and coercion, then it and any payments made pursuant to it were not voluntary and, in consequence, the defense would be established. It was serious error for the Court to fail to include and submit the issue of whether the "agreement" which preceded the payment of the money was made voluntarily or involuntarily.

In other words, to confine, as did the Court, the question of voluntary or involuntary action to the mere payment of the money, without also extending it to include the issue of the "agreement" alleged to antedate the payment of the money, was basic and prejudicial error.

The jury evidently sensed this fundamental distinction in the moral quality of the Bayers' acts but felt themselves prevented by the Court's charge from giving that distinction expression in the field of law. In no other way can their exceptional recommendation of the highest degree of clemency be accounted for (3526).

(5) In the second of these errors the Court in effect instructed the jury to find the defendants Bayer guilty, even though the jury should find that the payments made by them were the result of coercion and extortion. This was the charge of the Court (3403):

> "However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or [redacted] the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

The foregoing instruction was highly misleading and prejudicial. In effect, the jury was instructed to find the defendants Bayer guilty, even though the so-called "agreement" and their payments under it were the consequence of the extortion threats of Radovich and were made as the result thereof, and even though all they desired was that Radovich should perform his true duty as to the boys.

(6) As a result of these confusions, the Circuit Court of Appeals declared and held that the charge (156 Fed. (2d) 964, 967)

> "was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen. Of course, reversal should be ordered if the charge, although technically correct, is so equivocal as to be probably misleading in actual fact."

This declaration shows the petitioner's brief to be in error in stating at page 16 that "it does not appear from the opinion whether reversal of the judgments would have been predicated on such ground alone."

## IV

### The Matter of the Telephone Company's Record

(1) The Circuit Court of Appeals was also clearly entitled to hold that the Trial Court seriously prejudiced the Bayers in refusing to receive in evidence the record of the Telephone Company, which showed that a telephone call had been made collect by Radovich from Arlington, Virginia, presumably the Pentagon, to the Bayers' office in New York City on November 24, 1943 (3508-19). Exception was duly taken (3519).

The background shows the gravity of this error and the serious damage which it occasioned to the defense.

(2) Miss Solomon, Samuel Bayer's secretary, testifying for the defense, stated that Radovich telephoned her one morning in November 1943 from Washington and that she made an appointment for Samuel Bayer and her to meet him at Cavanagh's Restaurant in New York City (2779-80). He there made threats that the two boys would have to go with him on his Commando mission, and, if lucky, they would come home alive (2784-7). He further stated in this conversation that he had broad authority and if Bayer paid him $3,000 he could have the boys transferred into some other unit (2785-7). This took place *on the same day* that Martin Bayer called his father on the telephone from an Army Field in Connecticut and told him that he and his cousin Melvin Usdan were being transferred to Goldsboro, North Carolina (2788). Samuel Bayer said the same thing in his statement (Exh. 8, fols. 3686-9).

Melvin Usdan testified that he and Martin Bayer phoned to their folks on November 24th, telling about their transfer to Goldsboro (2582-7). The date (November 24th) was thus definitely fixed as the date of the Cavanagh Restaurant meeting described by Miss Solomon; and the U. S. Attorney, in his summation, referred to Usdan's statement of the date of his telephoning as accurate (3213-14).

In his summation, the U. S. Attorney laid great stress upon his claim that Radovich was in Goldsboro on November 24th (3211-17), since Miss Goertz (an Army employee in the Pentagon Building) had testified (766-7) that Radovich phoned her from Goldsboro, North Carolina, on November 24th concerning the transfer of Martin Bayer and Usdan. He argued accordingly that Radovich could not have been in New York City on November 24th, and that Samuel Bayer's statement and the testimony of Miss Solomon about the attempted extortion by Radovich at Cavanagh's Restaurant on November 24th were in consequence false, since Radovich was in Goldsboro at that time. He characterized it as "just another of the falsehoods" (3216). This was at the very conclusion of the summation, and court then adjourned to the next day (3219-20).

(3) On the next morning and before the charge to the jury, Mr. Keenan (the Bayers' counsel) informed the Court in chambers (3347-52) that, in view of the statements in the U. S. Attorney's summation above referred to, he was checking with the Telephone Company and that the Government must have among the records of the Bayers, which it had subpoenaed, a bill for a collect call from Washington on November 24th. He also stated that he wished to show that Radovich was in New York, as testified to by Miss Solomon, on November 24th and 25th (3352-3).

The Government, shortly thereafter, produced from its files a *bill* of the Telephone Company to the Bayers, show-

ing a collect call to Bayers' office from Washington on November 24th (3373-4).

Proceedings were then resumed in open court in the presence of the jury (3385). The Court proceeded to tell the jury, at the outset of its charge, that a Telephone Company bill to the Bayers showed a collect call from Washington to the Bayers on November 24th, but that "the record *does not show from whom the call came*" (3386-7).

It can be seen that what the Court said concerning the bill of the Telephone Company not only failed to connect Radovich with the collect call on November 24th but actually implied the absence of such connection.

The jury retired at 11:45 A. M. and returned for further enlightenment at 3:45 P. M. (3461). At that time, Juror No. 6 asked to hear again the U. S. Attorney's summation concerning the messages and meetings on November 24th and 25th (3487-8; 3499). Very evidently the juror had in mind that part of the U. S. Attorney's summation in which it was argued that Radovich could not have been in New York on November 24th in view of Miss Goertz's testimony that he telephoned to her from Goldsboro, North Carolina, on that date. The Court declined the request.

Eight minutes later the jury were again in court, requesting references to pertinent parts of the testimony as to that period (3499).

The Court, in response to this request referred the jury to the testimony of Miss Goertz, Miss Solomon and Usdan in reference to the dates, but did not cause any of it to be read. The Court said that the jury must rely on their memories (3500).

The jury thereupon again retired at 4:27 P. M. (3506). After the jury retired, Mr. Cohen, the associate defense counsel for Bayers, stated to the Court that the defense had not known that the U. S. Attorney was to make such an argument about November 24th; that he had made it only at the end of his summation; and that since that

time the defense had secured the original record of the Telephone Company's office in the form of an official *slip*, showing that the call had been made *by Radovich* (3509). Mr. Cohen then asked leave to put this Telephone Company record in evidence and emphasized that this was "highly important in view of the statements made to the jury by your Honor" to the effect that the *bill* had not shown from whom the collect call from Washington had come (3509-10). He also emphasized the statement made by one of the jurors "for further information concerning those dates" (3509). He exhibited the slip of the Telephone Company in open court (3510). It showed an Arlington, Virginia, collect call to Bayers' office *by Radovich* ("Captain Ravich") on November 24, 1943 (3509-13). Obviously the call was from the Pentagon; and obviously Radovich could easily have flown therefrom for a meeting at Cavanagh's Restaurant that afternoon.

The Court refused, however, to admit the Telephone Company's slip in evidence or to call it to the attention of the jury. The Court said that it came too late (3517-18).

Exception was taken to the ruling of the Court (3519). A motion was also made either for a mistrial or a new trial, which was denied; and exception again taken (3519).

(4) These rulings were serious error and, in view of what had occurred in court and in the minds of the jury concerning the date November 24th, gravely prejudicial. The case was still within the Court's control and was still being considered by the jury.

If Radovich did call the Bayers from Washington on November 24th and demand an immediate meeting in New York, it could only have been for extortion.

He was then in a position to show the Bayers that these two untrained and inexperienced boys were on that very day travelling south from New England under orders to join his Commando Unit for immediate service in Burma.

For two months previously Radovich had had no communication with the Bayers (3686). The special order for the boys' transfer to the Commando Unit had just been issued *at the instance of Radovich himself*. To quote the Government's brief in the Circuit Court (p. 8):

> "On November 22, 1943, at the instance of Radovich a special order issued directing the transfer of the boys as clerks to the Air Commando Group at Goldsboro, North Carolina, requiring attendance thereat not later than November 25th."

Again, to quote the Government's brief in the Circuit Court (p. 3): This Air Commando Unit was then "scheduled for immediate over-seas duty in the China-Burma-India Theatre."

Thus, on November 24th Radovich had the trap baited and ready for springing. If, on that day, he was not in Goldsboro but at the Pentagon Building demanding to meet the Bayers in New York, his purpose was clearly to demand a promise of money for opening the jaws of the trap.

(5) Obviously, the verdict might well have been different, had the jury been allowed to have knowledge of this final crucial fact, disclosed by the Telephone Company's office record, that Radovich was not in Goldsboro on November 24th as testified by Miss Goertz, but was at the Capital telephoning the Bayers for an immediate appointment, as testified by Miss Solomon and as stated by Samuel Bayer.

This was the very fact which the Trial Court itself had told the jury several hours earlier was missing from the Telephone Company's bill to the Bayers.

Hence, the Circuit Court of Appeals had the power to hold that, because of these rulings by the Trial Court, "the ends of justice" would be best served by a new trial. To quote the Circuit Court's opinion (p. 968):

"How important the matter had become was unmistakably shown by the jury itself. After four hours of deliberation, it returned to ask further instructions, one juror stating that several of them desired to hear again this part of government counsel's summation. And when recalled by the court eight minutes later, another juror had asked for references to pertinent parts of the testimony. Obviously the jury—however erroneously or for whatever reason—was vitally concerned with the question. While ordinarily a trial judge has a large area of discretion as to the reopening of a case for additional evidence, we think that in view of the importance which this issue had assumed the jury should not have been left with a partial and a misleading picture of the facts."

## V

## Conclusion

The case now comes down to this. The Circuit Court of Appeals has granted a new trial for reasons which have no significance outside the present litigation. It has held:

(1) As to the case against the Bayers, "the ends of justice require a new trial" (p. 967).

(2) "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich" (p. 968).

(3) As to Radovich also, "determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial".

The propriety of this disposition of the matter is clinched by the inescapable significance of the jury's recommendation of the "highest degree of clemency for all three defendants" (3526).

**The Petition should be Denied.**

Dated, New York, November 18, 1946

Respectfully submitted,

CHARLES H. TUTTLE,
*Counsel for Respondent Samuel Bayer.*

FILE COPY

*Argued by*
CHARLES H. TUTTLE

IN THE

# Supreme Court of the United States

**October Term, 1946**

**No. 606**

THE UNITED STATES OF AMERICA,
*Petitioner,*

*against*

SAMUEL BAYER, ELIAS BAYER and
WALTER V. RADOVICH,
*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS SAMUEL BAYER AND ELIAS BAYER

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THE UNITED STATES OF AMERICA,
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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF FOR RESPONDENTS SAMUEL BAYER AND ELIAS BAYER

On December 9, 1946, this Court granted a writ of certiorari to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, dated and filed August 14, 1946 (p. 1476), pursuant to its opinion (pp. 1467-76), reversing the judgment of the United States District Court for the Southern District of New York, entered upon a verdict of guilty (pp. 1176, 1344-6) and based upon an indictment (pp. 8-11) charging these respondents with violation of Section 88 of Title 18, United States Code.

The opinion of the Circuit Court of Appeals is reported in 156 F. 2d 964, and is in the Record at pages 1467-76.

The subsequent references in this brief are to folios unless otherwise stated.

## Statement of Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

## Questions Presented

As regards the respondents Samuel and Elias Bayer, the following are the basic questions involved:

1. Whether the Circuit Court of Appeals, in the exercise of its supervisory power as to the fairness of criminal trials, committed error in holding that the trial court's charge to the jury as to the basic issues concerning the guilt of the Bayers was inadequate and too equivocal and too difficult to understand, if not actually misleading to a jury of laymen.

2. Whether the Circuit Court of Appeals, in the exercise of its supervisory power as to the fairness of criminal trials, committed error as regards the Bayers in holding that the jury should not have been left with a partial and misleading picture of the facts concerning the whereabouts and telephoning of the defendant Radovich on November 24, 1943.

3. Whether the trial court committed errors prejudicial to the respondents Bayer as set forth in their other assignments of error.

## The Gravamen of the Decision of the Circuit Court

As regards the Bayers, the unanimous holding of the Circuit Court was (1471-3):

> "We are all agreed, however, though for somewhat differing reasons, that the ends of justice require a new trial in this case."

This determination and reversal as to the Bayers naturally and inevitably required a reversal also as to their co-defendant, Radovich. Again, to quote the opinion of the Circuit Court (1473):

> "In view of the charge of conspiracy, reversal as to the Bayers necessitates also a reversal as to Radovich."

It is true that the Circuit Court thereafter went on to discuss "two claims of error" made "in addition" by Radovich and peculiar to the case against him. But the fact is that, irrespective of such further discussion, the reversal as to the Bayers necessitated a reversal as to Radovich.

In other words, the decision of the Circuit Court was merely that there should be afforded to the Bayers an opportunity for a clearer and more definite and precise charge as to the issue determining guilt or innocence, and also an opportunity for a decision thereon by the jury after having the full facts concerning the important events of November 24, 1943. Such action necessarily carried with it a new trial as to Radovich irrespective of the merits of the additional two claims of error made by him. (*United Brotherhood of Carpenters v. United States*, decided by this Court March 10, 1947; 15 Law Week 4326, 4330.)

## Statute Involved

The only statute involved is Section 37 of the Criminal Code, 18 U. S. C. 88, which provides:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both."

## The Indictment

The indictment, in a single count (22-32), charges the three defendants with conspiracy to defraud the United States under Title 18, Section 88, United States Code. It charges that, beginning on or about September 1, 1942, the defendants combined with each other, and with other persons whose names are unknown, to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, and, more particularly, its right to the conscientious and faithful services and judgment of defendant Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

It is alleged that as a part of the conspiracy defendants Samuel Bayer and Elias Bayer became acquainted with various officers, entertained and made gifts to them, and gave sums of money amounting to approximately $7,000 to defendant Radovich, a Captain, with intent to influence his action and to induce him, in violation of his lawful duty, to transfer Privates Martin Bayer and Melvin Usdan, both soldiers, from and to various units of the United States Army in order that they would not be attached to a unit which was about to be sent out of the continental United States. The indictment sets forth a number of overt acts in furtherance of the conspiracy charged (28-32).

## The Trial and Verdict

After a lengthy trial before Hon. Alfred D. Barksdale and a jury, the jury, on October 23, 1945, returned the following verdict (3526):

> "We find them guilty, *with the highest degree of clemency for all three defendants*".

## The Sentences

On the next day, the Court sentenced the defendant Samuel Bayer to a term of imprisonment of two years and a fine of $10,000 and the defendant Elias Bayer to a term of imprisonment of eighteen months and a fine of $5,000; and the defendant Radovich to a term of one year and a day (3632-4). The jail sentence of two years for Samuel Bayer was the limit. It was in excess of the United States Attorney's recommendation of eighteen months. The jail sentence of Elias Bayer to eighteen months was in excess of his recommendation of a year and a day (3533-5).

A motion for bail pending the appeal of Samuel Bayer and Elias Bayer was granted by the Circuit Court of Appeals, after considering the moving papers and hearing argument.

Thereafter the Bayers made a motion for a new trial on newly discovered evidence under the circumstances stated in Point III, *post*.

## Statement of Facts

At the conclusion of the trial, the case against the Bayers (assuming there was any sufficient case at all) came down to certain financial transactions between them and Radovich. Those transactions were the subject of the summations and of the charge. There was no evidence of corruption of or by any other officer.

Neither of the Bayers nor Radovich testified. Certain written statements taken from each by the investigating officers were put in evidence. The statement by Radovich was objected to by the Bayers' counsel and was expressly received by the Court solely as evidence against Radovich and against him alone (1976).

The theory of the Bayer defense was that the Bayers were the victims of coercion and duress practiced upon

them by Radovich; that he extorted money from them by threats and menaces of violating his duty; and that the payments were made in the hope that these grave threats would not be carried out but that, on the contrary, he would perform his duty.

In the eye of the law as well as by any standards of morals, an assent or conduct forced by coercion, duress or threats of exposure to harm or danger is not an assent or voluntary conduct at all and certainly is not a conspiracy to defraud the United States.

As we shall show hereinafter, not only was this defense not accurately or appropriately set before the jury in the charge, but actually it was (as we submit) misstated; and the jury were left, if not indeed bound, to infer that in law it was no real defense at all and that essential factors in it were irrelevant. See Point I, *post*.

The following statement is presented for the purpose of showing how forceful and substantial that defense was in point of fact and how vital to the rights of the Bayers was a full and correct charge concerning its factual and legal bases. (*Bollenbach* v. *United States*, 326 U. S. 607, 613-5; *M. Kraus & Bros., Inc.* v. *United States*, 327 U. S. 614, 627; *Bihn* v. *United States*, 328 U. S. 633, 637-8.)

## A

The respondents Samuel Bayer and Elias Bayer, two brothers, were engaged in the business of manufacturing yarn and thread under the name of Plymouth Thread & Rayon Corporation, and thread converting under the name of Thread Converters, Inc., with offices at 30 West 21st Street. They enjoyed a very good reputation and had never previously been in any difficulty. Their good character was testified to by the president of a bank, their minister and by business men and attorneys of repute (2451-71, 2638-55).

The elder brother, Samuel, has three sons, Martin, Robert and Sanford. At the time of the trial, Martin, a soldier, was in Burma; Robert, a soldier, was at Okinawa; and Sanford, a sailor, was aboard a United States warship (2477).

In December, 1942, one of these sons, Martin Bayer, then eighteen years of age, and Melvin Usdan, a nephew of Samuel and Elias Bayer, voluntarily enlisted in the United States Army Air Corps (2481, 3702-3). Martin was not strong, had suffered from rickets and was only accepted upon his urgent request (2480-8). After being sent for a short time to Camp Upton (2489), both young men, within two weeks of their enlistment, were assigned to duties as filing clerks in the Headquarters Base, Mitchel Field, Long Island (2495). Being volunteers, they were entitled to choose the branch of the service in which they wished to serve, and they had designated the Air Corps (828-9).

B

In January, 1943, while at a night club in New York City, Elias Bayer met two officers, who were stationed at Mitchel Field, Lt. Col. Vidal and Lt. Roser (396-8, 3817). They entered into conversation and became quite friendly (3817). The officers asked Elias about his business and, on being told, they inquired if he knew anybody in the uniform manufacturing business and about the possibility of securing uniforms at a wholesale price (3817-18). Elias responded in the affirmative and the officers took his telephone number (3847).

A month later, the officers telephoned him, came to his office, and there met Samuel for the first time (399-403, 3818). A conversation followed concerning the procurement of uniforms at wholesale. Elias Bayer accompanied the officers to the establishment of I. Buss Company, run by three brothers named Busch, one of whom was a

brother-in-law of Samuel Bayer. Elias introduced them and arranged for their buying uniforms at wholesale prices (3819-20). It was Elias Bayer's understanding that the officers would pay for the uniforms (3848). This was also understood by Harold Busch (562, 590, 607-8).

Subsequently, a friendship developed between these two officers and the Bayers (3820, 3715-18). Through them, Elias Bayer met Lt. Col. Jacobson of the First Fighter Command at Mitchel Field (1090, 3820). Col. Jacobson thereafter met Samuel Bayer at the office and was extended the same courtesy of purchasing a uniform at wholesale from the Buss Company (1094-5, 3820).

While Col. Jacobson was at Bayers' office he noticed the pictures of the two young soldiers, Martin Bayer and Melvin Usdan, in uniform on the wall of the office (2760-3, 3673). He inquired about them and Samuel Bayer told him that the boys were filing clerks at Mitchel Field in the Headquarters Base Command (2761-2, 3822-3, 3673). Col. Jacobson thereupon stated that he could use clerks in his outfit and said that he was going to have them transferred (2762-3, 3822-3, 3673-4).

In April, 1943, without any request from the Bayers, Col. Jacobson requisitioned the boys from the Headquarters Base to his own command, the First Fighter Command (2501, 1101-3, 2761-3, 3822-3).

Col. Jacobson, a witness for the Government, testified that he had not acted upon any inducement from the Bayers and that they had never requested him to do anything improper or corrupt (1136, 1149). Indeed, no witness called by the Government testified to any improper action or favoritism as regards these two young soldiers, done at the request of the Bayers or otherwise (429, 432-4, 540, 544-5, 867, 1136, 1149). Nor does the indictment make any such charge against any officer other than Radovich.

C

Defendant Radovich—then a Captain, a flyer,—became the commanding officer of Privates Bayer and Usdan when they thus joined the First Fighter Command (1103, 2503).

Radovich met Samuel and Elias Bayer through the other officers above mentioned, and under similar circumstances. He likewise wished to procure a uniform at wholesale price and was introduced by Elias Bayer to the Buss Company (3673-4, 3822-4).

While Elias Bayer had understood that the uniforms would be paid for (3848) and the officers had been given bills at wholesale prices in the packages containing the uniforms (598-9), none of them paid the Buss Company (596, 3847-8). Some of them complained that the uniforms did not fit and Radovich returned both of his to the Buss Company (3740-1, 3849-50, 596-7, 451-2). Being unpaid, the Buss Company, a small concern, called upon the Plymouth Thread Corporation to pay for the uniforms, which it thereafter did (498-9, 596, 3737-8, 3848).

Radovich visited the office of Samuel Bayer very frequently (2767-8, 3674-5, 3824). He accepted much hospitality. It soon became apparent that he was greedy and avaricious. He showed an acquisitive interest in things which he saw around the office (3743). For example, he hinted about a traveling bag of Samuel Bayer and received a similar one (3743-4), and, again, a set of golf clubs which belonged to Martin Bayer were loaned to him but he never returned them (3790-1). He took advantage of the privilege of purchasing theatre tickets, which he charged to the account of Plymouth Corporation (3772, 3881). The other officers were entertained and on one occasion, upon his birthday, a set of automobile tires was given by Samuel Bayer to Col. Jacobson (1108-16). His relations with Elias Bayer were close (1134) and they had exchanged gifts. For example, when a child was born to

the Elias Bayers, Col. Jacobson presented them with a baby blanket (1156-7). Col. Jacobson, testifying for the Government, stated that he had never done anything for Samuel Bayer in return (1136, 1149-50). In fact, all of the officers were called as Government witnesses and uniformly testified that they had done nothing in their official capacities for the Bayers and had never been requested to do anything improper or corrupt (429, 432-4, 540, 544-5, 867, 1136, 1149).

Samuel Bayer was greatly concerned about his son, Martin, who, as above stated, was not strong and vigorous and had been accepted only upon his own insistence (2480-8). Martin was given no physical training by the Army to fit him for the combat service of a soldier. He received only two weeks' basic training (2495). He was given work as a filing clerk, for which he apparently was best suited (2498). It was obviously never the intention of the Army officers to make a combat soldier of him. The same appeared true of Melvin Usdan, who received only about one week's basic training (2492). He likewise was a filing clerk (2495).

## D

When Radovich became friendly with Samuel Bayer, he learned of the extreme solicitude of Samuel for the welfare of the boys and promptly proceeded to prey upon it. He was a young man, active, strong and daring—a flyer—and he told Samuel of the dangerous nature of his work (3686-8). Unquestionably, he was a brave soldier but his purpose was formulated to take advantage of Samuel's great interest in the boys. This is shown by the subsequent developments.

In the early summer of 1943, Radovich came to Samuel Bayer's office and informed him that something had occurred at Mitchel Field which required him to transfer Martin Bayer and Melvin Usdan to another camp (3675-6, 3826). The boys were happy at Mitchel Field and Samuel

Bayer asked Radovich to leave them alone (3676). He said he could not and thereupon left Bayer's office (3676). He returned on the following day and told Samuel Bayer that he had an angle through which he could have the boys transferred to the Medical Unit at Mitchel Field (2772-3, 3676-7, 3828-9). At the same time, he told Samuel Bayer that he needed $500 in order to send his wife home to Los Angeles (2775-6, 3677, 3829). Samuel Bayer was taken aback at Radovich's suggestion. He had extended hospitality in the form of entertainment and gifts but never in the form of money. He told Radovich that he did not have that amount of money available, but to come in on the following day (2776). He was uncertain whether it was a loan to Radovich or a hold-up (3677, 3829-30). On the following day he gave Radovich $450 (3746, 3830). He could have given him $500 but did not wish Radovich to think that he could pay out such large sums of money with ease (3677).

Radovich returned to Bayer's office about a week later and said that the transfer to the Medical Unit was going through and at the same time said that he needed $500 additional, but gave no explanation for his request for this additional money (3679, 3830, 2776). Samuel Bayer, by this time, was in fear of Radovich's control over the boys and was worried that harm might come to them, so he promised to give Radovich the money (3679). To use Samuel Bayer's words, "I was scared if I didn't give it to him he will take it out on my kids" (3679).

Some days later, Radovich again called at Samuel Bayer's office and told him that the application for transfer to the Medical Unit had fallen through and that the boys would have to go overseas (3679, 3831-2). This coercive assertion was made by Radovich in spite of the fact that the young men had received at the most only two weeks of basic training and could not properly be sent overseas (2492-5, 2630-3). Radovich told Samuel Bayer that he needed $1,000 and assured him that if that amount were paid the applications would be approved (3680,

3832). Samuel Bayer was greatly upset at the prospect that the boys might be transferred overseas without any adequate basic training and he was fearful of the power of Radovich over the boys (3679-80, 3749). While at first he delayed about giving Radovich the money, he told Radovich to call him up later on. A few days later, Radovich telephoned to Samuel Bayer, requested the money and asked Bayer to meet him at the Radio City Theatre (3680). Samuel Bayer went to the theatre and met Radovich there. They walked to Radovich's car, which was parked at the corner, and there Samuel Bayer gave Radovich $500, informing him that he would try to get together some more money within a few days (3680-1, 3752-3). A little later on, Radovich telephoned Samuel Bayer and asked Bayer to meet him at the St. Moritz Hotel, where Bayer then gave him $400 (3681, 3754-5). On the following day, Radovich went to Bayer's office and succeeded in obtaining an additional $600 (3681, 3755).

Upon applications made in the regular form by Martin Bayer and Melvin Usdan, at the instance of a 1st Lieutenant of the Medical Corps at Mitchel Field (Dft. Bayers' Exh. D), they were transferred from the First Fighter Command to the Medical Unit at the same field. The labor there was arduous and Usdan testified they worked both day and night (2518-19). They remained there for about a week (2518, 3682-3). They then received orders for a further transfer—Martin Bayer to Bradley Field, Connecticut, and Melvin Usdan to Westover Field, Massachusetts (2520). They were attached, at these fields, to the Medical Unit of Airborne Engineers (2522). They remained at these fields throughout the late summer and early autumn of 1943 (2525-9). There was nothing to show that these transfers were obtained through corruption by Radovich. They went through in the regular way.

In the latter part of August, 1943, Radovich, then a Major, began a larger design as to the two boys. He sought and obtained through a Captain Pepper at Mitchel Field information as to their whereabouts (624-5).

E

In about September, 1943 Radovich became a member of a secret and highly dangerous project commanded by Col. Philip Corcoran, which was to operate behind the Japanese lines in Burma as a commando unit (631-2, 780, 686-7, 698).

This unit was strictly voluntary in its nature and was intended for well-trained, daring volunteers (631-2, 686-98). Radovich had broad authority to select any members of it (2785). But the work was so hazardous that nobody was required to become a member without his consent, even though he had been selected (632, 686-98, 793, 807-8).

The assembly point of this unit was Goldsboro, North Carolina. Corcoran or Radovich designated and selected the members, which would be followed by a notification from Col. Goetz in Washington of the necessary orders for the transfer (755-63). The notification would result in orders as a matter of course. A young woman, Miss Goertz, in Col. Goetz's office, would prepare these orders at the request of Corcoran or Radovich (757-63).

In the meantime, Radovich had not abandoned his scheme to extort money. Shortly after the boys were transferred respectively to Westover and Bradley Fields, Radovich telephoned Samuel Bayer and informed him he knew who was responsible for the transfer of the boys from the Medical Unit and that if Bayer paid him $1500 additional he would have them re-transferred to Mitchell Field (2779, 3684-5). Samuel Bayer remonstrated and "asked him to please forget about it, to leave the boys alone as they were very happy where they were at their new station" (2779, 3684-5). For the time being Radovich subsided (3685).

For about a month Samuel Bayer did not hear from Radovich. Then Radovich telephoned to Bayer's office, talked with his secretary, Miss Solomon, and she made an appointment for Radovich to meet Bayer and herself at

the McAlpin Hotel in New York City (2781-3; 3685-6). He was accompanied by another officer. They dined together and Radovich related his flying exploits (3686). The apparent purpose of this McAlpin meeting was to impress upon Samuel Bayer the dangerous nature of Radovich's new duty and assignment.

**F**

Subsequently, nothing was heard from Radovich for maybe six weeks or two months (3686). Then, suddenly, during the morning of November 24, 1943, Radovich telephoned "collect" to Miss Solomon at Bayer's office, from Arlington, Virginia,—the location of the Pentagon Building of the War Department and of the Washington Airport (2779-80, 3360-1, 3386, 3508-13, 3788). He was by that time fully set "to put the squeeze" on the Bayers in a big way.

This call is shown by the record of the Telephone Company, which became available after the case was submitted to the jury and while the jury was out (3508-18). It records that a telephone call was made "collect" by Radovich from Arlington, Virginia, to Chelsea 3-2872, which is the Bayers' telephone number in New York City, on November 24, 1943. As shown hereafter, it was error for the Judge to refuse to admit this slip in evidence, for it directly corroborates the testimony of Miss Solomon. Exception was taken to the ruling which excluded it (3519).

Miss Solomon testified that this telephone call by Radovich was to tell her that he was flying to New York, and that it was very important for him to meet her and Samuel Bayer. An appointment was thereupon made for lunch at Cavanaugh's Restaurant (2780, 3686-7). There were present, Radovich, Samuel Bayer and Miss Solomon (2784, 3686). Radovich told them that he was attached to a commando unit which was going abroad to the

Burma-India front "on a very dangerous mission" and that it "would write history" (2784, 3687-8). He told Samuel Bayer that he was taking Martin Bayer and Melvin Usdan with him as members of this commando unit, "and if the boys were lucky enough to return they would return in eight months" (2784-5, 3688).

The boys, as Samuel Bayer knew, were utterly unfitted and untrained for such dangerous work and had received no substantial amount of basic training (2492-5, 2630-3). Nevertheless Radovich had already, on November 22, 1943, selected these inexperienced and unqualified young men as members of the Special Commando Unit; and, in fact, orders for their transfer to that Unit from their posts at Bradley Field and Westover Field had already been issued, at Radovich's insistence (764-6).

Samuel Bayer remonstrated and asked Radovich "why he was taking it out on the boys" (2785, 3688). Radovich responded that he had the authority to do it, that "he could do anything he wanted" (2785), but that if Samuel Bayer would pay him $5,000 he would release the boys from the unit into some other outfit (2785-6, 3688-9).

Thereupon Samuel Bayer begged Radoyich not to interfere with the boys but to leave them alone (3689, 2787). Radovich's response was that the boys would have to go with him and that Samuel Bayer should not worry *"because maybe if the boys were lucky they would come home alive"* (2787, 3688).

Samuel Bayer kept on pleading with Radovich, who insisted that the money must be paid promptly. Radovich turned a deaf ear to the pleas of Samuel Bayer (2787, 3689). He finally gave Samuel Bayer a direction for the payment of the money (3689).

On the same day (November 24) that Radovich was making these demands, Martin Bayer telephoned to his father and told him that he and Melvin Usdan had been ordered to Goldsboro, North Carolina, and were even then going through New York City en route (3687).

On the very next morning (November 25), Radovich came to Bayer's place of business and asked "What did you decide?" (2788-9, 3690). Samuel Bayer again begged him to leave the boys alone. Radovich replied that it was not up to him alone but that he had to pay most of the money to others in order to prevent the departure of the boys with the commando unit, and he advised Samuel Bayer to act promptly (2788-9, 3690-1). Elias Bayer, who overheard some of the conversation, also then pleaded with Radovich to leave the boys alone, to which Radovich replied by giving an "ultimatum" that the money had to be delivered to *him at Goldsboro* promptly (3835-8).

During the course of these discussions the two young men were, to the knowledge of the Bayers, traveling to the commando unit at Goldsboro, North Carolina where they arrived at 3:30 in the afternoon of November 25 (786-91, 2551-60, 2585-7).

## G

Finally yielding to the demands of Radovich, Samuel Bayer sent $5,000 to Radovich, which was delivered to him personally at Goldsboro "a day or two" later by an unnamed person, who was accompanied by Elias Bayer (3758, 3765-6, 3839-41).

The petitioner's brief (p. 9) says that the $5000 was not delivered to Radovich until *after* the boys had been transferred out of his commando unit on November 29. This is a mistake. The money was delivered not later than November 27 (3839).

After Martin Bayer and Melvin Usdan reported at Goldsboro, Lt. Col. Boebel, who was the Adjutant of the Air Commando group at the time when they arrived, later found them unfit for its purposes (791-2, 795-6, 817-18). He testified that he told Radovich "I do not think these are the type of men we want in our organization. They are not the calibre of man that we are looking for"

(795-6). He directed Radovich to transfer them out of the unit (795-6, 817-18). They remained there only about a week (2546-7). Radovich, in full possession of the $5,000, then arranged the transfer of Martin Bayer and Usdan to the Newcastle Army Air Base, Air Transport Command, at Wilmington, Delaware (767-9, 2546). The Special Order for their transfer is dated November 29 (363).

Thus, Radovich had fully accomplished his scheme of extortion. The payment made by Samuel Bayer had been coerced from him by Radovich, who had refused to do his true duty by the boys and had included them in a commando unit for which they had not volunteered and were not fitted, and who took advantage of the situation which he had created, in order to achieve and execute his wrongful purpose.

## H

The theory of the Bayers' defense, which was entirely overlooked or disregarded by the Trial Court in his charge to the jury, is that the Bayers wanted Radovich to do his duty as an officer, not to violate it; that Samuel Bayer made the payments, not to corrupt Radovich but in order to induce him to act properly and conscientiously toward the two young soldiers, Martin Bayer and Melvin Usdan.

These two boys had only two weeks of basic training and were not fit for Radovich's Commando Unit, which was intended for highly dangerous special duty in the Pacific. Nor had the boys volunteered for such duty, though it was a voluntary unit. Nor were they physically or by training equipped for such a task. Hence, Radovich's duty was to *exclude* them from the unit—*not* to *include* them.

It was further the theory of the Bayers' defense that the payments made by the Bayers were coerced and ex-

torted from them by Radovich, who threatened not to do his true duty by the boys, but to discriminate improperly against them, unless he were paid, and who took advantage of the situation to frighten the Bayers in order to achieve and execute this plan of extortion.

I

After the conviction and before the appeal was argued in the Circuit Court of Appeals, the Bayers made a motion before Judge Barksdale for a new trial on the ground of newly discovered evidence as to the events of November 24 and 25, 1943. Judge Barksdale adhered to his rulings at the trial.

The record on that motion has been certified here, and is discussed in Point III, *post*. We submit that it sustains conclusively the justice of the Circuit Court's award of a new trial.

## POINT I

**The Circuit Court of Appeals, exercising its supervisory power as to the fairness of criminal trials, committed no error in holding that the Trial Court's charge to the jury as to the basic issues concerning the alleged guilt of the Bayers was inadequate and too equivocal and difficult to understand, if not actually misleading to a jury of laymen.**

(1) A case of an inadequate, confusing and misleading charge, quite similar to the present in its degree of ambiguity, is presented by *Bollenbach* v. *United States*, 326 U. S. 607, where this Court reversed a conviction and said (pp. 613-5):

"What reason is there for assuming that the jury did not also fail to appreciate these factors which the

Government, in an elaborate argument, explains as requisite for a proper understanding of that which at best was dubiously expressed? A conviction ought not to rest on an equivocal direction to the jury on a basic issue. And a charge deemed erroneous by three circuit judges of long experience and who have a sturdy view of criminal justice is certainly not better than equivocal. * * *

In view of the Government's insistence that there is abundant evidence to indicate that Bollenbach was implicated in the criminal enterprise from the beginning, it may not be amiss to remind that the question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts. * * *

In view of the place of importance that trial by jury has in our Bill of Rights, it is not to be supposed that Congress intended to substitute the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be."

In *Bihn* v. *United States*, 328 U. S. 633, this Court again reversed a conviction because of an inadequate, confusing and misleading charge, saying (pp. 637-8):

"We assume that the charge might not be misleading or confusing to lawyers. But the probabilities of confusion to a jury are so likely (cf. *Shepard* v. *United States*, 290 U. S. 96, 104) that we conclude that the charge was prejudicially erroneous. * * *

And in any event the probabilities of confusion in the minds of the jurors seem so great, and the charge was so important to the vital issue in the case, that we conclude that prejudicial error was committed. * * *

Nor is it enough for us to conclude that guilt may be deduced from the whole record. Such a course would lead to serious intrusions on the historic functions of the jury under our system of government. See *Bollenbach* v. *United States*, 326 U. S. 607."

See also like action by this Court under like circumstances in *Kraus & Bros.* v. *United States*, 327 U. S. 614, 627.

If the right and duty to make rulings of this character and thus to appraise the fairness of criminal trials are part of the appellate jurisdiction of this Court, then all the more are they part of the appellate jurisdiction of circuit courts of appeals. (*McNabb* v. *United States*, 318 U. S. 332, 340-1.)

(2) At the outset, we challenge as incorrect the statement on pages 3 and 85 of the petitioner's brief that the trial judge's charge "concerning the defense of extortion" was "concededly proper" or "concededly accurate." On the contrary, both at the trial and since we have earnestly argued that it was erroneous, misleading and prejudicial.

(3) As regards the Bayers, the "basic issue" in the case was whether or not the payments had been extorted by Major Radovich by threats to violate his duty, or had been made pursuant to conspiracy to seduce Radovich from fulfilling his duty.

Exception was taken to the failure of the Trial Court to charge adequately as to this basic distinction, which goes to the essence of the case for the defense, and to its refusal of a request designed to clarify the fact and the nature of the distinction (3436, 3400-1).

No denial was made that they had paid him money, but they explained in their statements that this was the result of a "hold-up" and that the payments were actuated by their fear that harm would come to the two young soldiers by reason of Radovich's wrongful tactics, since they had not received sufficient basic training to be sent overseas and were not fit for commando service behind the Japanese lines in Burma.

The Trial Court, in its charge, though it fully outlined the theory of the prosecution, neglected to outline the theory of the defense. The Court merely said (3400-1):

> "Counsel for the defendants Bayer claims that payments of money by defendant Samuel Bayer to defendant Radovich were made as the result of express or implied threats by defendant Radovich to improperly and unfairly include Privates Martin Bayer and Melvin Usdan in the Air Commando Group organized for an immediate dangerous overseas mission, which would be a violation of his duty as an officer."

This was a mere description—and both incomplete and inadequate—of the defendants' claim. It was not a charge as to the extent to which in law it would be a defense or as to the rules of law which should be applied to its component elements.

It will be observed that there was no statement by the Trial Court anywhere in the charge that the jury could find that there would in law be no conspiracy or agreement on the part of the Bayers as charged in the indictment if the jury believed the contention of the defense, namely, that the Bayers were the victims of a shrewd and ruthless plan of extortion. The Judge should have instructed the jury that, if the jury found that the moneys, or the promise to pay the moneys, were obtained by Radovich from the Bayers as the consequence of a scheme of extortion concocted by Radovich, in that event there would not be a voluntary agreement, which is the essence of a conspiracy under United States Code, Title 18, Section 88.

(4) These errors of commission and omission were greatly accentuated by two further errors and by inadequate, confusing and equivocal statements in the Court's further instructions to the jury.

In the first of these errors, the Trial Court told the jury, in practical effect, that the defendants Bayer would be guilty even though the payments of money were involuntary on their part.

Thus the Court said (3401):

> "If you believe from the evidence beyond a reasonable doubt that at any time during the period alleged these three defendants mutually agreed to defraud the United States as alleged in the indictment, and did some act in pursuance of such agreement, they would be guilty irrespective of whether the actual payment of money were made voluntarily or involuntarily."

This instruction, we submit, was grossly misleading and prejudicial.

Certainly, if the payments were made by the Bayers involuntarily and as a result of duress, threats and coercion, the jury should have been instructed that they could find that there was no agreement on the part of the Bayers, inasmuch as their action would then be the result, not of a true meeting of the minds, but of extortion and duress.

The Court, on the contrary, charged in effect that if the defendants Bayer paid money to Radovich, the fact that such payment was made "involuntarily" would constitute no defense if it were made as part of an "agreement". The Court did not call the jury's attention to the vital consideration, which was fundamental in the defense, that if the so-called "agreement" was itself wrung from the Bayers by the threats and coercion, then both it and any payments made pursuant to it were not voluntary and, in consequence, the defense would be established. It was serious error for the Court to fail to include and submit the issue of whether the alleged "agreement" which accompanied or preceded the payment of the money was itself made voluntarily or involuntarily on the part of the Bayers.

In other words, to confine, as did the Court, the issue of voluntary or involuntary action to the mere payment of the money, without also extending it to include the matter of the "agreement" alleged to have accompanied or antedated the payment of the money, was basic and prejudicial error.

(5) In the second of these errors the Court used language which a jury of laymen could easily understand as instructing them to find the defendants Bayer guilty, even though the jury should find that the payments made by them were the result of coercion and extortion.

The Court said (3403):

> "However, in your consideration of this phase of the case, I charge you that the matter of whether or not the payments were made at the suggestion of Samuel Bayer or upon the demand of Radovich, or whether the payments were made cheerfully or grudgingly, or whether or not they were greater than Samuel Bayer expected, are immaterial if you are satisfied beyond a reasonable doubt that the payments were made by and in the course of the agreement of the defendants."

The foregoing instruction was highly misleading and prejudicial.

It could be construed as an instruction to find the defendants Bayer guilty, even though the so-called "agreement" and their payments under it were the consequence of the menacing demands of Radovich, and even though all that the Bayers desired was that Radovich should perform his true duty as to the boys.

(6) The jury evidently sensed this fundamental distinction in the mental and moral quality of the Bayers' acts but felt themselves prevented by the Court's charge from giving that distinction expression in the field of law.

In no other way can their exceptional recommendation of "the highest degree of clemency" be accounted for (3526).

(7) As a result of these confusions, the Circuit Court of Appeals declared and held that the charge (156 Fed. (2d) 964, 967)

> "was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen. Of course, reversal should be ordered if the charge, although technically correct, is so equivocal as to be probably misleading in actual fact."

This declaration was in accord with the principles laid down by this Supreme Court in *McNabb* v. *United States*, 318 U. S. 331, 340-1. It also shows the petitioner's brief to be in error in stating at page 86 that "it is not clear whether reversal of the judgments would have been rested on this ground alone."

## POINT II

**Furthermore, the Circuit Court of Appeals, in the exercise of its supervisory power as to the fairness of criminal trials, also committed no error in holding that "the jury should not have been left with a partial and misleading picture of the facts" concerning the whereabouts and the telephoning of Radovich on November 24, 1943.**

(1) The Circuit Court of Appeals was also clearly correct in holding that, under the circumstances and the importance which the matter had come to have, the Trial Court seriously prejudiced the Bayers in refusing to receive in evidence the record of the Telephone Company, which showed that a telephone call had been made collect by Radovich from Arlington, Virginia, presumably the Pentagon, to the Bayers' office in New York City on November 24, 1943,—precisely as testified by Miss Solomon (3508-19). Exception was duly taken (3519).

The background shows the gravity of this refusal and the serious damage which it occasioned to the defense.

(2) Miss Solomon, Samuel Bayer's secretary, testifying for the defense, stated that Radovich telephoned her one morning in November, 1943 *from Washington* and that she made an appointment for Samuel Bayer and her to meet him at Cavanaugh's Restaurant in New York City (2779-80). He there made threats that the two boys would have to go with him on his Commando mission, and, if lucky, they would come home alive (2784-7). He further stated in this conversation that he had broad authority and if Bayer paid him $5,000 he could have the boys transferred into some other unit (2785-7). The very size of the sum demanded showed its extorsive purpose.

Samuel Bayer said the same thing in his statement (Exh. 8, fols. 3686-9).

On the following day (November 25) returned and demanded "a decision" (2788-9).

The meeting at Cavanaugh's Restaurant took place *on the same day* that Martin Bayer called his father on the telephone from an Army Field in Connecticut and told him that he and his cousin Melvin Usdan were being transferred and were then in transit to Goldsboro, North Carolina (2788).

Melvin Usdan testified that he and Martin Bayer telephoned to their folks on November 24th, telling about their transfer to Goldsboro (2582-7).

The date (November 24th) was thus definitely fixed as the date of the Cavanaugh Restaurant meeting described by Miss Solomon; and the U. S. Attorney, in his summation, referred to Usdan's statement of the date of his telephoning as accurate (3213-14).

(3) The petitioner's brief twice urges that the decision of the Circuit Court of Appeals is based upon a "misconstruction of the United States Attorney's argument" concerning November 24, 1943. (Brief, pp. 30, 79).

This is not the fact. The United States Attorney urged, as the climax of his summation, that since Miss Goertz testified that Radovich telephoned her on November 24th from Goldsboro, North Carolina and that since her testimony was clear and uncontradicted, Radovich could not have phoned to Bayers' office from Washington and met Samuel Bayer and Miss Solomon in New York City, at Cavanaugh's Restaurant on that day. The best evidence is, of course, the reproduction of this portion of his summation. At folio 3213, the United States Attorney said at the close of his summation:

> "Now you will recall that neither Sam Bayer in his statement nor Miss Solomon in her testimony from the stand was able precisely to fix that date of that meeting in Cavanaugh's restaurant, but young Melvin Usdan fixed it precisely. He testified that he and Martin arrived at Goldsboro, North Carolina, on November 25th, and he testified that they had left Westover the day before, November 24th. He testified that the date he left, the 24th, he phoned his family and Martin Bayer phoned his father, Samuel Bayer. So that the date, the date of the telephone call which informed Sam Bayer of the transfer is definitely fixed; and since that is the date that Sam Bayer says he met Radovich at Cavanaugh's, the date of that meeting at Cavanaugh's is fixed definitely and precisely as the 24th of November, 1943.
>
> So, on the very day, November 24th, that Radovich, according to Bayer, is making the first threats here in New York to take these boys unless he got $5,000, Radovich, according to Miss Goertz, is actually in Goldsboro, North Carolina, and is calling Miss Goertz from Goldsboro to Washington and asking her to issue the orders transferring the boys as surplus out of the Air Commando unit and into the Air Transport Command. Her testimony is clear, it is exact, and it is uncontradicted. She fixed November 24th definitely as the date that Radovich called her from Goldsboro and asked her to issue the orders transferring the boys out of the Air Commando group to the Air Transport Command. • • •"

At folio 3216, he added:

> "So that the absurdity of Sam Bayer's claim of extortion is apparent, it is glaring. It is just another of the falsehoods which have characterized his statements continuously since August, 1944."

Thus, it must be clear that the final and basic argument of the United States Attorney was that the defense's version of November 24th was "another falsehood", because Miss Goertz definitely placed Radovich as in Goldsboro on that date. Accordingly, it must also be clear that the Circuit Court of Appeals neither misconstrued nor misstated the summation of the United States Attorney.

(4) On the next morning after this summation and before the charge to the jury, Mr. Keenan (the Bayers' counsel) informed the Court in chambers (3347-52) that, in view of the statements in the U. S. Attorney's summation above referred to, he was checking with the Telephone Company and that the Government must have among the records of the Bayers, which it had subpoenaed, a bill for a collect call from Washington on November 24th. He also stated that he wished to show that Radovich was in New York, as testified to by Miss Solomon, on November 24th and 25th (3352-3).

The prosecution thereupon admitted that it had taken possession of Bayers' records by subpoena, and agreed to look through them for such a bill (3355, 3372-3).

The prosecution, shortly thereafter, produced from its files a *bill* of the Telephone Company to the Bayers, showing a collect call to Bayers' office from Washington on November 24th (3373-4).

Proceedings were then resumed in open court in the presence of the jury (3385). The Court proceeded to tell the jury, at the outset of its charge, that a Telephone Company bill to the Bayers showed a collect call from

Washington to the Bayers on November 24th, but that "the record *does not show from whom the call came*" (3386-7).

It can be seen that what the Court said concerning the bill of the Telephone Company not only failed to connect Radovich with the collect call on November 24th but actually implied the absence of such connection.

(5) The jury retired at 11:45 A. M. and returned for further enlightenment at 3:45 P. M. (3461). At that time, Juror No. 6 asked to hear again the U. S. Attorney's summation concerning "the meetings and messages" on November 24th and 25th (3487-8, 3499). Another juror asked where these facts "can be found in any of the evidence" (3499).

Very evidently the jurors had in mind that part of the U. S. Attorney's summation in which it was argued that Radovich could not have been in New York on November 24th in view of Miss Goertz's testimony that he telephoned to her from Goldsboro, North Carolina, on that date. The Court declined the request to have that portion of the summation read (3488).

Eight minutes later the jury were again in court, requesting references to pertinent parts of the testimony as to that period (3499).

The Court, in response to this request referred the jury to the testimony of Miss Goertz, Miss Solomon and Usdan in reference to the dates, but did not cause any of it to be read. The Court said that the jury must rely on their memories (3500).

The jury thereupon again retired at 4:27 P. M. (3506). After the jury retired, Mr. Cohen, the associate defense counsel for Bayers, stated to the Court that the defense had not known that the U. S. Attorney was to make such an argument about November 24th; that he had made it only at the end of his summation; and that since that time the defense had secured the original record of the Tele-

phone Company's office in the form of an official *sheet*, showing that the call had been made *by Radovich* (3509).

Mr. Cohen asked leave to put this Telephone Company record in evidence, and emphasized that this was "highly important in view of the statements made to the jury by your Honor," especially the statement that the *bill* had not shown from whom the collect call from Washington had come (3509-10). Mr. Cohen also emphasized the significance of the request made by one of the jurors "for further information concerning those dates." He said that the subject had evidently become "of great moment to the jurors" (3509, 3515).

Mr. Cohen then exhibited the record of the Telephone Company in open court (3510). It showed a collect call from Arlington, Virginia, to Bayers' office *by Radovich* ("Captain Ravish") on November 24, 1943 (3509-13). Obviously the call was from the Pentagon or the Washington Airport. In other words, Radovich was in Washington and not in Goldsboro; and obviously Radovich could easily have flown therefrom in an hour or so for a meeting at Cavanaugh's Restaurant later that day.

The Court refused, however, to admit the Telephone Company's record in evidence or to call it to the attention of the jury. The Court said that it came too late (3517-18).

Exception was taken to the ruling of the Court (3519). A motion was also made either for a mistrial or a new trial, which was denied; and exception again taken (3519).

(6) These rulings were serious error and, in view of what had occurred in court and in the minds of the jury concerning the date November 24th, gravely prejudicial. The case was still within the Court's control and was still being considered by the jury.

In view of the importance which the issue of November 24th and 25th had assumed, the jury should not have

been left with a fragmentary and distorted picture of the actual facts. In formulating rules of evidence for federal criminal trials, this Court has never limited itself to strict canons but has been guided "by considerations of justice" (*McNabb* v. *United States*, 318 U. S. 332, 340-1). Far more is involved than a mere matter of discretion, and the cases cited in petitioner's brief (p. 84) are not in point.

If Radovich did call the Bayers from Washington on November 24th and demand an immediate meeting in New York, *it could only have been for extortion.*

He was then in a position to show the Bayers that these two untrained and inexperienced boys were on that very day travelling south from New England under his orders to join his Commando Unit for immediate service in Burma.

For two months previously Radovich had had no communication with the Bayers (3686). He knew the whereabouts of the two boys, because he had inquired of Captain Pepper (624-5). Just before November 24th the special order for the boys' transfer to the Commando Unit had been issued *at the instance of Radovich himself.* To quote the Government's brief (p. 8):

> "On November 22, 1943, at the request of Radovich, a teletype message was sent from Headquarters Army Air Forces in Washington directing the transfer of Melvin and Martin from the Airborne Engineers to the First Air Commando Group at Goldsboro, North Carolina, and ordering them to report not later than November 25 (Govt. Ex. 3, R. 118-121, 1217-1218; R. 256)."

And to quote the Government's brief in the Circuit Court of Appeals (p. 3): This Air Commando Unit was then "scheduled for immediate over-seas duty in the China-Burma-India Theatre."

*Thus, on November 24th Radovich had the trap baited and ready for springing.* If, on that day, he was not in Goldsboro but at the Pentagon Building or the Washington Airport telephoning a demand to meet the Bayers in New York, his purpose was clearly to extort a promise of money for opening the jaws of the trap.

No wonder the jury attached vast importance to the whereabouts of Radovich on November 24th, and to whether he was telephoning in a demand to see the Bayers on that date.

(7) Obviously, the verdict could well have been different, had the jury been allowed to have knowledge of this final crucial fact, disclosed by the Telephone Company's office record, that Radovich was not in Goldsboro on November 24th as testified by Miss Goertz, but was at the Capitol telephoning the Bayers for an immediate appointment, as testified by Miss Solomon and as stated by Samuel Bayer.

This was the very fact which the Trial Court itself had pointedly told the jury several hours earlier was missing from the Telephone Company's bill to the Bayers. It constituted the missing link in the chain of evidence.

Hence, the Circuit Court of Appeals, guided "by considerations of justice" (*McNabb* v. *United States*, 318 U. S. 332, 340-1), was entirely correct in holding that, because of these rulings by the Trial Court, "the ends of justice" would be best served by a new trial. To quote the Circuit Court's opinion (p. 968):

> "How important the matter had become was unmistakably shown by the jury itself. After four hours of deliberation, it returned to ask further instructions, one juror stating that several of them desired to hear again this part of government counsel's summation. And when recalled by the court eight minutes later, another juror had asked for references to pertinent parts of the testimony. Obviously the jury—however erroneously or for whatever

reason — was vitally concerned with the question. While ordinarily a trial judge has a large area of discretion as to the reopening of a case for additional evidence, we think that in view of the importance which this issue had assumed the jury should not have been left with a partial and a misleading picture of the facts."

The consequences of the conviction in this case were altogether too serious to be at the hazard of merely technical considerations,—particularly as the Trial Judge himself, after the evidence had been closed and after the summations had occurred, had appreciated the vital importance which the District Attorney's summation had caused to be attached to the whereabouts of Radovich on November 24 and to the silent but conclusive evidence which the telephone records would furnish. In consequence, the Trial Judge introduced his charge by informing the jury that there had come before him since the summations a telephone bill which recorded a collect charge to the Bayers from Washington on November 24; but he emasculated its significance by telling the jury that it did not identify the telephoner, an identification which was soon supplied by the official record of the call itself (3386-7).

We respectfully submit that the Trial Judge having himself invited the jury to a partial glimpse of this crucial fact, should have made available to the jury the full truth about it in the interest of justice.

## POINT III

**The record on the Bayers' motion for a new trial also establishes and emphasizes the injustice of the exclusion of the decisive record of the Telephone Company as to November 24, 1943.**

**That record demonstrates that there was no call by Radovich from Goldsboro, North Carolina, on November 24; that Radovich actually was in New York on November 24 and 25; and that Miss Solomon and the Bayers were correct as to the events of those days.**

(1) After the verdict and sentence, the Bayers moved for a new trial. They again presented the Telephone Company's record of Radovich's collect call to the Bayers from the Capitol area on November 24. They offered it, together with other new evidence related to it and to November 24 and 25, as newly discovered evidence presented pursuant to Criminal Rule 33.

Judge Barksdale, however, adhered to his ruling on the subject at the trial and denied the motion.

The record on that motion was thereupon printed and filed with the Circuit Court of Appeals at the time of the argument of the appeals from the judgment of conviction.

Printed copies thereof were thereafter certified to this Court by the Clerk of the Circuit Court of Appeals, with his certificate that "the attached were used on the argument of the above-entitled case in this Court."

The petitioner's brief treats these papers thus certified as part of the Record before this Court, for at pages 81 to 84 inclusive it refers to them, cites statements at various pages therein, and seeks to support its position thereby. See, particularly, the footnote to page 81 of the petitioner's brief, asserting that a certified copy of these

papers, which it refers to as "this document," "has been filed with the Clerk" of this Court.

The conclusion of the Circuit Court of Appeals for a new trial is strongly confirmed by the affidavits and evidence thus presented on this motion for a new trial.

(2) Miss Solomon's affidavit therein explained that after the United States Attorney's summation she went at once to the office of the Telephone Company and obtained the official record of the long distance telephone call made by Radovich on November 24th from Arlington, presumably either the Pentagon or the Washington Airport (p. 45). A copy is annexed to the motion papers as "Exhibit A" (p. 31). This call was made collect to the Bayers' telephone number in New York City at 11:44 A. M. by Radovich ("Capt. Ravish"). Thus, the official record is proof conclusive that Miss Solomon's testimony was accurate, and that Miss Goertz erred in testifying that Radovich telephoned to her from Goldsboro at that time (pp. 45-6).

The testimony of Miss Goertz in the court-martial proceeding against Radovich is also set forth in the motion papers (pp. 32-39). It contains no reference whatever to the date of November 24th. Her testimony therein concerning the dates is entirely different from her testimony at the trial (766-7). The United States Attorney had made her testimony, which he said was uncontradicted, the climax of his argument that Radovich could not have been in New York on November 24th (3213-15). The jurors' questions indicated that they had Miss Goertz's testimony and the prosecutor's summation on that point in their minds.

Also, attached to those motion papers, is the official flight records of Radovich in his plane from November 22, 1943, to November 26, 1943 (both dates inclusive) (p. 48). They show that on November 24 Radovich was in Washington at 9.30 a.m., in ample time to send the collect telephone call to the Bayers later that morning as testified by

Miss Solomon. They also show that, as testified by Miss Solomon and as asserted in the Bayers' statements, he was again in New York on November 25, 1943, the date when they finally promised to pay him $5,000. These flight records prove conclusively that he could not have been in Goldsboro, North Carolina, at any time on November 24. Accompanying these flight records there is a statement by Radovich himself that it is possible that he "caught a lift" by another plane to New York and back to Washington in the course of November 24; that he remembered last seeing the Bayers in New York on the day "after the luncheon at Cavanaugh's"; that he also remembered being taken by taxicab to LaGuardia Airport; and that he is quite sure he was not in Goldsboro on November 24 (pp. 47-8).

Furthermore, the record on the motion for a new trial demolishes completely the petitioner's argument that because the orders for the transfer of the two boys out of Radovich's Burma unit were initiated in an official letter dated November 25 (363), therefore Radovich could not have been in New York on November 24 and 25 to extort $5,000 from the Bayers as the price for authorizing such transfer. Actually, the date of that letter proves just the opposite, because Radovich did not extort the final promise of the Bayers to pay the $5,000 until November 25. The moment he had their promise, he caused a preliminary letter for the transfer to be issued. He received the money in Goldsboro on November 27 (pp. 21, 43 of motion papers and folios 3838-9 of Record). The official Special Order for the transfer is dated November 29, 1943 (362-3).

(3) The petitioner's brief contains a twice-repeated assertion that the decision of the Circuit Court of Appeals puts "a premium on lawyers' afterthoughts" (pp. 31, 84).

There is no justification or warrant for that statement. Miss Solomon's affidavit shows that she desired to vindi-

cate the truthfulness of her testimony and that, therefore, after the summation of the United States Attorney she went to the office of the Telephone Company and promptly obtained the Company's record of Radovich's long distance call. That record fully vindicated her. The circumstances are all set forth in her affidavit on the motion for a new trial (pp. 44-6).

Surely, this was not a "lawyer's afterthought". It was occasioned by the statements of the United States Attorney at the close of his summation, which was followed by the immediate check of the Telephone Company's records (3508-10).

(4) The petitioner's brief urges, with seeming seriousness, that Radovich's telephone call from Washington on November 24th was not a "matter of importance" (Brief, pp. 31, 81). To the precise opposite, it was a matter of vital importance and relevancy upon the issue of extortion. The jury's questions and remarks indicated that they appreciated this fact and were gravely concerned with it. The identical logic which induced the Trial Court to receive in evidence the Telephone Company *bill*, after reopening the case for that purpose, should have led it to receive the Telephone Company *record* itself. The bill, as the Trial Court said, did not show from whom the Washington collect call came. The slip supplied the "missing link". It furnished the very proof which the Trial Court itself had stated to the jury was lacking (3386-7).

In the light of the questions and remarks of the jurors, this issue went to the crux of the case. The jury was vitally concerned with it. If the jury had had this "missing link" their verdict, the very wording of which shows the extreme doubt in their minds, might well have been different.

## POINT IV

**The Trial Court committed seriously prejudicial error in not charging the jury that gifts made by the Bayers to officers other than Radovich were not evidence of conspiracy with Radovich, and that there was no evidence of any conspirac o defraud the United State of the honest services of such other officers.**

**The Court committed further prejudicial error in charging, in effect, the very opposite.**

(1) The only conspiracy charged in the indictment was between the Bayers, Radovich and "divers persons" whose names were unknown (23).

The case was tried by the prosecution on the theory that the charge at issue was a conspiracy by the Bayers to defraud the United States of the service of Radovich,—not of any other officer.

The prosecution had called as witnesses a number of Army officers who testified to gifts or entertainment by the Bayers, but all of whom categorically denied (without contradiction) that no effort had been made to influence them to take improper action as regards the two boys or otherwise (429, 432-4, 540, 544-5, 867, 1136, 1149).

Hence, at the close of the trial, it was vitally important that the jury should be instructed that the indictment's charge of a conspiracy to seduce officers other than Radovich had failed of proof; that there was no evidence that the Bayers either with or without Radovich had conspired to corrupt the other officers; that no improper action by other officers as regards the two boys had been shown; and that the gifts to or entertainment of other officers were not proof of the substantive issue ultimately submitted to the jury.

(2) The presence, however, of this mass of testimony, which had no legitimate bearing upon the basic factual and legal issue ultimately submitted to the jury, could readily be misunderstood and misapplied by the jury. It was dangerously prejudicial to the Bayers.

Even the petitioner's brief herein concedes (p. 91) that the Trial Court never expressly stated to the jury "that evidence of the dealings with other officers was limited to motive and intent." (assuming that it was relevant at the end of the trial even for that limited purpose).

On the contrary, the Trial Judge gave a charge which could be well (if not necessarily) understood by the jury as authorizing them to consider this evidence not only on the substantive issue but also as proving (what was not even alleged in the indictment) that these other officers who had testified as witnesses "were guilty of participation in the conspiracy here alleged". That charge read as follows (3411):

> "Whether these persons, or any of them, or any of the persons who have testified as witnesses, were guilty of participation in the conspiracy here alleged, is of no concern to you except insofar as their activities have a bearing on the guilt or innocence of the defendants of the offense charged, and as such participation may bear on the weight or credibility of their evidence."

We emphasize again that the indictment did not charge that anyone "participated" in the alleged conspiracy other than the Bayers and Radovich except that it also included "divers other persons whose names are to the Grand Jury unknown" (23). Other "officers of the United States Army" were referred to in the indictment; but only as the objects of the alleged conspiracy and not at all as participants in it. Not only is it not alleged that the names of such other officers were unknown, but they are actually identified by the posts with which they were connected; and, presumably, they had testified before the Grand Jury (24, 25).

Hence, the foregoing charge to the jury was, we submit, grossly prejudicial error because it authorized the jury to find, on the part of such other officers who had testified, a "participation in the conspiracy here alleged" notwithstanding that there was no such "participation" charged in the indictment, and notwithstanding that every such officer had denied such participation, and notwithstanding that there was no evidence of any such participation. This charge could not possibly have included the Bayers or Radovich among the "witnesses" referred to, because they had not testified.

(3) This charge was, we also submit, grossly erroneous because it told the jury that if they found "participation in the conspiracy here alleged" by "any of the persons who testified as witnesses," such participation would "have a bearing on the guilt or innocence of the defendants of the offense charged."

In other words, the Trial Judge in effect told the jury that they could find that any or all of the half dozen Army officers who testified for the prosecution and who in one form or another had been entertained or given gifts by either of the Bayers "were guilty of participation in the conspiracy here alleged," and that such a finding would "have a bearing on the guilt or innocence of the defendants of the offense charged."

(4) Furthermore, counsel for the Bayers unsuccessfully asked the Trial Judge in various forms to charge the jury that there was no evidence that they had engaged in unlawful conduct with other officers, and that evidence of gratuities to other officers "would not in itself constitute any evidence of guilt on the part of" either of the Bayers (3299-3311, Requests 48 and 56).

(5) Nor were these prejudicial errors in the main charge cured in any way by the Judge's subsequent re-

sponse to the following question by a juror on the occasion of one of the jury's several returns in search of further clarity (3502):

> "Another juror: I don't know whether this is apropos, but in the minds of some of the jurors there appears to be a little confusion regarding the guilt of others in connection with the three that are now on trial, and it seems to me perhaps it might be clarified by the Judge, perhaps, to clear their minds of the idea that—I mean, we seem to be a little confused."

To this the Judge replied (3504):

> "The only persons whom you are trying in this case are the three defendants, Elias Bayer, Samuel Bayer and the defendant Radovich, and the only persons as to whom your verdict can in any wise affect, and they are the only persons whose guilt or innocence you should consider. Now there are other persons who have been mentioned in the testimony, persons who have testified here about their own activity in connection with the activities of these defendants. Now as to whether those persons, or any of them, are guilty or innocent of anything, should not concern you at all, they are not here on trial, with this exception: you may consider that for what bearing their activities have upon the actions of the defendants who are upon trial and for what effect in your judgment the activities of these other persons might have upon the testimony which they have given, that is whether it is true or not, whether it is all true or part true. But as to whether they are guilty, whether any person other than those named in this indictment are guilty of any offense or not, is not a matter which should concern you at all. You are charged with the duty of trying the persons named in the indictment and those only."

This subsequent instruction, we respectfully submit, merely repeated and emphasized the preceding errors, and certainly surrounded with confusion and obscurity what should have been made clear and definite.

Here again there was no statement that the actions of the Bayers as to other officers could be considered, if at all, only on motive and intent. On the contrary, the jury was told that they could pass on an issue not even presented by the indictment, to wit, as to whether any of the other testifying officers were "guilty or innocent of anything," and, indeed, that they should "consider *that*," to wit, the guilt or innocence of such officers, "for what bearing their activities may have upon the actions of the defendants who are upon trial," and also for what bearing it might have upon the credibility of the "testimony which they have given" (3505).

To this supplemental charge the Bayers excepted (3506-7).

(6) Thus, on these vital issues, precisely as on those discussed in Point I hereof, the charge was, we submit, erroneous, equivocal, and altogether capable of confusing and misleading a jury of laymen.

## POINT V

**The Trial Court also permitted and committed prejudicial error as regards the so-called "alias" and the alternative name "Boyarsky", repeatedly assigned to the Bayers throughout the indictment.**

**As a prelude to the new trial, these invidious repetitions should be stricken out.**

The indictment names these defendants as (23):

> "Samuel Bayer, alias Samuel Boyarsky,
> Elias Bayer, alias Elias Boyarsky"

The same "alias" is repeated in the indictment thereafter nearly every time the defendants Bayer are mentioned,—even in the overt acts,—a total of *twelve repetitions.*

Each repetition of "alias" is coupled with the word "Boyarsky", strongly suggestive of a racial and foreign origin not at all connoted by the name "Bayer".

This extraordinary and wholly unnecessary drumming in the indictment on "alias" and on "Boyarsky" was indefensible; and, in view of the time and the nature of the accusation, was prone to excite prejudice, animus and even intolerance. It was highly dangerous and unfair to the Bayers.

There was not the slightest justification for such poisoning of the stream of justice at its source. The Bayers had no criminal record. They were not using two names. There was no question as to their identity. Their name was "Bayer". By that name alone they were known throughout all the events involved and by all the witnesses who testified. There was no evidence whatever of any alias or of the invidious implications which that word conveys to the common mind.

At the close of the charge a request was made that the jury be instructed to disregard these prejudicial words in the indictment (3440). The request was made *after* the jury had received the main charge and had retired (3423), for the Court had directed that counsel state their objections after the jury had left the courtroom (3423). Accordingly the jury was called back; and the following transpired (3455):

> "The Court: Ladies and gentlemen, I have only one matter to add: It has been called to my attention that the indictment as to the two defendants Bayer, refers to them as Samuel and Elias Bayer, alias Samuel Boyarsky and Elias Boyarsky. I charge you that there is no inference to be drawn by you from that statement in the indictment. The literal meaning of the word 'alias' is 'other or otherwise', and carries no inference. However, in common acceptation of the word it sometimes is considered to refer to a person who has more than one name for improper purposes. There is no proof about that, and I

charge you to not infer anything of an evil nature from the fact. I do not think on the other hand that you should infer any improper conduct on the part of the Government by so naming them in the indictment, because it appears somewhere from their statements, I think, that the name Boyarsky was their Russian name before they became Americanized. So I direct you to disregard the alias reference entirely. • • •

"Mr. Keenan: I take exception, your Honor, to the manner in which you charged on the alias.

"The Court: Yes, sir.

"Mr. Keenan: As being in itself inflammatory.

"The Court: You may note an exception.

"All right. If during your deliberations you should desire any further elucidation on the matter of the law and its application to the facts, I will endeavor to give it to you upon request.

"In view of the exception just made by counsel, I wish to state that I certainly meant nothing inflammatory or derogatory to any one person whatsoever, and I charge you that I certainly meant none and I don't believe you received any. All right."

The petitioner's brief now says (pp. 91, 92) that had not the Bayers' counsel thus brought up the matter of "alias" and "Boyarsky", the jury would never have learned of the presence of those words in the indictment.

The indictment was part of the record of the trial. The "alias" and the "Boyarsky" are carried into the docket (7) and are in the title with which the testimony begins (67). There is no justification for saying that the jury had not become aware of these invidious terms in the indictment. Obviously, the consciousness of that awareness was what prompted the Bayers' counsel to request the instruction above mentioned. The Trial Court itself treated the matter as one before the jury. It did not say to counsel that the references in the indictment had not come to the notice of the jury and could not come to their notice.

Nor was there anything in the statements of the Bayers to justify the Court's charge "that the name Boyarsky was their Russian name before they became Americanized".

## CONCLUSION

**The decree for a new trial in the interest of "the ends of justice" should be affirmed; and the references in the indictment to "alias" and "Boyarsky" should be stricken out.**

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 606.

THE UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

## BRIEF FOR THE RESPONDENT WALTER V. RADOVICH

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March 25, 1947.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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## BRIEF FOR THE RESPONDENT WALTER V. RADOVICH

### OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 1467-1476) is reported at 156 F. (2d) 964.

### JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 14, 1946 (R. 1476). On September 13, by order of the Chief Justice, the Government's time to file a petition for a writ of certiorari was extended to October 12, 1946 (R. 1478). The petition for a writ of certiorari was filed October 11, 1946, and was granted December 9, 1946 (R. 1479). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

## QUESTIONS PRESENTED

(1) Whether a written confession taken from the respondent, an army officer, by a Special Agent of the Federal Bureau of Investigation, was rendered inadmissible by reason of the fact that it was based upon, the outgrowth of, and substantially the same as an earlier written statement taken from the respondent by the same agent while the respondent was being, and after he had been for approximately four weeks, unlawfully held in an army psychopathic ward, without counsel and under circumstances of great hardship and oppression.

(2) Whether the conviction of the respondent, an army officer, by a court-martial upon charges alleging that he was guilty of conduct unbecoming an officer and gentleman and conduct to the prejudice of good order and military discipline, in that he had accepted from two named individuals the sum of $7,000 for the purpose of effecting the transfer of two named soldiers to certain organizations not alerted or assigned for overseas movement, was a bar to the prosecution of the respondent in the District Court, upon an indictment charging that he conspired with the same two named individuals to defraud the United States of his honest services, and specifically charging that such conspiracy contemplated the acceptance by the respondent of $7,000 from the two named individuals for transferring the same two soldiers into units of the army which were not about to be sent out of the continental United States.

## STATUTES INVOLVED

The pertinent statutes involved are set out in Appendix A to the petitioner's brief, pages 96-104.

## STATEMENT OF FACTS

The respondent, Major Radovich, and two co-defendants, Samuel Bayer and Elias Bayer, were tried and convicted upon an indictment alleging that they conspired to defraud the United States of the faithful services of Radovich, an

officer of the United States Army, and specifically alleging that the conspiracy contemplated that Samuel Bayer and Elias Bayer would pay to Radovich the sum of $7,000, to induce Radovich in violation of his duty to transfer Privates Martin Bayer and Melvin Usdan to certain units of the army which were not to be sent out of the continental United States (R. 8).

## I.

## THE CONFESSION

The government offered in evidence against Radovich a written confession made by him to Special Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945. This statement, which was marked "Government's Exhibit 25" (R. 1396) and was admitted in evidence over the objection and exception of the respondent (R. 659), was the basis of the case against Radovich. The statement was in the handwriting of Flynn and was initialed and signed by Radovich. According to the statement, Radovich told Flynn that in consideration of $7,000 paid to him by Samuel and Elias Bayer during the summer and fall of 1943, while Radovich was an officer in the Army Air Corps, he had transferred Privates Martin Bayer and Melvin Usdan to certain units of the United States Army which were not to be sent out of the continental United States.

In the absence of the jury the Court heard testimony bearing upon the admissibility of the respondent's confession (R. 533-660). The statement having been admitted in evidence, the testimony heard by the Court in the absence of the jury was in large part repeated before the jury (R. 718-793).

The record disclosed the following facts respecting the confession taken from Major Radovich by Special Agent Flynn on March 15 and 17, 1945:

Special Agent Flynn testified that he took the confession from Radovich at the office of the Federal Bureau of Investigation at New York City; that Radovich, who at this time was stationed at Mitchel Field, Long Island, New

York,[1] came to Flynn's office at the request of Flynn; that before Radovich made the statement Flynn warned him that it might be used against him[2] (R. 536-538; 672-674).

Flynn testified (R. 538-540; 677 et seq.) that before taking the statement on March 15 and 17, 1945, he produced and showed to Radovich another written confession taken from Radovich by him on September 5 or 6, 1944. The statement of September 5 or 6, 1944, like that of March 15-17, was in the handwriting of Flynn and signed by Major Radovich (R. 539, 677). The March 15-17 statement on its face purported to be a "supplementary" statement (R. 1306), and Flynn admitted that it was "basically" the same as the previous statement taken on September 5 or 6, 1944 (R. 539-540; 677). He said that the March statement "went into more detail", that "Major Radovich had told me many more instances or circumstances which I thought should go into the statement, and I decided to put it in and make it one complete statement" (R. 677). He said that before taking the supplementary statement, he read over the previous one and handed it to Radovich, who also read it over; that the first statement was on Flynn's desk when he wrote the second one; that he produced the first statement at the suggestion of Radovich (R. 538-540; 677). Flynn admitted that he included in the supplementary statement, not all that Radovich told him, but only "most of what I considered important", although he said that he

[1] Major Radovich at this time was in a status of military arrest, and was under "administrative restriction", which meant that he was barred from the Officers Club and required to "secure the personal permission of the Base Commanding Officer prior to his departure from the limits of the Air Base at any time" (R. 767-768).

[2] In this connection, the confession contains only the statement by Major Radovich "I know that anything I say may be used in a criminal proceeding" (R. 1306). Flynn testified that he "got ahead" of himself when he was writing the confession, and left out the statement that it might be used against Radovich; that while he recognized the substantial distinction between the two phrases, his omission was not significant and specifically did not mean that he had assured Major Radovich that Radovich would not be indicted (R. 673-674).

did not leave anything out "with any design" (R. 673; 675-676).

A request by counsel for Radovich that the District Attorney produce the first written statement was denied by the District Attorney and by the Court, the ground of the Court's denial being that examination of the two statements by the Court revealed that there was no material conflict between them (R. 551, 552; 681; 901).

The evidence concerning the circumstances leading up to and surrounding the making of the two confessions by Major Radovich showed:

Major Radovich, who was then 24 years old (R. 721), returned to the United States from Burma in the late spring of 1944 (R. 720, 746, 752). While in Burma he had served with great gallantry and distinction as an officer of the First Air Commando Group (R. 746-752). He was awarded the Air Medal,[3] Distinguished Flying Cross,[4] the

[3] The citation for the Air Medal, dated 24 April, 1944, was (R. 746-747):

Citation: Served as pilot. For meritorious achievement in aerial flight displayed on a bombing mission in Northern Burma on 13 March, 1944, during which exposure to enemy fire was probable and expected. The mission was extremely dangerous due to heavy ground fire encountered and hazardous flying due to surrounding mountainous terrain. Enemy storage installations, trucks and barracks area were definitely destroyed.

Destruction of this great amount of enemy material seriously hampered the operations of the enemy in this sector and materially aided the allied effort in this theatre.

The successful accomplishment of this mission by these officers with a display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects great credit upon themselves and upon the Army Air Forces of the United States.

[4] The citation for the Distinguished Flying Cross was (R. 747):

For extraordinary achievement in aerial flight by participating in more than 50 flights over the combat areas of Northern Burma, where exposure to enemy fire was probable and expected. These flights performed in direct support of a new type of air-ground operations were largely instrumental in the successful operations of the (deleted) air commando group in

Oak Leaf Cluster to the Distinguished Flying Cross (meaning a second D.F.C.),[5] a Presidential Unit Citation,[6] and

this theatre. Close coordination was maintained between the bomber, fighter, glider, transport and light plane sections and the ground crew operations of the British, Indian, Chinese and American armies, when critically needed troops and supplies were flown in with both gliders and transports to the vital areas. This close liaison between air and ground operations was primarily responsible for our successes in the Burma area, with destruction of large numbers of enemy aircraft and critical damage to his installations, material and equipment, with a considerable loss of personnel which has materially reduced his effectiveness and ability to conduct any offensive action against the Allied forces.

These officers and enlisted men have displayed a devotion to duty and a degree of efficiency above and beyond that normally expected, thereby reflecting great credit upon themselves and upon the air forces of the Allied Nations.

Pilot from 26 December, 1943, to 25 April, 1944. Home address, 912 East 87th Street, Los Angeles, California.

[5] The citation for the Oak Leaf Cluster to the Distinguished Flying Cross, dated 25 June, 1944, was (R. 749):

For extraordinary achievement in aerial flight displayed on 8 March, 1944. Major Radovich was a member of a 21-plane fighter sweep over the enemy air field at Anasean, Burma, several hundred miles from home base. His plane was loaded with a large auxiliary fuel tank and one 500-pound bomb.

With complete disregard for the enemy antiaircraft and ground fire, he successfully bombed the objective and then joined the strafing pattern. In the successful accomplishment of this mission they destroyed 35 enemy planes, strafed ground personnel, trucks and antiaircraft positions, set the gasoline dumps afire and all buildings surrounding the field were completely burned.

This display of a devotion to duty and a degree of efficiency above and beyond that normally expected reflects great credit upon Major Radovich and upon the Army Air Forces of the United States.

Home address, 912 East 87th Street, Los Angeles, California.

[6] The citation for the Presidential Unit Citation, dated 9 April, 1945, was (R. 750):

The First Air Commando Group is cited for outstanding performance of duty in action during the period 1 December 1943 to 20 May 1944. The First Air Commando Group was given a mission so unusual that few individuals outside the organization considered it feasible. Lacking proper military facilities for the assembling of their equipment and deprived

the British Distinguished Flying Cross.[7]

On August 3, 1944, while stationed at the Santa Monica Redistribution Center, Santa Monica, California, not far from his home in Los Angeles (R. 721-728), he was ordered to report to Mitchel Field, New York (R. 733-734). He proceeded to Mitchel Field as ordered. Upon his arrival on August 9, 1944, he was immediately placed under arrest and locked up in the psychopathic or "nut" ward in the station hospital at the field (R. 564, 573, 591, 733, 766, 782). His uniform was taken from him and locked up and for clothes he was given only hospital pajamas without a string to tie up the pants, and a bathrobe without a cord (R. 561, 566, 732, 736). He was deprived of his razor, tooth brush,

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for security reasons of native labor, officers and enlisted men assembled and tested the airplanes and equipment of the Group in record time. Fighter Pilots loaded bombs and refueled their own airplanes while enlisted personnel unloaded strings of box cars for future operations.

The task performed by the group normally called for strength of five times their personnel. The comparatively small assault force of the group flew as many as 682 missions in one month, and on one mission, on 8 March, 1944, destroyed 20 per cent of the known Japanese aircraft in Burma. The liaison section of the group evacuated as many as 700 sick and wounded in less than three weeks.

On D-Day the group displayed exceptional team work, destroyed the enemy positions, carried assault troops and engineers behind the enemy lines and supplied them until their mission had been accomplished.

This display of group heroesim and devotion to duty reflects highest credit on the First Air Commando Group and the military forces of the United States.

[7] The citation for the British Distinguished Service Cross was (R. 751):

This officer showed the highest courage on D.1 Day when he volunteered to fly in daylight in an undefended light plane across 180 miles of enemy-occupied Burma to Broadway, where a number of our troops had been wounded and where we appeared to have lost communication. He carried out this task successfully, delivered an operator with a radio set and ciphers and brought out a wounded man. Throughout, Major Radovich displayed complete disregard for his own personal safety and great devotion to duty.

toilet articles, money, shoes, pencils, and all personal belongings (R. 561 et seq., 736). He was placed in a small room or cell measuring approximately 9 x 6 feet, with rough concrete walls and floor, and a guard watched him constantly night and day, even when he went to the bathroom (R. 561-566, 738, 782-787). The other inmates of the ward were mental cases, drug addicts and alcoholics (R. 564, 733, 782). The ward was entered through a heavy steel door similar to that used in jails which was kept locked, and the windows of the ward, including that of the respondent's room, were covered with heavy steel grille work which was also locked (R. 562 et seq., 734 et seq., 782-787). The respondent's food was served on a tin platter, with no knife, and later he was deprived of both knife and fork, and required to eat all of his food, including his meat, with a spoon (R. 565, 737). The experienced hospital attendant in charge of the respondent testified without contradiction that he observed no abnormal conduct on the part of the respondent and saw nothing that indicated that the respondent needed restraint (R. 568; see R. 574). No medical treatment of any kind was given to or prescribed for the respondent (R. 742). The respondent was held in the psychopathic ward from August 9, 1944 to September 16, 1944 (R. 591-593, 766, 767). About two weeks after his incarceration began he was permitted a brief exercise period each day, in the company of an armed guard (R. 573, 781).

The uncontradicted evidence (R. 567-570; 576-577; 737-741; 783-787) showed that Major Radovich was held *incommunicado* in the psychopathic or "nut" ward. He complained frequently about this (R. 576, 738; 783-785; 789). Specifically, the record showed that Radovich "was fretful and crying, and he was complaining about he wanted to use the telephone to get in touch with the outside world and of course, that could not be granted to him" (R. 568-569). "He wanted to get in touch with his wife and see if he could talk to her, and, of course, that privilege was denied. * * * he said he wanted to get in touch with an

attorney, but he wasn't allowed to use the telephone" (R. 569). "He wanted to get in touch with some friends, he said, maybe on the field * * * he wanted to make a telephone call to get in touch with an attorney or his wife and baby and see what he could do" (R. 738-739). "The orders were the Major could not make any calls and he couldn't visit and have visitors" (R. 576).* After some two weeks of incarceration the respondent was permitted to make telephone calls to persons "on the post" after getting permission from the military authorities (R. 569-570; 576). All of his mail was censored "in and out" (R. 568).

The chief investigator in the office of the Provost Marshall at Mitchel Field was the only guard assigned to exercise Major Radovich (R. 780, 783). He testified that he received this assignment about two weeks after Major Radovich was incarcerated in the "nut" ward (R. 781), and that at this time Radovich "was complaining about being confined and he was complaining about not having counsel assigned to him to look out for his interests" (R. 576). The investigator further testified (R. 783-785):

> Q. When you came into contact in the relationship just stated with Major Radovich, will you tell me whether he was taking his confinement there contentedly or complainingly, or how? A. Well, he was complaining about his confinement and he wanted to get an attorney and he wanted to be released, and he made quite a strong complaint. I submitted that complaint to Major Anthony, and he took the necessary steps, and some time later I believe the Major was released.
>
> * * * * *
>
> Q. You do not know anything about his getting an attorney as a result of his complaint to you and you to Major Anthony? A. Yes, sir, a Mr. Bradspies went over to see him and I don't know whether Mr. Bradspies represented him. I don't believe he did. He just went over to talk to him. I don't believe he was the attorney.
>
> * * * * *

* The Provost Marshal (R. 781)

> Major Radovich knew Mr. Bradspies and mentioned his name, and wanted to know whether or not Mr. Bradspies would represent him, and I gave that information to Major Anthony that way.
>
> Q. What was the rank of Mr. Bradspies? A. He was a warrant officer, junior grade.
>
> Q. So far as you know, then, during the time of your visits there, which I assume continued until Major Radovich was released from confinement in that hospital, Major Radovich, so far as you saw or knew, had no assistance of counsel? A. No, I don't believe he did, no, sir.

Although Major Radovich was confined in the psychopathic ward "pending trial by general court-martial for violation of the 95th and 96th Articles of War" (R. 591, 766) on charges growing out of his transactions with Samuel Bayer and Elias Bayer (R. 597), charges were not served upon him as required by the 70th Article of War, (10 U.S.C.A. 1542) nor was he taken before a committing magistrate for arraignment on any charges preferred against him in the civil courts (R. 805). The military charges were finally served upon the respondent on May 30, 1945 (R. 587, 588). To account for the delay, the official report of the Staff Judge Advocate, made pursuant to the 70th Article of War (10 U.S.C.A. 1542), stated (R. 606):

> Delay. The charges were preferred on 10 August 1944. Investigation completed about 24 August 1944 and received at this headquarters 25 August 1944.
>
> The delay referring them (charges) for trial was at the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused.

The respondent was being held under the circumstances described above when he made the first confession to Agent Flynn on September 5 or 6, 1944. Flynn testified that he and another agent were taken to the respondent's place of confinement in the psychopathic ward by Lieutenant Colonel

Miller, the Assistant Staff Judge Advocate, whose office had referred the case to the United States Attorney (R. 541, 546); that Colonel Miller told the respondent that Flynn and his companion "were special agents of the Federal Bureau of Investigation, that we wanted to talk to him about this matter, and that it was up to him whether he wanted to tell us anything"; that Flynn told the respondent "that the Federal Bureau of Investigation was conducting an investigation into this matter and that we had come to him to get his story as to just what happened", and that Radovich then told the story without hesitation (R. 542, 543).

The record showed that Radovich was released from the psychopathic ward on September 16, 1944 (R. 591-593, 766, 767); that from September 16, 1944, to January 2, 1945, he was restricted to the confines of Mitchel Field; and that from January 2, 1945, to and including the date of the supplementary statement to Agent Flynn on March 15-17, 1945, he was under "administrative restraint", which meant that he could not leave Mitchel Field without the personal permission of the base commander (R. 595, 768, 791).

Flynn testified that when he wanted to see Radovich at Flynn's office he would "usually" call Lieutenant Colonel Miller, and "ask him to have Radovich at the office on such and such a date" (R. 537).[9]

The evidence taken in the absence of the jury also showed that on August 21, 1944, while confined in the psychopathic ward, Radovich tendered his resignation from the Army of the United States, for the good of the service (R. 596). This resignation was not forwarded to the Adjutant General by the respondent's commanding officer until January 27, 1945 (R. 597). The War Department refused to accept the resignation and ordered that the respondent be tried

[9] It may be noted that Major Radovich was ordered by the military authorities to report to the United States Attorney for the Southern District of New York "for temporary duty" not later than 10:30 o'clock on the morning of his trial in the District Court (R. 28, 42).

by court-martial (R. 600). On March 8, 1945, the respondent's commanding officer at Mitchel Field was advised of this action by the War Department, and ordered to inform Radovich (R. 600). The respondent, however, was not informed until after March 20, 1945 (R. 600, 601), *several days subsequent to his "supplementary" statement to Agent Flynn on* March 15-17. In forwarding the respondent's resignation to the War Department, under date of January 27, 1945, the respondent's commanding officer at Mitchel Field stated "The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe money" (R. 597).

At the hearing in the absence of the jury, Assistant United States Attorney Edward C. Wallace testified (R. 607 et seq.) that he talked to Major Radovich on several occasions prior to March 15, 1945, when Flynn began the taking of the second confession; that Radovich was served with a subpoena directing him to appear in Mr. Wallace's office for these talks; that the first talk occurred on or about November 10, 1944; that Agent Flynn was usually present at the talks. Mr. Wallace further testified that when he talked to Radovich he, Radovich, was justified in assuming that he was not going to be indicted with the Bayer brothers, since it was not the policy of the United States Attorney to proceed against military personnel who were subject to military discipline. It was admitted by the United States Attorney that Major Radovich was not named in the original indictment returned against Samuel Bayer and Elias Bayer in March 1945, but that the case was resubmitted to the grand jury and a second indictment was obtained which included Major Radovich; and that the reason for the resubmission of the matter to the grand jury was the refusal of Major Radovich, through counsel, to testify or to make any further statements to the United States Attorney (R. 613, 614, 619).

Upon the foregoing evidence, the District Court ruled as a matter of law that the "supplementary" confession made by the respondent to Agent Flynn on March 15-17, 1945 was voluntary and admissible (R. 655 et seq.) The respondent duly excepted (R. 659, 660). The District Court instructed the jury as follows with respect to the confession (R. 1140):

> Upon evidence which I heard during your absence I concluded, and held as a matter of law, that each of the statements of the defendants[10] which has been introduced in evidence was admissible because not coerced nor induced by promises, and purely for your consideration of the guilt or innocence of the person making the statement.
>
> I have also admitted for your consideration testimony in regard to the circumstances existing at the time and place of the making of these statements for your consideration, not on the question of whether the statements should have been admitted into evidence, but for such bearing as such facts and circumstances might have in your judgment on the weight and credibility of the statement. In other words, the primary question for you to determine in regard to these statements is whether or not they are true, or how much of them is true. It is entirely within your function to believe all of any statements or any part thereof, or none. And you should, of course, compare what is said in the various statements with the other facts and circumstances disclosed by the other evidence in the case.

Exception to the Court's charge was duly noted. (R. 1143).

The Court refused to give the following instructions requested by Radovich (R. 1113, 1114):

> You are instructed that if the statements claimed to have been made by the defendant Radovich to the government investigators were induced or coerced in any degree by the circumstances of his confinement at Mitchel Field, then you must reject such statements

[10] One statement by each defendant was introduced.

altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to prove beyond a reasonable doubt that the statements claimed to have been made were not so induced or coerced.

You are instructed that if the statements claimed to have been made to the government investigators by the defendant Radovich were induced by any promise or hope of immunity, leniency, benefit, or favor, held out to Radovich by the investigators either directly or by implication, then you must reject such statements altogether, and you must not consider them for any purpose whatever. In this connection, you are further instructed that the burden is upon the government to show beyond a reasonable doubt that the statements claimed to have been made by Radovich were not induced by promises or hopes held out by the investigators.

Exceptions to the Court's refusal to give the requested instructions were duly noted (R. 1143-1144).

## II.

## THE PLEA IN BAR

The indictment against Radovich, Samuel Bayer and Elias Bayer (R. 8-11) alleged that beginning on or about September 1, 1942, and continuing up to and including the date of the indictment (July 12, 1945), the three named defendants, and divers other persons whose names were to the grand jurors unknown, conspired and agreed

> to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

The indictment further alleged that it was a part of the conspiracy and agreement

> that defendants Samuel Bayer and Elias Bayer would during the period aforesaid give sums of money amounting to approximately $7,000 to the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant, Walter V. Radovich, and to induce him, in violation of his lawful duty, to transfer Private Martin Bayer, and Private Melvin Usdan, both soldiers in the United States Army, from and to various units of the United States Army in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of continental United States.

Before trial Radovich filed a plea in bar, setting up that he had previously been convicted and sentenced by a general court-martial for the same offense charged in the indictment. His plea in bar was as follows (R. 13):

> Now comes WALTER V. RADOVICH, one of the defendants herein, and pleads in bar to the indictment herein against him as follows:
>
> 1. On June 11, 1945, this defendant, then and now an officer of the United States Army, before a United States Army general court-martial having jurisdiction of the defendant and the offense charged, was arraigned upon charges preferred against him, pleaded not guilty, was tried, and on June 29, 1945, was convicted and sentenced by said general court-martial. A copy of said charges, findings, and sentence are herewith, Exhibit A.
>
> 2. Thereafter on July 12, 1945, a grand jury, duly empaneled in the District Court of the United States, Southern District of New York, returned in said court the indictment herein charging the defendant with the same offense as that for which he was tried, convicted and sentenced by said general court-martial.
>
> WHEREFORE, defendant prays that the said indictment against Walter V. Radovich be dismissed.

## EXHIBIT A

RECORD OF TRIAL OF RADOVICH, WALTER V., MAJOR, AIR CORPS, MITCHEL FIELD, NEW YORK, BY GENERAL COURT-MARTIAL APPOINTED BY THE COMMANDING OFFICER, HEADQUARTERS FIRST AIR FORCE, MITCHEL FIELD, N. Y.—TRIED AT AIR BASE, MITCHEL FIELD, N. Y., 11, 27, 28, 29 JUNE 1945.

### ARRAIGNMENT

The accused was then arraigned on the following charges an specifications—

CHARGE I: Violation of the 95th Article of War.

[Art. 95. *Conduct Unbecoming an Officer and Gentleman.*—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. Title 10, U. S. C., § 1567.]

SPECIFICATION 1: In that, Major Walter V. Radovich, (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December, 1943, wrongfully and unlawfully accept and receive from Elias Bayer the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport

Command, an organization not alerted for overseas movement.

CHARGE II: Violation of the 96th Article of War.

[Art. 96, *General Article*.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognziance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court. Title 10, U. S. C. § 1568.]

SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

## FINDINGS

Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43.

Upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

Of Specification 1 of CHARGE I: GUILTY
Of Specification 2 of CHARGE I: GUILTY
Of CHARGE I GUILTY
Of Specification 1 of CHARGE II: GUILTY
Of Specification 2 of CHARGE II: GUILTY
Of CHARGE II GUILTY

## SENTENCE

The court was closed, and upon secret written ballot two-thirds of the members present at the time the vote was taken concurring, sentenced the accused to be dismissed the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years.

The Government demurred to the respondent's plea in bar (R. 20). After argument the demurrer was sustained and an exception noted (R. 85). In sustaining the demurrer the District Court said (R. 83, 84):

> As to the plea of former jeopardy, filed by defendant Radovich, he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offenses as alleged in the indictment here, and that by virtue of the constitutional provision against double jeopardy, this prosecution must be dismissed. The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one, and therefore the constitutional provision against double jeopardy does not apply.
>
> The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against double jeopardy applies to prosecutions in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in

the indictment here is substantially the same as the offense for which he was tried by a court-martial.

The District Court held that the offense charged in the indictment was not substantially the same as the offense for which Radovich was tried by court-martial.

By motions at the close of the Government's case (R. 446) and again at the close of all of the evidence (R. 949) the respondent renewed his plea in bar. Both motions were overruled.

## SUMMARY OF ARGUMENT.

### I

The Circuit Court of Appeals was correct in holding that the initial confession made by the respondent in the psychopathic ward on September 5 or 6, 1944, after the respondent had been held there for a month, would have been inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 332 and *Anderson* v. *United States*, 318 U. S. 350. The Court was also correct in holding that the "supplementary statement" made by the respondent on March 15 and 17, 1945, to the same agent who took the first confession, was the fruit of the first, and therefore inadmissible under the principle of *Silverthorne Lumber Company* v. *United States*, 251 U.S. 385, and *Nardone* v. *United States*, 308 U.S. 338.

The confinement of Major Radovich in the psychopathic ward was improper and lawless from its inception. Under Article of War 69 (10 U.S.C.A. 1541), and Army regulations made pursuant thereto, the confinement of an accused pending trial by general court-martial is authorized only when necessary to prevent his escape or to restrain him from further criminal acts. The record affirmatively shows that the confinement of the respondent was not necessary, nor was it imposed, to prevent his escape or to restrain him from further crimes. Even if some restraint of the respondent was necessary—and it was not—there was no

justification whatever under the military law for holding him *incommunicado* for weeks in a ward for the insane, under conditions of cruel and deliberately planned hardship and oppression. Finally, Article of War 70 (10 U.S.C.A. 1541) required that upon the arrest or confinement of the respondent "immediate steps" be taken to try him "or to dismiss the charge and release" him, and that any officer "responsible for unnecessary delay in investigating or carrying the case to a final conclusion" be punished. This Article also specified that "when a person is held for trial by general court-martial the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay". As the Circuit Court of Appeals correctly held, the words "if practicable" were inserted in this statute "to provide for unusual situations arising out of the peculiar exigencies of military life"—in other words, a necessary delay under the statute is only that resulting from military exigency. In this case, however, "immediate steps" were not taken to try the respondent, and he was held for a month prior to his initial confession without being furnished a copy of the charges. The only excuse offered for the delay by the military authorities was that it was "at the specific request of the United States Attorney," and under the Article of War this was not a legitimate excuse. All of these circumstances of the respondent's confinement bring the initial confession of September 5 or 6 squarely within the principle of the *McNabb* and *Anderson* cases.

The second confession, of March 15-17, 1945, was made to the same agent who had obtained the initial statement from the respondent in the psychopathic ward; and the second was made under such circumstances that the conclusion is inescapable that it was the fruit of the first. The

second confession was therefore inadmissible under the principle of the *Silverthorne* and *Nardone* cases.

## II

A. The argument of the Government, that the respondent's plea of former jeopardy must fail because his conviction by court-martial was disapproved upon review, is based upon matters which are not in the record and not properly before this Court. At the trial the Government demurred to the plea in bar, and the District Court decided the matter upon the plea and demurrer. If the Government desired to challenge the plea upon the facts, it should have done so at that time; and the attempt now made to try the facts in this Court, by injecting into the record new matter, is improper and unfair. The new matters which the Government attempts to place in the record, and which have to do with the opinion of the Board of Review and the action of the confirming and reviewing authorities in respect of the court-martial conviction of the respondent, are matters of which the respondent has no knowledge or notice. Moreover, since a court-martial is not a court of record, this Court should not take judicial notice of such matters. *McClaughry* v. *Deming*, 186 U. S. 49. As the Circuit Court of Appeals correctly held, "determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial."

B. Even if the new evidence now offered by the Government should be considered by this Court, it would not affect the validity of the plea in bar. From the statements made in the Government's brief concerning the disposition of the military charges against Radovich, it appears that the findings and sentence of the court-martial have been finally disapproved and that the case has been dismissed. If this be so, then at military law the respondent has been once in jeopardy under the military charges, and he cannot be tried again in a military court for the offense alleged in those

charges, nor can he be tried for the same offense in the civil courts. Even if this Court should consider the extraneous matters which Government counsel have attempted to inject into the record, the decisive question would still be whether or not the military charges and the indictment allege substantially the same offense.

C. Proof of the allegations of the indictment would have sustained the military charges under which the respondent had previously been convicted. The trial of the respondent upon the indictment, therefore, put him twice in jeopardy for the same offense. The indictment alleged that the respondent, Samuel Bayer, and Elias Bayer conspired and agreed to defraud the United States of the faithful services of the respondent, an army officer, it being a part of the conspiracy or agreement that the respondent would accept $7,000 from the Bayers to induce the respondent to transfer Martin Bayer and Melvin Usdan to posts of safety. The military charges alleged that the respondent, an army officer, had been guilty of conduct unbecoming an officer and gentleman and conduct to the prejudice of good order and military discipline in that he had accepted $7,000 from Samuel Bayer and Elias Bayer, "*for the purpose of effecting the transfer*" of Martin Bayer and Melvin Usdan to posts of safety. The military charges were broad in their scope, and clearly included in their ambit an agreement to pay and receive money, and thus to defraud the United States in the manner specified in the indictment. In other words, proof of the allegations of the indictment would have justified a conviction under the military charges. Since proof of the indictment would have supported the military charges upon which the respondent had been once in jeopardy, the indictment cannot be maintained.

## ARGUMENT

### I

### The Confession

The Government introduced in evidence against Major Radovich a written confession made by him to Special Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945. This statement, which was marked "Government's Exhibit 25" (R. 1306) and was admitted in evidence over the objection and exception of the respondent (R. 659), was the basis of the case against Radovich. The statement was in the handwriting of Flynn and was initialed and signed by Radovich. The Circuit Court of Appeals held that this statement was inadmissible, by reason of the fact that "it was patently the fruit" of an earlier confession which was taken from Radovich by Flynn and which was itself inadmissible (R. 1475). The first confession was made by the respondent in the psychopathic ward of the army hospital at Mitchel Field on September 5 or 6, 1944, after the respondent had been held there for a month. We shall demonstrate, first, that the initial confession was inadmissible under the rule of *McNabb* v. *United States*, 318 U. S. 322, and *Anderson* v. *United States*, 318 U. S. 350, and, second, that the later statement which was introduced in evidence was in fact the fruit of the first, and therefore inadmissible under the principle of *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385, and *Nardone* v. *United States*, 308 U. S. 338.

As to the statement of September 5 or 6, 1944:

The record showed that Major Radovich, who was then 24 years old, returned to the United States from Burma in the late spring of 1944. While in Burma he had served with great gallantry and distinction as an officer of the First Air Commando Group (*supra*, page 5). On August 3, 1944, while stationed at the Santa Monica Redistribution Center, Santa Monica, California, he was ordered to report to Mitchel Field, New York. He proceeded to Mitchel Field

as ordered. Upon his arrival on August 9, 1944, he was immediately placed under arrest and locked up in the psychopathic or "nut" ward in the station hospital at the field (*supra*, page 7). He was held in the psychopathic ward from August 9, 1944, to September 16, 1944 (*supra*, pages 8, 11). In other words he had been held in the ward for approximately a month when he made the original confession to Agent Flynn. This confinement of Major Radovich in the psychopathic ward was improper and lawless from its inception.

Article of War 69 (10 U. S. C. A. 1541) provides:

> Any person subject to military law charged with crime or with a serious offense under these articles shall be placed in confinement or in arrest, as circumstances may require; but when charged with a minor offense only, such person shall not ordinarily be placed in confinement. Any person placed in arrest under the provisions of this article shall thereby be restricted to his barracks, quarters, or tent, unless such limits shall be enlarged by proper authority.

This Article of War in its present form was adopted in 1920. The Manual for Courts-Martial (1921) states (p. 40):

> The chief object of Congress in changing, by the code of 1920, the provisions of A. W. 69 relating to arrest and confinement was to lessen resort to confinement, particularly of enlisted men, in cases where restraint is not a necessity, *either to prevent the escape of the accused or to restrain him from violence, or for other like reasons. No soldier or officer will be ordered into, or retained in, confinement prior to trial by court-martial except where confinement is necessary for one of the reasons indicated.* (Emphasis supplied)

War Department Technical Manual T. M. 27-255, Military Justice Procedure (1945) accurately and authoritatively summarizes the law and regulations with respect to arrest and confinement pending trial (T. M. 27-255, pp. 15-16):

> b. *Necessity and purpose of restraint.* If an offense has been committed for which trial by court-martial is

required, the question of imposing some form of restraint on the accused pending trial must be considered. The purpose of such restraint is to insure the presence of the accused at the trial and to prevent him from committing other offenses in the meantime. A W 69 provides that when "charged with crime or with a serious offense" the accused "shall be placed in confinement or arrest as circumstances may require" but "shall not ordinarily be placed in confinement" when charged with a minor offense. It is *not* mandatory that the accused be restrained at all pending trial (par. 19, MCM). The necessity for any restraint must be determined in the light of the offense charged and the character of the offender. If some restraint is deemed necessary, only the minimum required under the circumstances should be imposed (par. 19, MCM).

c. *Types of restraint.* (1) A person in arrest is restrained within certain limits, not by physical force, but by his moral and legal obligation to obey the order or arrest (par. 139a, MCM). When placed in arrest he is required to remain within his barracks, quarters, or tent unless larger bounds, such as the company area, are specified (A W 69).

(2) By *confinement* the accused is physically restrained (par. 139a, MCM) either by being imprisoned in a guardhouse or being put under the control of a guard.

d. *Degree of restraint to be imposed.* No greater degree of restraint should be imposed than is required by the circumstances of the particular case. Unless physical restraint is necessary, an accused should not be placed in confinement pending trial. Confinement results in loss of manpower. Not only is the person confined unavailable for duty during his confinement, but the more soldiers there are in the guardhouse, the greater the number of guards who must be taken from other duties to control them. For minor offenses restraint in any form may be unnecessary. For example, there is usually no need to restrain a soldier who voluntarily returns after a few days' absence without leave. The fact that he has returned on his own accord is a good indication of his intention to stay with his

> organization. His availability for trial a few days later can safely be assumed. Arrest or restriction would in any event be futile if he should decide to run off again. On the other hand, a soldier who breaks restriction and remains absent without leave until apprehended, probably requires confinement since his past conduct indicates that only physical restraint will hold him with his organization. Even a person who commits a serious military offense, such as a sentinel who sleeps on post,[11] is not necessarily to be confined unless there is some basis for believeing that otherwise he will flee before trial. The question to be decided in each case is: what restraint, if any, is necessary to insure the presence of the accused at the trial and to prevent his doing harm to persons or property in the meantime.

In brief, the confinement of an accused pending trial by general court-martial is proper *only* when necessary to prevent his escape or to restrain him from further criminal acts. In the case of the respondent, the record affirmatively showed that his confinement was not necessary, nor was it imposed, to prevent his escape. He was an officer of the army, subject to military orders and discipline. He could have been restrained "by his moral and legal obligation to obey" an order restricting him. Had he fled he could have been shot for desertion. (A. W. 58, 10 U. S. C. A. 1530) During the days immediately preceding his confinement he traveled alone from California to Mitchel Field (*supra*, page 7). His Army efficiency ratings, a fair measure of his amenability to discipline, had always been "excellent" or "superior" (R. 598). There was not the slightest suggestion or reason to believe that he would not have been available at all times. After his release from the psychopathic ward he was available and subject to the beck and call of the military authorities and the United States Attorney during the many months preceding his trial (*supra*, page 11). When indicted in the District Court he was released in the "custody of the army" (R. 3), and he was

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[11] A sentinel who sleeps on post may be sentenced to death. A. W. 86, 10 U. S. C. A. 1558.

not required to give bond until after his conviction (R. 7). The record affirmatively showed also that the confinement of Radovich was not necessary, nor was it imposed, to restrain him from further crimes. The offenses charged against him by the military authorities were alleged to have occurred more than eight months before his incarceration. There was no suggestion of any disposition on his part to commit further offenses; on the contrary the record showed that during the interval between the date of the alleged offenses and the date of his confinement he had become a hero of the war. Only six weeks before he was incarcerated he was awarded a second Distinguished Flying Cross for gallantry and devotion to duty (*supra*, page 6). After his release from the psychopathic ward the United States Attorney found him so "cooperative" that he was not named in the original indictment returned against his alleged co-conspirators. In short, therefore, the confinement of Major Radovich was grossly improper and unjustified, under military law.

Even if some restraint of the respondent was necessary—and it was not—there was no justification whatever in the military law for holding him *incommunicado* for weeks in a ward for the insane, under conditions of cruel and deliberately planned hardship and oppression. Under the law, if any restraint at all was deemed necessary, the military authorities were permitted to impose "only the minimum required under the circumstances" (T. M. 27-255, *supra*, page 25). We have already (*supra*, pages 7-10) detailed the conditions of the restraint imposed upon the respondent—conditions of cruelty and hardship which the Government's brief touches fleetingly if at all (Government's brief, pp. 10-11). To summarize: The respondent was stripped of his uniform, shoes, and all personal belongings, forced to wear hospital pajamas without a string and a bathrobe without a cord, and was locked in a barred and heavily guarded ward for the insane. He was watched constantly, night and day, even when he went to the bathroom. His food was served without a knife, and later he was de-

prived of both knife and fork, and required to eat with only a spoon. He was held *incommunicado*, denied visitors, denied the use of the telephone, denied counsel. All of this was done, notwithstanding the fact that the respondent showed no need for restraint, that there was nothing wrong with him mentally or physically, and that he was given no medical treatment. We challenge the Government to demonstrate that there was any legitimate reason or excuse for such restraint.

In this connection, counsel for the Government say in their brief (p. 42) that "an accused soldier is not, like a civilian charged with a noncapital offense, entitled to bail; he remains in custody. There is, of course, no bail at military law." This statement is misleading. While there "is no bail at military law", it does not follow that an accused must be confined; on the contrary, as we have shown, he should not be confined at all, except in unusual cases of necessity. It is not mandatory that he even be restrained at all; and if he is restrained, then his "moral and legal obligation to obey the order of arrest" is all the restraint or "bond" that is required.

The suggestion in the Government's brief (pages 33, 34, 56), that the respondent had the assistance of counsel during his incarceration in the psychopathic ward, is not supported by the record. As we have shown (*supra*, pages 8-10), at least two weeks after his confinement began the respondent complained to his guard, as he had done before, that he was being denied counsel. As a result of these complaints a warrant officer, junior grade, named Bradspies, who was a lawyer, finally talked to the respondent, *but he did not act as the respondent's attorney and in fact the respondent was without counsel during his entire imprisonment.*

Finally, in our consideration of the legality of the long confinement of the respondent, we come to Article of War 70 (10 U. S. C. A. 1541). That Article provides:

> When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try the person accused or to dismiss the charge and release him. Any officer who is responsible for unnecessary delay in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct: When a person is held for trial by general court-martial, the commanding officer will, within eight days after the accused is arrested or confined, if practicable, forward the charges to the officer exercising general court-martial jurisdiction and furnish the accused a copy of such charges. If the same be not practicable, he will report to superior authority the reasons for delay.

As the Circuit Court of Appeals well said (R. 1474), the Article "is mandatory in tone and expressly provides for the punishment of any officer responsible for unnecessary delay in investigating or carrying a case to conclusion". *Prompt action is required.* Although the statute does not set up a complete time-schedule, the necessity for speed is recognized, and the degree of promptness that is required is indicated, by the following statement in Military Justice Procedure, War Department Technical Manual T. M. 27-255 (1945), page 36:

> In general court-martial cases, the charges should be investigated within 48 hours after they are preferred; should be sent to the officer exercising general court-martial jurisdiction within 24 hours after completion of the investigation and should be referred for trial within 48 hours after receipt by the officer exercising general court-martial jurisdiction. After being so referred they should promptly be served on the accused * * *.

While it is true that the statutory requirement that charges be served upon the accused within eight days after his arrest or confinement is qualified by the words "if practicable", it is plain that, as the Circuit Court of Appeals held, this qualification "was inserted to provide for unusual situations arising out of the peculiar exigencies of military

life". (R. 1474). The soundness of this construction becomes apparent when the present Article 70, enacted in 1920, is considered in the light of the old articles from which it is derived. The prior articles are printed in the Government's brief at pages 44 and 51. These old articles authorized delay "until such time as a court-martial can be assembled"; or in certain situations "at remote military posts or stations", or when "the necessities of the service prevent * * * trial". It is obvious that the modern expression "if practicable" is intended to be a synthesis of these old phrases, and to refer, as did they, to "situations arising out of the peculiar exigencies of military life".

When the confinement of Major Radovich is tested by the standards of Article of War 70 it is plain that the military authorities acted in lawless disregard of that Article. Radovich was incarcerated on August 9, 1944. The charges against him were preferred on August 10. The investigation was completed "about" August 24 and received by the officer exercising general court-martial jurisdiction on August 25, 1944 (*supra*, page 10). Yet the charges were not referred for trial and served on Radovich until May 30, 1945 (*supra*, page 10). Putting it another way, Radovich was held in the psychopathic ward for four weeks after the military investigation was completed. The military investigation had been over for two weeks when Flynn obtained the confession of September 5 or 6, 1944. And the only excuse for the delay, officially reported by the military authorities as they were required to do by the statute, was that it "was at the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused" (*supra*, page 10). This excuse for delay, having nothing to do with military necessity, was not a legitimate reason under the Article of War. Certainly the Article of War does not mean that the disposition of military charges shall be at the convenience of the United States Attorney.

Counsel for the Government in their brief (page 55), argue that the delay may be justified by the fact that "Radovich had submitted his resignation for the good of the service, and it would be reasonable to withhold decision as to trial until that request had been acted upon". Certainly the pendency of the resignation could not justify the long confinement of Radovich in the psychopathic ward. In any event, the resignation was submitted by the respondent on August 21, 1944, *and the respondent's commanding officer did not forward it to the Adjutant General, who alone could act upon it, until January 27, 1945.* And here again, to explain the delay, the authorities at Mitchel Field stated "The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe money" (*supra*, pages 11, 12). And more: although on March 8, 1945, the authorities at Mitchel Field were ordered by the War Department to inform Radovich that his resignation would not be accepted, and that he would be tried by court-martial, they did not so inform Radovich until March 20, 1945—in other words they delayed until Flynn had obtained the second confession from Radovich on March 15 and 17 (*supra*, pages 11, 12). It appears that the Army was being administered, not according to fairness and military law, but as the catspaw of the District Attorney and Agent Flynn.

Counsel for the Government also argue at length that the mistreatment of Radovich by the military authorities was in some way remedied by the fact that during the military investigation Radovich probably learned of the charges against him. We think that no argument is necessary to demonstrate that this fact—if it is a fact—could not cure the fundamental violations of law which the military authorities committed when they confined Radovich in the first place, when they held him for weeks under the conditions we have described, and when they failed promptly to

refer the charges against him for trial and promptly to serve a copy of these charges upon him as they were required to do by the Article of [redacted]. By their treatment of him the military authorities "subjected the accused to the pressures of a procedure which is wholly incompatible" with fairness and with the spirit and purpose of the Articles of War (see *McNabb* v. *United States*, 318 U. S. 332, 342); and the fundamental impropriety of their conduct cannot be glossed over by legalistic argument. In this connection we say further that to one familiar with the methods of criminal investigators the purpose behind the long and brutal confinement of Major Radovich is apparent: the purpose was *to insulate him* from the advice, assistance and support of his family, his friends, and counsel, and by systematic mistreatment to break him down until he would "talk". There could have been no other purpose; if government counsel believe that there was, then they are indeed naive. And we repeat, in the light of what was done in the execution of that purpose, talk about whether or not Radovich knew of the charges against him is futile.

From what has been said, we think that the conclusion is inescapable that the confession made by Radovich to Agent Flynn on September 5 or 6, 1944, in the psychopathic ward, falls squarely within the principle of the *McNabb* and *Anderson* cases. The analogy between those cases and this is complete. The unjustified detention of Radovich before confession was far longer than the detention of the defendants in those cases. The hardships of Radovich's detention were far greater, and far less defensible. Indeed this case presents a striking example of the lengths to which criminal investigators would go, were it not for the salutary doctrine of the *McNabb* and *Anderson* cases.

We now turn to the second confession, made by Radovich to Agent Flynn on March 15 and 17, 1945, and received in evidence against Radovich; and we shall demonstrate that this confession was the fruit of the first, and tainted with the same illegality.

Flynn testified that he took the March 15-17 confession from Radovich at the office of the Federal Bureau of Investigation in New York City; that Radovich, who at this time was stationed at Mitchel Field, came to Flynn's office at the request of Flynn; that before Radovich made the statement, Flynn warned him that it might be used against him (*supra*, pages 3-4). It appeared that on March 15-17 Radovich was under "administrative restriction" at Mitchel Field, which meant that he could not leave the limits of the Base without the personal permission of the commanding officer; and that Flynn arranged for the appearance of Radovich at Flynn's office by calling a Lieutenant Colonel Miller at Mitchel Field (*supra*, page 11). Colonel Miller's office had originally referred the case to the United States Attorney; and Colonel Miller was the officer who had introduced Flynn to Radovich in the psychopathic ward, upon the occasion when Radovich made the first confession to Flynn (*supra*, pages 10, 11).

Flynn testified that before taking the confession on March 15 and 17, 1945, he produced and showed to Radovich the confession which he had taken from Radovich on September 5 or 6, 1944. The statement of September 5 or 6, 1944, like that of March 15-17, was in the handwriting of Flynn and signed by Major Radovich. The March 15-17 statement on its face purported to be a "supplementary" statement, and Flynn admitted that it was "basically" the same as the previous statement taken on September 5 or 6, 1944. He said that the March statement "went into more detail", that "Major Radovich had told me many more instances or circumstances which I thought should go into the statement, and I decided to put it in and make it one complete statement". He said that before taking the supplementary statement, he read over the previous one and handed it to Radovich, who also read it over; that the first statement was on Flynn's desk when he wrote the second one; that he produced the first statement at the suggestion of Radovich. A request by counsel for Radovich that the District Attorney

produce the first written statement was denied by the District Attorney and by the Court, the ground of the Court's denial being that examination of the two statements by the Court revealed that there was no material conflict between them (*supra*, pages 4, 5).

Upon this state of facts we submit that anyone who recognizes what the Circuit Court of Appeals aptly described as "the practical realities of the situation" (R. 1474) must conclude that the second statement to Flynn was the fruit of the earlier one. The second was a mere supplement or continuation of the first, made to the same agent who had obtained the first. Since the first statement was inadmissible, and the second was the fruit of the poisonous tree, the second statement was likewise vitiated. *Silverthorne Lumber Company* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338; *Watson* v. *United States*, 6 F. (2d) 870. As this Court said in *Nardone* v. *United States*, 308 U. S. 338, 340):

> To forbid the direct use of methods thus characterized but to put no curb on their full indirect use would only invite the very methods deemed 'inconsistent with ethical standards and destructive of personal liberty.' What was said in a different context in *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 392, 64 L. Ed. 319, 321, 40 S. Ct. 182, 24 A. L. R. 1426, is pertinent here: 'The essence of a provision frobiding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court, but that it shall not be used at all.'

The situation in the case at bar is unlike that in *Lyons* v. *Oklahoma*, 322 U. S. 596, cited in the Government's brief. In that case, after improper coercive methods were used to obtain a confession, a second statement was made in another place and with different persons present; and the second statement was used at the trial. This Court held that the second statement was not shown to have been the unavoidable outgrowth of the first, and that the introduction in evidence of the second statement therefore did not

constitute a violation of due process. In the case at bar, however, the second statement purported on its face to be "supplementary" to the first and it was made to the same agent who had taken the first, under such circumstances that the conclusion that it was derived from and the unavoidable outgrowth of the first statement is inescapable. Furthermore, the decision in *Lyons* v. *Oklahoma* did not involve unlawful confinement, or a violation of a statute requiring prompt arraignment or prompt service of charges; on the contrary the decision depended only upon the question whether or not the effect of prior coercion had *in fact* been dissipated before a second confession was made. Obviously the principle of the *McNabb* and *Anderson* cases was not involved in the *Lyons* case.

## II.

## The Plea in Bar

A. The argument of the Government, that the respondent's plea of former jeopardy must fail because his conviction by court-martial was disapproved, is based upon matters which are not in the record and not properly before this Court. These new and extraneous matters, which counsel for the Government have attempted to place in the record, have to do with the opinion of the Board of Review and the action of the confirming and reviewing authorities in respect of the court-martial conviction of the respondent.[12]

At the trial the respondent filed a plea of former jeopardy (*supra*, page 15). The Government demurred to this plea and the District Court decided the matter upon the plea and demurrer. The District Court said (R. 83, 84, *supra*, page 18):

> As to the plea of former jeopardy, filed by defendant Radovich he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offense as alleged in the indictment

[12] See Government's brief, pp. 2, 15, 27, 28, 61-68, 110-125.

here, and that by virtue of the constitutional provision against double jeopardy, this prosecution must be dismissed. *The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one*, and therefore the constitutional provision against double jeopardy does not apply.

The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against double jeopardy applies to prosecution in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in the indictment here is substantially the same as the offense for which he was tried by a court-martial.

If the Government desired to challenge the plea in bar upon the facts, it should have done so at that time. The plea was filed on September 26, 1945, and the Government's demurrer was filed on October 3, 1945 (R. 4). The opinion of the Board of Review, which counsel for the Government now seek to inject into the record, and upon which they rely in their attack upon the plea in bar, was dated August 17, 1945 (Government's brief, Appendix C, page 110); and the record shows that a copy of this opinion was in the possession of the United States Attorney when the demurrer was filed (R. 41, 42, 1475). The attempt of counsel to bring this opinion and other new matters into the record at this time, and thus to try the facts in this Court, is improper and unfair. In this connection it is important to note that the opinion of the Board of Review, and the other military proceedings subsequent to the conviction of the respondent by court-martial, are matters of which the respondent has no knowledge or notice (see R. 42). This was recognized by the Circuit Court of Appeals and was not denied by the Government in that Court or in the District Court (R. 1475, 1476; 41-43). Moreover, since a court-martial is not a court of record, this Court should not take

judicial notice of such matters. *McClaughry* v. *Deming*, 186 U. S. 49. As the Circuit Court of Appeals wisely held, "determination of whether or not jeopardy attached may therefore be more appropriately made when the full facts are in evidence on a new trial" (R. 1476).

B. Even if the new and extraneous evidence concerning the military proceedings, which the Government now offers, should be considered by this Court, it would not affect the validity of the plea in bar.

Article of War 40 (10 U. S. C. A. 1511) provides:

> No person shall, without his consent, be tried a second time for the same offense; but no proceeding in which an accused has been found guilty by a court-martial upon any charge or specification shall be held to be a trial in the sense of this article until the reviewing and, if there be one, the confirming authority shall have taken final action upon the case.

Counsel for the Government state in their brief (pp. 63-64; 124-125) that in the court-martial case of Major Radovich the Board of Review and the Judge Advocate General held that the record of trial was "legally insufficient to support the findings of guilty and the sentence", that "the findings of guilty and the sentence" were, therefore, "disapproved", by order of the Secretary of War; that no rehearing was ordered and that none can be, now. This means, of course, that the case has been dismissed.[13] The dismissal of the case in turn means that "final action upon the case" has been taken within the meaning of A. W. 40—in other words jeopardy has attached and the re-

[13] Under A. W. 50½, when a reviewing or confirming authority has disapproved or vacated a finding and sentence by reason of the action of the Board of Review, approved by the Judge Advocate General, holding the record of trial legally insufficient to support the findings or sentence, only four alternatives are provided for further action in the case: (1) a rehearing may be ordered, (2) the findings or sentence may be approved in part only, (3) the record may be returned for revision, (4) the case may be dismissed. In the case of Radovich the Government concedes that alternatives (1), (2), and (3) were all rejected by the authorities.

spondent cannot be tried again for the offense charged against him before the court-martial. There can be no question that this is the military law. Thus the Manual for Courts-Martial (1921), recognized as authoritative by counsel for the Government, states (par. 149, p. 119):

> *Limitation as to Number of Trials.*—(a) No person shall be tried a second time for the same offense. (A. W. 40.)
>
> (b) A person subject to military law has not been "tried" in the sense of A. W. 40 * * * in any case, until either an acquittal has been announced in open court, or else, after conviction, the reviewing and, if there be one, the confirming authority *shall have taken final action upon the case (A. W. 40), i.e. shall have ordered execution of the sentence or dismissed the case.* (Emphasis supplied)

Counsel for the Government attempt to draw an analogy between the action of the reviewing and confirming authorities in the case of Radovich and the dismissal of an indictment in a criminal case in the civil courts (Government's brief p. 64). The analogy fails completly, for as we have seen the dismissal of the military case operates as an acquittal, whereas, of course, the dismissal of an indictment has no such effect. For the same reasons no parallel can be drawn between the dismissal of the military case and the reversal of a criminal conviction in the civil courts.

From the foregoing it is plain that even if this court should consider the new and extraneous matters which counsel for the Government have attempted to place in the record, the decisive question would still be whether or not the military charges and the indictment alleged substantially the same offense.

C. The military charges and the indictment did allege substantially the same offense.

It is established that one convicted by a military court of competent jurisdiction cannot be tried a second time in a Federal civil court for the same offense. *Grafton* v. *United*

*States*, 206 U. S. 333. The question therefore is whether or not the offense of which the respondent was convicted and sentenced by general court-martial was the same or substantially the same as that alleged in the indictment. In answering that question "The test is, whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second can not be maintained; when there could not, it can be." *Manning* v. *United States*, 275 Fed. 29, 31 (C. C. A. 8, 1921), citing Bishop's Criminal Law (8th Ed.) par. 1052, subd. 2; *Morgan* v. *Devine*, 237 U. S. 632, 641, 35 Sup. Ct. 712, 59 L. Ed. 1153; *Carter* v. *McClaughry*, 183 U. S. 365, 394, 22 Sup. Ct. 181, 46 L. Ed. 236; *Burton* v. *United States*, 202 U. S. 344, 384, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 362.

Proof of the allegations of the indictment would have supported the conviction of the respondent under the military charges and specifications. This becomes apparent when the charges and specifications are considered in the light of military law and precedent.

The indictment alleged that the respondent, Samuel Bayer, and Elias Bayer, conspired and agreed to defraud the United States of the faithful services of the respondent, an army officer, it being a part of the conspiracy and agreement that the respondent would accept $7,000 from the Bayers to induce the respondent to transfer Martin Bayer and Melvin Usdan to posts of safety. The military charges alleged that the respondent, an army officer, had been guilty of conduct unbecoming an officer and gentleman, in violation of A. W. 95, and conduct to the prejudice of good order and military discipline, in violation of A. W. 96, in that he had accepted $7,000 from Samuel Bayer and Elias Bayer, "*for the purpose of effecting the transfer*" of Martin Bayer and Melvin Usdan to posts of safety.

The 95th and 96th Articles of War, 10 U. S. C. A. 1567, 1568, (formerly the 61st and 62d articles) are military

common law articles.[14] Conduct which violates them must be specified but need not be, and usually is not, given a name; whether conduct does or does not violate the articles is determined by a court-martial in the light of service custom and precedent. As the Circuit Court of Appeals pointed out, charges under these articles are the "broadest and most inclusive of military charges" (R. 1475). According to military common law, conduct which in any manner defrauds, or tends to defraud, the Government of its rights, or which violates or neglects official duty, or prejudices military command and good order and discipline, *including conspiracies*, is cognizable under these articles. *In fact, any conspiracy to defraud the Government, except the particular fraud specified in Article 94 (10 U. S. C. A. 1566) must be charged under Articles 95 and 96.* Specifically, the charge made in the indictment was cognizable at military law under the 95th and 96th Articles of War and *only* under those articles. See Manual for Courts-Martial (1943) 186, 187; Winthrop, *Military Law and Precedents* (2d Ed. 1920) pages 710 et seq., 720 et seq.

The military charges clearly included in their scope an agreement or conspiracy to pay and receive money, and thus to defraud the United States as alleged in the indictment. The acceptance and receipt of money by Radovich involved, and was alleged by the military charges to include, the participation of the Bayers. An allegation of agreement and concurrence between Radovich and the Bayers was

[14] *Article 95* (10 U. S. C. A. 1567). *Conduct unbecoming an officer and gentleman.*—Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service.

*Article 96* (10 U. S. C. A. 1568). *General article.*—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital, of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court.

thus implicit in the military charges. Indeed it seems absurd to argue, as the Government apparently does, that Radovich could have accepted the money from the Bayers "for the purpose of effecting the transfer" of the named soldiers, in the absence of an agreement and a common design between him and the Bayers. Our conclusion in this respect is fully supported by the authorities. *Gebardi* v. *United States*, 287 U. S. 112, 122; *United States* v. *Katz*, 271 U. S. 354, 355; *Norris* v. *United States*, 34 F. (2d) 839, 841; *United States* v. *Dietrich*, 126 Fed. 664, 667; *United States* v. *N. Y. C. & H. R. R. Co.*, 146 Fed. 298; *United States* v. *Sager*, 49 F. (2d) 725; cf. *United States* v. *Zeuli*, 137 F. (2d) 845. Thus it follows that a finding by the court-martial that Radovich corruptly agreed or conspired to accept and receive money for the specified purpose would have been entirely consistent with the military charges. Such a finding moreover would have been proper under military law and would have supported a verdict of guilty of the charges: A corrupt agreement by Radovich to accept the money for the specified purpose would, of course, have constituted conduct unbecoming an officer and gentleman and conduct to the prejudice of good order and military discipline in violation of A. W. 95 and A. W. 96; and if the proof had shown such an agreement—that is if the proof had shown only those things charged against Radovich in the indictment, but had fallen short of showing the actual giving and receiving of the money—then under age-old military practice the particular military specification would have been amended by the court-martial to conform to the proof, and a conviction upon the charges would have followed. In any event, as the Circuit Court of Appeals said, whatever the evidence before the court-martial may actually have been, "it is hard to believe that careful distinction was made, or could have been made, between the actual giving and receiving of the money for the purpose involved and the arrangement made to that end" (R. 1475). The argument of the Government,

that the court-martial would have acquitted Radovich if only the corrupt agreement had been proved, is literally fantastic.

The flexibility of military charges and specifications, the wide latitude allowed to a court-martial in making findings thereunder, and the vast scope of the 95th and 96th Articles of War, are well illustrated by the following quotations from Winthrop, *Military Law and Precedents* (Second Edition, 1920) 380, 381, 383, 384:

> Where a court-martial determines that the accused is guilty of a *specification* but not precisely as laid, that is to say is guilty of a part but not of the remainder, or is guilty of the substance of the entire specification but not of certain details, it may, and it is its duty, in convicting him theron, to except specifically from the finding of Guilty such portions as are not proved, and thus declare the *exact measure* of the criminality deemed to be established. Thus it may find him Guilty of the facts set forth in certain of the averments, and Not Guilty of those set forth in certain other averments; or it may find him Guilty of the specification as a whole except only as to certain designated words, amounts, articles, quantities, or other matters of description set forth therein. Having thus shaped its finding on the specification according to the proof, it may find the accused Guilty of the *charge*, provided of course there is enough left in the specification to support the charge.
>
> * * * * * * *
>
> The authority of a court-martial to make a partial finding is not limited to the mere making of exceptions. Where, while the allegations in a specification are substantially made out, certain items therein are not precisely proved as averred, the court, in excepting the same, may *substitute* the true facts or details as established by the evidence. As, for example, where sums of money, numbers of things, kinds of quantities of articles, species of military stores, etc., words spoken, names of persons, dates, or places, have been incorrectly set forth in the specification, and the true particulars have been disclosed in the course of the testimony on the trial; in such cases the court, in its finding of Guilty, may and properly will except the erroneous

and substitute for them the correct statements or words of description. The authority to make substitution is subject to the same conditions as the authority to make exceptions, *viz.*, that the specifications shall not be rendered legally defective, or the nature of the offence so modified that the finding upon the specification will not support a conviction upon the charge.

In regard to the authority to except and substitute in findings, it may be remarked that it is certainly one of no little practical value and convenience. By its exercise defects in the pleadings may to a considerable extent be remedied, and variances between the pleadings and the proof be in the main cured. Moreover, the finding is thus made to correspond with the precise facts of the case, justice to both sides is more nearly done, and the accused is the more effectually protected against a second prosecution based upon the same transaction.

. . . . . .

Though at one time otherwise ruled, it is now fully settled by the uniform practice of the service that where the charge is of one of the specific designated offences made punishable by the Articles of War other than the general, or 62d Article, and the evidence fails fully to sustain the charge as laid, but fixes upon the accused a neglect of duty or disorder as involved in the acts alleged in the specification, the court may properly find him Guilty of the specification, (with such exceptions, etc., as may be required) and Not Guilty of the charge but Guilty of Conduct to the prejudice of good order and military discipline.

This finding, of an offence in violation of the General Article under a charge for a violation of a specific Article, was first sanctioned where the charge was 'Conduct unbecoming an officer and a gentleman,' in violation of Art. 61, and is still most frequently resorted to thereunder. It has since, however, been extended to *all cases of charges of specific offences* made punishable by the code, having been especially applied to such as Disobedience of Orders, Disrespect to a commanding officer, Mutiny, Misbehavior before the enemy, Breach of Arrest, Violations of Art. 60, and—in time of war—Violations of Art. 58.

> The legal theory upon which this form is based is that it is a finding of *a lesser included offence*, every specific offence being viewed as including either *a neglect of duty or a disorder in breach of discipline;* and it is resorted to in order to prevent the failure of justice which would in general be incurred were it not availed of.

In conclusion we submit that, as the Circuit Court of Appeals held, "from any realistic viewpoint" the offense alleged in the indictment and the offense alleged in the military charges are identical. It follows that since Radovich had been once in jeopardy in the military proceedings, the indictment against him for the same offense cannot be maintained.

## CONCLUSION

The confession received in evidence against the respondent was inadmissible. The trial of the respondent placed him twice in jeopardy for the same offense. The decision of the court below was right and should be affirmed.

Respectfully submitted,

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March 25, 1947.

No. 606

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

THE UNITED STATES OF AMERICA,
*Petitioner,*

vs.

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH.

## REBUTTAL BRIEF ON BEHALF OF THE RESPONDENTS BAYER

CHARLES H. TUTTLE,
JOSEPH B. KEENAN,
I. MAURICE WORMSER,
ARCHIBALD PALMER,
*Counsel for Respondents Samuel Bayer and Elias Bayer.*

IN THE

# Supreme Court of the United States

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THE UNITED STATES OF AMERICA,
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vs.

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH.

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## REBUTTAL BRIEF ON BEHALF OF THE RESPONDENTS BAYER

The Petitioner's reply brief was not delivered to counsel for the Bayers until shortly before the argument and there was no opportunity adequately to examine it in the courtroom.

We find on pages 22 and 23 thereof that there is reference to an army letter, dated November 25, 1943, authorizing the transfer of these boys from the base at Goldsboro, North Carolina, to the Air Transport Command at Wilmington, Delaware (Rec., pp. 122-3, 1218). The Petitioner thereupon attempts to argue that because of that letter the transfer of the boys from the Burma Commando Unit must have been set in motion before Radovich was paid $5,000 at a time not later than November 27th.

Such argument loses its entire force because of the fact that the boys did not arrive at Goldsboro, North Carolina,

from New England until at least 3:30 in the afternoon of November 25th (fol. 2586) and by that time Radovich, in New York, had extorted the promise of the Bayers to deliver $5,000 to him promptly thereafter. The actual order for the transfer of the boys from the Burma Air Commando Unit to the Air Transport Command at Wilmington, Delaware, is dated November 29, 1943, and did not actually issue until then (fols. 362-3).

Furthermore, it is to be borne in mind that before that special order issued on November 29th, Lt. Col. Boebel, who was the Adjutant of the Air Commando Unit at Goldsboro, had, after the arrival of the boys there, found them unfit for its purposes (fols. 791-2, 795-6, 817-8). Called as a witness by the Government he testified that he thereupon told Radovich that "they are not the calibre of man that we are looking for" (fol. 795), and that they should be transferred out of the Air Commando Unit. It is significant that this witness for the Government did not testify that Radovich claimed to have already ordered them out of the unit. On the contrary, Col. Boebel said that Radovich explained that he had ordered them into the unit solely as "a favor to Col. Jacobson" (fol. 792). Col. Boebel also said that Radovich further said "he would take my word for it and have them transferred out of our organization" (fol. 792).

At least two days prior to such special order, Government's Exhibit 4, dated November 29, 1943, Radovich had received the $5,000 (fols. 3758, 3765-6, 3839-41). Although Radovich knew at that time that the boys were not acceptable for the Commando Unit and must be transferred out of the Commando Unit, the Bayers did not know these facts and it was because the Bayers did not know the truth of the situation that Radovich was able to accomplish his scheme of extorting the $5,000 from them. At the time of

the extortion the special order for the transfer of the boys had not yet issued; they were still in his unit and under his control and as far as the Bayers knew Radovich was still in complete command of the situation and would carry out his threat if they had failed to make the payment of the $5,000.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

No. 606

THE UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

## SUPPLEMENTAL BRIEF FOR RESPONDENT WALTER V. RADOVICH

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April 11, 1947

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946

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No. 606

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THE UNITED STATES OF AMERICA, *Petitioner*

v.

SAMUEL BAYER, ELIAS BAYER AND WALTER V. RADOVICH

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**On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit**

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## SUPPLEMENTAL BRIEF FOR RESPONDENT WALTER V. RADOVICH

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### I

This brief is filed in reply to the supplemental memorandum of the petitioner, and in response to certain statements made by counsel for the petitioner upon the argument of this cause and in their reply brief filed on the day of argument.

II

Counsel for the petitioner argue that final action in the court-martial of the respondent has never been taken, by dismissal of the charges or otherwise. As we said in our main brief (pp. 31, 38), we think it may be inferred, from the statements made in the petitioner's main brief concerning the court-martial proceedings, that the court-martial case has been dismissed. However this may be, it is plain that the court-martial case has been consummated by final action, so that jeopardy has attached and a subsequent trial for the offense charged is barred. As the petitioner's brief shows (p. 125), the court-martial proceedings were "disapproved" by order of the Secretary of War on July 26, 1946. This disapproval was unqualified. Such unqualified disapproval constitutes, and has been held by the Judge Advocate General of the Army to constitute, a consummation of a trial which will support a plea of former jeopardy. This is clearly shown by Court-Martial Case No. 241027, decided by the Judge Advocate General in 1943 and reported in II Bulletin of the Judge Advocate General of the Army, p. 424. The report of this case in full is as follows:

> Accused was found guilty of larceny of a ring from Mrs. H., in violation of Article of War 93. On the former trial the accused was originally charged with the larceny of the same ring from Mr. H. but, under an amended specification, he was found guilty of larceny of the ring from Mrs. H. The findings and sentence were disapproved and the accused was ordered restored to duty. On the present trial the accused entered a plea of former jeopardy. Held: The record is legally insufficient to support the findings and sentence. *When the former record was acted upon by the reviewing authority, including the findings under the amended specification, the accused was placed in jeopardy for the offense alleged in the amended specification. The unqualified disapproval, therefore, of the record of trial by the reviewing authority without ordering a rehearing constituted a consummation of that trial which operated as a bar to any subsequent trial for the same*

*offense.* (MCM, 1928, par. 68; Winthrop, 1920 Reprint, pp. 259-260, 451-452). (Emphasis supplied)

It will be noted that in support of his opinion in CM 241027 the Judge Advocate General cited Winthrop, 1920 Reprint. At page 452, one of the pages cited by the Judge Advocate General, Winthrop states (Note 20),

> "The effect of the disapproval is not merely to annul the sentence but also to prevent the accruing of any disability, forfeiture, &c., which would have been incidental upon an approval." DIGEST, 672. And see Circ. 12 of 1883. The disapproval is "tantamount to an acquittal by the court." 13 Opins. At. Gen., 460. That the fact of the disapproval does not divest the accused of the right to plead the acquittal or conviction in the event of a second arraignment for the same offense—see Chapter XVII—"Plea of Former Trial."

Presumably the "reviewing authority" mentioned in CM 241027 was the Commanding General who had appointed the court-martial. If the disapproval of the record of trial by such an officer constituted a consummation which operated as a bar to any subsequent trial for the same offense, then *a fortiori* a similar result must flow from the unqualified disapproval by the Secretary of War, who, of course, is the superior of any Commanding General, and is the constitutional organ of the Commander in Chief.

We emphasize that the action that consummated the court-martial proceedings in the case of Radovich was the unqualified disapproval by the Secretary of War on July 26, 1946. The opinion of the Board of Review (dated August 17, 1945), upon which the petitioner has focused attention, was *not* the operative fact.

The petitioner concedes that "Where the President, acting under AW 49 (10 U. S. C. 1520), personally disapproves the findings and sentence, such action constitutes an acquittal; and AW 40 bars further trial." The petitioner cites examples of Presidential disapprovals which occurred in 1941 and 1943. The case at bar is distinguished from

these, says the petitioner, because "GCMO 240 of 1946, which deals with Radovich's case, is not a disapproval by the President." (Petitioner's Supplemental Memorandum, II, E, (i), mimeographed copy, p. 14). This argument overlooks the fact that on May 26, 1945, by Executive Order No. 9556, 10 F. R. 6151, the President provided for the exercise, by the Secretary of War and the Under Secretary of War, of the court-martial functions, duties and powers of the President under Articles of War 48, 49, 50, 50½, 51, and 52, in all cases of sentences except those extending to death. In pertinent part Executive Order No. 9556 provides as follows:

> 1. Subject to such regulations as may be prescribed by the Secretary of War * * * there is hereby transferred and delegated to * * * the Secretary of War and the Under Secretary of War, the functions, duties, and powers of confirmation vested in the President under Article of War 48, together with the power of commutation, and all functions, duties, and powers vested in the President by Articles of War 49, 50, 50½, 51, and 52, in all cases of sentences except those extending to death; * * *
>
> 2. By virtue of the foregoing transfers and delegations of functions, duties and powers, the same may be exercised by * * * the Secretary of War, [and] the Under Secretary of War * * * respectively, to whom such transfers and delegations are hereby made without the necessity of any signature, approval, ratification or other act by the President of the United States except to the extent required by such regulations as may be issued by the Secretary of War * * * and all officers, officials, and employees of the United States, including disbursing, accounting, and auditing officers, shall give the same effect to any acts of those to whom transfers and delegations are made hereunder as if done by the person or persons in whom the functions, duties and powers were vested prior to such transfers and delegations.

The petitioner attempts to brush aside the words "By order of the Secretary of War", appearing upon the un-

qualified disapproval of the military proceedings against Radovich (Petitioner's Supplemental Memorandum, note 10, mimeographed p. 15). We submit that these words mean, and can only mean, precisely what they say. They import decision and action by the Secretary of War, precisely as an order of a commanding general, issued through his chief of staff or assistant adjutant general, imports decision and action by the commanding general.

The reason why the final quietus was given to the court-martial case by the Secretary of War, instead of by the Commanding General, First Air Force, is doubtless explicitly revealed by the War Department files—which of course are closed to the respondent. By inference from statements made in the petitioner's briefs, however, the reason becomes apparent. Under AW 50½, 10 U.S.C.A. 1522,

> • • • rehearing shall be had in all cases where a finding and sentence have been vacated by reason of the action of the board of review approved by the Judge Advocate General holding the record of trial legally insufficient to support the findings or sentence or that errors of law have been committed injuriously affecting the substantial rights of the accused, unless in accord with such action, and the recommendations of the Judge Advocate General thereon, the findings or sentence are approved in part only, or the record is returned for revision, or unless the case is dismissed by order of the reviewing or confirming authority.

The findings and sentence in the Radovich case not having been approved in part only, and the record not having been returned for revision, it follows that the Commanding General was required either to order a rehearing or to dismiss the case. According to the petitioner, the Commanding General did nothing (Petitioner's main Brief, pp. 63, 64; Petitioner's Supplemental Memorandum, mimeographed p. 15). The time within which he could order a rehearing passed (Petitioner's main Brief, pp. 63, 64), so that the only remaining alternative was dismissal of the charges. Still he did nothing. At last, after more than eleven months had

passed, the Commander in Chief himself, through the Secretary of War, took hold of the proceedings and by his unqualified disapproval brought them to a final consummation—in other words he did what his subordinate the Commanding General should have done.[1] That consummation, we repeat, was a bar to any subsequent trial for the same offense.

It will be observed that in CM 241027, cited above, the accused was ordered restored to duty. In the case at bar a further note of finality was added to the unqualified disapproval by the Secretary of War on July 26, 1946, in that subsequent to this disapproval, on October 1, 1946, the respondent was discharged from the Army. The respondent's discharge is evidenced by an order, now in our possession, dated October 1, 1946, and specifically reciting that he was discharged "By direction of the President". This discharge terminated the respondent's military status and ended court-martial jurisdiction over him, MCM (1928) page 8 par. 10. It emphasized the final and irrevocable termination of the court-martial proceedings by the authority of the President.

## III

While we think that the foregoing disposes of the petitioner's attack upon the plea in bar, we venture to suggest a broader ground of decision.

The petitioner asserts that no conviction may be pleaded in bar until it has become "final". While this doctrine has been frequently applied to justify successive trials in the same cause, it produces monstrous results when invoked to permit successive or simultaneous trials for the same offense in two or more independent causes and courts. Having tried, convicted and sentenced a man before a court-martial, the Government may indefinitely postpone final

[1] As Commander in Chief the President of course might have directed a rehearing in the first instance, and he might have convened a court-martial for the purpose, A. W. 8, 10 U. S. C. A. 1479. He was also the "confirming authority" under A. W. 48 and A. W. 50½.

action in the case during the process of review. This postponement may be effected without the knowledge or consent of the accused, for the review of military cases is automatic and does not involve affirmative action by the accused. Having thus by its own motion placed the court-martial case in a state of suspended animation, the Government may then proceed to indict, try, convict, and sentence the accused in a civil court, for the same offense, and prosecute this proceeding to final judgment. By the whim of the Government the accused is deprived of his right to plead the military conviction in bar in the civil court. Having achieved a final conviction in the civil court, the Government may then bring the military proceedings to a close, by entering a final judgment of conviction or an order of dismissal, i.e. of acquittal. We submit that such a result and such a doctrine are contrary to the spirit and purpose of the constitutional inhibition against double jeopardy. As Mr. Justice Holmes observed in his dissent in *Kepner* v. *United States*, 195 U. S. 100, 134, with respect to the principle of double jeopardy:

> *Everybody agrees that the principle in its origin was a rule forbidding a trial in a new and independent case where a man already had been tried once.*

We submit that the Government should not be permitted to say that a man has not been tried once, and that he may be tried for the same offense in an independent case and a different court, when the final consummation of a first trial has been deliberately delayed by the Government without the consent of the accused and without affirmative action on his part. We submit that the rule of the *Kepner* decision should be applied here.

The argument of the petitioner in its supplemental memorandum (mimeographed pp. 4, 5) that Radovich "embraced the results" of the review and is therefore "bound by its burden, viz., that there has not been a valid trial", is wide of the mark. The review was automatic. Radovich had nothing to do with starting it, he had nothing to do with its progress or lack of progress; he might state his

case before the Board of Review, but that was all he could do, and whether he did so or not, the machinery would grind on. In accordance with Army practice, the action of the Board of Review, and indeed all that was done after the findings and sentence of the court-martial were first announced in open court on June 29, 1945, were kept a secret from him. He could hardly "embrace the results" of which he was ignorant. In any event he had no choice under the law; it was not for him to accept or reject anything. He was simply a billet of wood in the military lathe. We submit that under those circumstances it is going far to say that Radovich "accepted" anything, or "consented" to a retrial, or "waived" his right to plead former jeopardy.[2]

## IV

Counsel for the petitioner suggest in their reply brief (pp. 8-12) that the question of the voluntary nature of the respondent's confession was submitted to the jury. The record shows, however, that a request by the respondent that this issue be submitted to the jury was denied by the Court (R. 1143, 1144, 1113, 1114); and that the Court told the jury that the confession was "not coerced nor induced by promises" (R. 1140, 1141). Exceptions to the Court's ruling and charge in this respect were noted (R. 1143, 1144) and the matter was assigned as error in the Circuit Court of Appeals (R. 1458, 1461), in view of *Wilson* v. *United States*, 162 U. S. 613; *McAfee* v. *United States*, 70 App. D. C. 142, 105 F. (2d) 21, 24, and *McNabb* v. *United States*, 318 U. S. 332, 338, note 5.

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[2] *Sanford* v. *Robbins*, 115 F. (2d) 435 (C. C. A. 5), cited by the petitioner (Supplemental Memorandum, mimeographed p. 5), is not apposite. In that case the first trial was a nullity and a retrial was ordered by the President. In the case at bar the first trial was not a nullity and no retrial was ordered—on the contrary the President finally disapproved and ended the proceedings.

V

From first to last, improperly we think, counsel for the petitioner have injected into the record "facts" to serve their purpose. They suggest in their reply brief (p. 6), and they asserted at the argument, that the psychopathic ward was the only place available at Mitchel Field for the confinement of an officer. Under these circumstances we deem it proper to state, upon our own personal knowledge, that other places of confinement for officers were available at Mitchel Field. Major Radovich himself was confined in his quarters for some time after his conviction and sentence by court-martial and we know that in the cases of other officers, including at least one other officer charged with bribery (and later convicted and sentenced therefor), confinement in quarters was imposed. Counsel for the petitioner would have been more accurate had they stated that the psychopathic ward was the only place at Mitchel Field where the peculiar type of harassment, visited upon Major Radovich, could be practiced.

Respectfully submitted,

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April 11, 1947

# SUPREME COURT OF THE UNITED STATES

No. 606.—October Term, 1946.

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| The United States of America, Petitioner, *v.* Samuel Bayer, Elias Bayer and Walter V. Radovich. | On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit. |

[June 9, 1947.]

Mr. Justice Jackson delivered the opinion of the Court.

This is a sordid three-sided case. The Government charged all of the defendants with conspiring to defraud by depriving it of the faithful services of an Army officer. 18 U. S. C. § 88; 35 Stat. 1096. The defendant Radovich, the officer in question, admits receipt of money from the other defendants and admits the questioned actions but denies the conspiracy, claiming the others induced him to accept a bribe. The defendants Bayer admit payment of the money but claim they were victims of extortion by Radovich. The jury found all guilty but recommended "the highest degree of clemency for all three defendants." The Court of Appeals for the Second Circuit reversed.[1] We granted the Government's petition for certiorari.[2]

The principal facts are admitted and it is contested inferences which are decisive of the issue of guilt. None of the defendants testified. It would serve no purpose to review the evidence in detail. It justifies finding as follows:

The Bayer brothers were manufacturers of yarn and thread and bore good names in their circle. Samuel had

[1] *United States* v. *Bayer*, 156 F. 2d 964.

[2] — U. S. —.

three sons in the service. One of them, Martin, with Melvin Usdan, a nephew of both Bayers, was involved in this case. Martin's health had not been robust. These two boys enlisted in the Air Corps on the day which Samuel had learned was the last on which a volunteer could select the branch in which to serve. They were almost immediately assigned as file clerks at Mitchel Field, Long Island. In January 1943, at a night club, Elias Bayer picked up the acquaintance of two officers stationed there. They were interested in obtaining uniforms at wholesale. The Bayers eventually aided them and others to obtain uniforms and paid for them, though they claim to have understood that the officers were to pay for them. The acquaintance extended to other officers, and there was considerable entertainment. In April 1943 replacement of men in clerical positions by Women's Army Corps personnel was impending and one Col. Jacobson requested a transfer of these two boys with the effect, as Samuel understood it, of assuring them a year's assignment at Mitchel Field. Jacobson was given a dinner at the Waldorf and presented with four new automobile tires.

This transfer placed the two boys under command of Radovich. By July there were rumors that the officers were receiving gifts from the Bayers and Radovich told Samuel that the boys would have to be transferred. Samuel wanted them kept at Mitchel Field. Radovich made a transfer from his unit to the medical detachment at the same field, which at first was disapproved, and then he accomplished it by an exchange of personnel. After the transfer was made, Samuel paid Radovich some $1,900 or $2,000.

In August 1943 the boys were again transferred to a unit of airborne engineers for overseas duty. Both Bayers were greatly concerned about this and besought their friends among the officers to prevent it. Radovich had

gone. He had joined an Air Commando group with high priority on personnel. But he several times talked with Captain Pepper, in charge of personnel, about transferring these boys from the overseas service to Air Transport Command for service only in continental United States. This could not be done. Then Radovich proposed to use his unit's higher priority to requisition the boys for it, to drop them as surplus, and thereupon to have them transferred to the Air Transport Command for domestic service. Pepper agreed this might be done. Radovich told Pepper it was "worth his while" to get it done and he would see that doing it was worth Pepper's while.

On November 22, 1943 Radovich requisitioned the transfer of the boys to his unit, to report November 25. Almost at once he also requested that they be transferred out of his unit and to Air Transport Command. This was effected shortly. Elias Bayer and one of name unknown to the record then delivered $5,000 to Radovich, who sent Pepper $500. Pepper testified that he destroyed the check.

The Government from these facts and other evidence draws, as did the jury, the inference of conspiracy. The Bayers say they were victims of extortion and there is evidence that Radovich used the transfer to his own unit, one of extremely dangerous mission for which these boys had neither training nor aptitude, to force money out of the Bayers. Radovich denies the conspiracy and pleads certain court-martial proceedings as a bar.

The issue as to whether the Bayers tempted Radovich with a bribe or Radovich coerced them with threats is one with evidence and inferences both ways. Radovich was a gallant and skillful flier and explained his conduct thus: "I was going overseas on a very hot job and didn't expect to come back, had the wife and the baby, figured I might just as well take care of them." The Bayers were persons

of some means, thoroughly frightened at the prospect of service for these boys in combat areas, and ready to use their means to foster the boys' safety. Whether they were victims of extortion or voluntary conspirators was for the jury to say, and the reversal does not rest on any inadequacy of proof. The grounds of reversal by the Court of Appeals raise for our consideration four questions of law.

1. The Bayers assigned as error the trial judge's charge as to conspiracy. The Court of Appeals unanimously said, "There is no question but that this charge was an accurate, albeit brief, statement of the law." But a majority thought that "the statement was so cryptic as to be difficult to understand, if not to be actually misleading to a jury of laymen," while one Judge thought it "a welcome relief from much judicial verbosity."[3] We are not certain whether a reversal as to the Bayers would have been rested on this criticism of the charge alone. We do not consider objection to the charge to amount to reversible error. Once the judge has made an accurate and correct charge, the extent of its amplification must rest largely in his discretion. The trial judge, in the light of the whole trial and with the jury before him, may feel that to repeat the same words would make them no more clear, and to indulge in variations of statement might well confuse. How far any charge on technical questions of law is really understood by those of lay background would be difficult to ascertain, but it is certainly more evident in the living scene than in a cold record. In this case the jury asked a rereading of the charge on conspiracy. After repeating his instruction, the court inquired of the jury whether anything about it was not clear, or whether there was anything which they desired to have amplified. Nothing was suggested, although inquiry was made as to other

[3] 156 F. 2d at 967.

matters. While many judges would have made a more extended charge, we think the trial court was within its area of discretion in his brevity.

2. The Bayers won reversal on another ground. After the jury had been out about four hours, it returned for instructions and asked to have parts of the summations of counsel read. The court declined to read parts. It was at this point that counsel for the Bayers asked to reopen the case and to put in evidence a long distance call slip from telephone company records. It was the memorandum of a call on November 24, 1943, from one we assume to be Radovich, spelled on the ticket "Ravish," from Arlington, Virginia, to Bayer's number in New York. The ticket tended to corroborate Samuel Bayer's secretary who testified to receiving such a call and who was the Bayers' chief witness on the subject of extortion. It also tended to contradict a Government witness. The matter had become of importance because of the District Attorney's argument that the Bayers' witness falsified her story. The court had already, at respondents' request, after the jury had been instructed, told them that a check of the Bayers' records showed a collect-call from Washington that day, but on request of counsel for Radovich the court had also stated that the record did not show who made the call. We will assume that the proffered evidence was relevant, corroborative of the Bayers' contentions, and had the offer been timely and properly verified, its exclusion would have been prejudicial error.

But the item of evidence was disputed. The District Attorney had not seen the slip and did not admit the interpretation Bayer's counsel put upon it. Counsel for Radovich objected. To have admitted it over his objection might well have been prejudicial to him. The trial court had already, as he admitted, and as Radovich's counsel charged, given the Bayers the benefit of an irregular conveyance of information to the jury about the call

which had not been regularly proved. Moreover, defendants offered no witness to authenticate the slip. As the trial court pointed out to counsel, his proposal was merely to hand to the jury "an unverified memorandum from the telephone company." Even during the trial such an offer, with no foundation in testimony and against objection, would have been inadequate. To have admitted it with no witness to identify or support it would have cut off all cross-examination by both the Government and Radovich, and cross-examination would not have been unreasonable concerning a slip in which the Bayers wished Arlington to be taken as equivalent to Washington and "Ravish" to identify Radovich. The evidence, if put in after four hours of deliberation by the jury, would likely be of distorted importance. It surely would have been prejudicial to the Government for the District Attorney would then have had no chance to comment on it, summation having been closed. It also would have been prejudicial to the other defendant, Radovich, who, with no chance to cross-examine or to comment, would be confronted with a new item of evidence against him. The court seems to have faced a dilemma, either to grant a mistrial and start the whole case over again or to deny the Bayers' request. Certainly a defendant who seeks thus to destroy a trial must bring his demand within the rules of proof and do something to excuse its untimeliness.

Not only was the proffer of the evidence technically deficient, but no excuse for the untimeliness of the offer appeared. It is true, no doubt, that counsel was surprised at the argument made by the District Attorney which would have been less effective had this evidence been in. But Miss Solomon, an employee of defendants and, hence, an interested witness, was left to carry the burden of proving extortion without the corroboration of the testimony of her employer-defendants. This was defendants' right, but it should have been apparent that every bolster

to her credibility would be important. It is well known that the telephone companies keep such records and they seem to have been easily obtained when asked for. We do not consider it reversible error to refuse to let this unsworn, unverified slip be put into evidence four hours after the case had been submitted to the jury. The judgment of reversal as to the Bayers was, in our opinion, erroneous.

3. Radovich's case raises additional questions. The first concerns the receipt in evidence of his confession of March 15 and 17, 1945. In absence of the jury, the Court heard testimony before admitting it and thereafter most of it was repeated before the jury. The proof against Radovich largely rested on the confession.

After service of distinction in Burma, Radovich, then 24 years of age, was ordered to report to Mitchell Field. Upon arrival on August 9, 1944, he was placed under arrest and confined in the psychopathic ward in the station hospital. Here, for some time, he was denied callers, communication, comforts and facilities which it is needless to detail. Charges for court-martial were not promptly served on him as said to be required by the 70th Article of War, nor was he taken before a magistrate for arraignment on any charges preferred by civil authorities. Military charges were finally served on May 30, 1945. Meanwhile, under such restraint, he made a first confession on September 5 or 6, 1944. Without more, we will assume this confession to be inadmissible under the rule laid down in *McNabb* v. *United States*, 318 U. S. 332, and *Anderson* v. *United States*, 318 U. S. 350. But this confession was neither offered nor received in evidence.

A second confession made to Agent Flynn of the Federal Bureau of Investigation on March 15 and 17, 1945 was received, however, and the Court of Appeals has held it to be "patently the fruit of the earlier one" [4] and equally

[4] 156 F. 2d at 970.

inadmissible, citing *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385; *Nardone* v. *United States*, 308 U. S. 338.

At the time of this confession Radovich was still at Mitchel Field, but only under "administrative restrictions," which meant that he could not depart the limits of the base without leave. Flynn testified that Radovich had a number of conversations with F. B. I. agents. He had volunteered some facts not in the original statement and the meeting of March was to incorporate the whole story in one statement. Flynn warned him his statement might be used against him. Radovich requested the original statement and read it before making the second. The March statement is labeled a "supplementary" statement and is "basically" the same as the earlier one but went into more detail. The District Attorney refused to produce the first statement, which was not offered in evidence, and the court sustained him, having examined the statement and found no material conflict between them.

Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. But this Court has never gone so far as to hold that making a confession under circumstances which preclude its use, perpetually disables the confessor from making a usable one after those conditions have been removed. The *Silverthorne* and *Nardone* cases, relied on by the Court of Appeals, did not deal with confessions but with evidence of a quite different category and do not control this question. The second confession in this case was made six months after the first. The only restraint under which Radovich labored was that he could

not leave the base limits without permission. Certainly such a limitation on the freedom of one in the Army and subject to military discipline is not enough to make a confession voluntarily given after fair warning invalid as evidence against him. We hold the admission of the confession was not error. *Cf. Lyons* v. *Oklahoma*, 322 U. S. 596.

4. Lastly, we must consider whether the court-martial proceedings instituted against Radovich bar this prosecution on the ground of double jeopardy. Radovich was tried and, on June 29, 1945, convicted by court-martial of violating the 95th and 96th Articles of War, 10 U. S. C. §§ 1567, 1568, 41 Stat. 806–807. The offense charged and found was that of conduct unbecoming an officer and gentleman, and of conduct to the prejudice of good order and military discipline and of a nature to bring discredit upon the military service. As to each offense, the specifications set forth receipt of the same payments of money from the Bayers for effecting the same transfers that are involved in this indictment. Radovich's plea in bar was overruled by the trial court upon the ground that the conspiracy charged in the indictment was not the same offense as that under the Articles of War. The Court of Appeals disapproved this ground but left the issue of double jeopardy to be decided after retrial because of doubt meanwhile raised about the status of the military judgment.

The Court of Appeals thought the identity of the specifications in the court-martial proceedings and the offense charged in the indictment, and the likelihood that the military court did not distinguish carefully between the passing of the money and the arrangement to that end, required the plea in bar to be sustained under *Grafton* v. *United States*, 206 U. S. 333. In that case a soldier on guard duty in the Philippines shot and killed two Filipinos. He was tried by court-martial on charge of homicide and acquitted. A prosecuting attorney of the Islands then

filed in Provincial Court a charge of "assassination" on identical facts. This Court found not merely the evidence but the offense charged to be identical in everything but name, and held retrial of the same offense in Philippine Courts to constitute double jeopardy.

But here we think the District Court correctly ruled that the two charges did not accuse of identical offenses. The indictment is for conspiring and we have but recently reviewed the nature of that offense. *Pinkerton* v. *United States*, 328 U. S. 640. Its essence is in the agreement or confederation to commit a crime, and that is what is punishable as a conspiracy, if any overt act is taken in pursuit of it. The agreement is punishable whether or not the contemplated crime is consummated. But the same overt acts charged in a conspiracy count may also be charged and proved as substantive offenses, for the agreement to do the act is distinct from the act itself. *Pinkerton* v. *United States*, 328 U. S. 640, 644. In the court-martial proceedings, Radovich alone was accused. No conspiracy was alleged and the specification was confined to Radovich's receipt of money for effecting transfers. This was a substantive offense on his part under the Articles of War. The agreement with others to commit it constituted a separate offense, although among the overt acts proved to establish the conspiracy were the same payments and transfers. Both offenses could be charged and conviction had on each. The plea in bar was properly overruled.

This conclusion makes it unnecessary to decide whether the disapproval of the court-martial judgment for errors in trial and without ordering retrial creates a status for the military judgment such that in no event would it be available to bar this prosecution.

The judgment of the Circuit Court of Appeals is reversed and that of the District Court is affirmed.

MR. JUSTICE FRANKFURTER would affirm the decision of the Circuit Court of Appeals substantially for the reasons set forth below by Judge Clark in reversing the conviction of the Bayers, which, under a charge of conspiracy, carries with it a reversal as to Radovich. 156 F. 2d 964, 967–68.

MR. JUSTICE RUTLEDGE is of the view that the judgment of the Circuit Court of Appeals should be affirmed insofar as it relates to the respondent Radovich, for the reasons stated in that court's opinion. 156 F. 2d 964, 968–70.